

Citation:	Mount Wellington Cableway Company Pty Ltd v Hobart City Council and Others [2022] TASCAT 128	
Division:	General	
Stream:	Resource & Planning	
Parties:	Appellant:	Mount Wellington Cableway Company Pty Ltd
	First Respondent:	Hobart City Council
	First Party Joined:	Tasmania Water and Sewerage Corporation Pty Ltd
	Second Party Joined:	Tasmanian Conservation Trust
	Third Party Joined:	Residents Opposed to the Cable Car Incorporated
	Fourth Party Joined:	Bob Brown Foundation Incorporated
	Fifth Party Joined:	South Hobart Progress Association
	Sixth Party Joined:	(Withdrawn)
	Seventh Party Joined:	The Tasmanian Aboriginal Corporation
	Eighth Party Joined:	Karl Rollings
	Ninth Party Joined:	Geoffrey Law
	Tenth Party Joined:	Graham Anthony Murray
Hearing Date(s):	22, 23, 24, 25, 29, 30, 31 August, 1, 2, 5, 6, 7 and 8 September 2022	
Hearing Location:	Hobart	
Date of Orders:	3 November 2022	

Date Reasons Issued:	3 November 2022
Panel:	M Schyvens, President R Grueber, Deputy President M Baird, Member M Kitchell, Member D Tanner, Member
Orders Made:	1. The decision of the Hobart City Council made 27 July 2021 to refuse a permit for application PLN-19-345 is affirmed. 2. Any application for an order for costs in this appeal is to be made in writing with supporting submissions within the next 21 days. In the absence of any such application supported by submissions being so filed the order of the Tribunal is that each party bear its own costs.
Catchwords:	Planning Appeal – cableway proposal in Wellington Park – operation of the Wellington Park Management Plan – assessment against standards - whether tourist operation use or transport depot and distribution use – effect of noise on residential amenity – effect of noise on the quiet enjoyment of natural and cultural values – whether special circumstances exist in respect to biodiversity – economic and social community benefit – adverse effects on native vegetation – offset planting - effect on threatened fauna – whether adverse impacts on geoheritage values – visual impact – use of photomontages - sewage disposal – traffic effect on junctions – parking sufficiency – independence of expert witness - words and phrases: “adverse effect” “avoid” “mitigate” “remedy” “harmonise” “visual character” “quiet enjoyment”
Legislation Cited:	<i>Land Use Planning and Approvals Act 1993; Resource Management and Planning Appeal Tribunal Act 1993; Tasmanian Civil and Administrative Tribunal Act 2020; Wellington Park Act 1993; Environmental Management and Pollution Control Act 1994; Environment Protection and Biodiversity Act 1999; Threatened Species Protection Act 1995; Hobart Interim Planning Scheme 2015; Clarence Interim Planning Scheme 2015; Wellington Park Management Plan 2013</i>
Cases Cited:	<i>Mount Wellington Cableway Company Pty Ltd v Hobart City Council & Others [2021] TASCAT 23; Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council [2022] TASFC 5; Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; Project Blue Sky Inc. v Australian Broadcasting Authority [1998] HCA 28; Sztal v Minister for Immigration and Border Protection [2017] HCA 34; Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd [2017] TASSC 14;</i>

Tomaszewski v Hobart City Council (No.2) [2021] TASSC 15; *Sandy Bay Developments v Loring* [1991] TASSC 34; *Tricare (Bayview) Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 31; *Re Carmel Elizabeth McDonald v Director-General of Social Security* [1984] FCA 57; *Boland v Clarence City Council* [2021] TASFC 5; *DVB Projects Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 40; *Von Witt v Hobart City Council and Others* [1995] TASSC 12; *Clarence City Council v Resource Management and Planning Appeal Tribunal* [2018] TASSC 41; *R v Klamo* [2008] VSCA 75; *A Wyminga v Glamorgan Spring Bay Council and Spring Bay (Tasmania) Pty Ltd* [2022] TASCAT 41; *AAD Nominees Pty Ltd v Resource Management and Planning Appeal Tribunal* [2011] TASFC 5; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; *South Western Sydney Local Health District v Gould* [2018] NSWCA 69; *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44; *Timber World Pty Ltd v Meander Valley Council* [2020] TASSC 27; *Wilderness Society (Tasmania) Inc v Wild Drake Pty Ltd* [2021] TASFC 12; *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council* [2022] TASFC 5; *Tasmanian National Parks Association Inc v Tasman Council and Miff Pty Ltd* [2008] TASSRMPAT 217; *B Rees v Hobart City Council and LXN Architecture and Consulting and Anor* [2021] TASSRMPAT 30; *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454; *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33; *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33; *DVB Projects Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 40; *South Hobart Progress Association v Hobart City Council and Giameos* [2017] TASSRMPAT 5; *Paterson & Others v Hobart City Council and Tasmania Wild Experience Pty Ltd* [2020] TASSRMPAT 24; *S & S McElwaine and A Hamilton v West Tamar Council and Growth Developments Pty Ltd* [2021] TASCAT 4

Representation:

<i>Appellant:</i>	A Galasso SC and N Billett - Billet Legal
<i>Respondent:</i>	S Brennan SC and J Wright – Hobart City Council
<i>First Party Joined:</i>	No appearance
<i>Second Party Joined:</i>	P McGlone
<i>Third, Fourth, Seventh and Ninth Parties Joined:</i>	D Deller and R Browne – Browne Fitzgerald
<i>Fifth Party Joined:</i>	D Day
<i>Eighth Party Joined:</i>	In person
<i>Tenth Party Joined:</i>	In person

File No:

102/21P

Publication Restriction:

Nil

BRIEF SUMMARY

This brief summary is intended to assist the public's understanding of the outcome of this proceeding, given that the appeal is a matter of public interest and that the reasons are lengthy and complex. This summary is not a complete or authoritative statement of the conclusions reached by the Tribunal and does not form part of the Tribunal's reasons for decision.

The Mount Wellington Cableway Company Pty Ltd (the Appellant) applied to the Hobart City Council for a permit for a cableway to run from a base station at South Hobart through Wellington Park up the eastern face of kunanyi/Mount Wellington and the Organ Pipes to a pinnacle centre just below the summit of the mountain. The pinnacle centre would include a café, visitor information and interpretation spaces, a retail area, visitor amenities, staff offices and amenities, and a rangers' office. The cableway would run via three towers, two close to the base station and a third on the escarpment of the mountain. Two cable cars would each run on three cables, one ascending as the other descended, taking 15 minutes each way and carrying up to 40 passengers.

The Council refused a permit and the Appellant appealed. Subsequently a number of other parties with an interest in the appeal were joined.

It was not the role of the Tribunal to consider conceptual or policy matters concerning whether or not a cableway in itself might be appropriate on kunanyi/Mount Wellington or have a social licence. The appeal was solely decided on the basis of whether the proposal satisfied specific standards for use and development set out in the Hobart Interim Planning Scheme and the Wellington Park Management Plan, which are the statutory reflections of the public interest in the appropriate development of land in Wellington Park. The Scheme and the Management Plan establish acceptable solutions for use and development in the Park. The acceptable solutions are measurable standards which a proposal will either meet or not. If a proposal meets those standards then it must be approved. If it does not meet an acceptable solution then it must be assessed against performance criteria, which give rise to qualitative assessments that generally require the exercise of discretion in respect to matters which are not amenable to certain measurement, such as effect on amenity. Those assessments must be undertaken objectively and reasonably, based on the evidence.

Twenty six grounds of refusal raised by the Council and other parties were considered. The grounds raised compliance of the proposal with standards relating to use, noise emissions, visual impact, effect on the geoheritage of the mountain, effect on biodiversity, management of sewage, effect on traffic and sufficiency of parking. The Tribunal concluded that the proposal failed in respect of eighteen of the grounds.

Two grounds of refusal were rejected on the basis that they raised general matters of conformity with the values of the Park, but did not raise standards against which the proposal should be assessed. A further ground asserting that the proposed use was a prohibited use in the Park was also rejected. The proposal was found to satisfy the requirements of standards in respect to elements of geoheritage, management of sewage, increased traffic and parking requirements.

The proposal failed to meet standards in the Scheme or the Management Plan in respect to noise emissions, visual impact, effects on elements of geoheritage, and effects on biodiversity.

In respect to noise emissions, the evidence established that the operation of the proposal would have an unreasonable impact on residential amenity outside the Park. Although traffic noise from Pinnacle Road might be reduced, the proposal would also have an adverse effect on quiet enjoyment of natural and cultural values in the Park. The proposed pinnacle centre, the cableway and a tower on the escarpment above the Organ Pipes would adversely impact visual values and visual character in the Park. While the construction of that tower would satisfy standards in respect to loss of geoheritage values, the construction of the pinnacle centre would impermissibly impact geoheritage values at the pinnacle. Removal of native vegetation for fire prevention and construction of the access road to the base station would cause the loss of breeding habitat for the swift parrot and the masked owl, and foraging habitat for the parrot, which would result in adverse effects for those threatened species.

As a result, the decision of the Council to refuse a permit was affirmed.

REASONS FOR DECISION

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INTRODUCTION

Development application, appeal and joinder of parties

1. kunanyi/Mount Wellington¹ is the summit of the Wellington Range. It rises to 1,271 metres and sits within the 18,250-hectare Wellington Park, part of which falls within the municipal area of the City of Hobart. Hobart is located at the foot of the mountain, which forms the backdrop to the city.
2. On 12 June 2019 the Appellant, the Mount Wellington Cableway Company Pty Ltd, applied to the Respondent, the Hobart City Council (the Council) for planning approval for a cableway and associated infrastructure to run between South Hobart, a suburb of Hobart, and the pinnacle of the mountain. Following an extended period during which further information was sought by the Council and provided by the Appellant the application, PLN-19-345, was publicly notified in accordance with s57 of the *Land Use Planning and Approvals Act 1993*. During the 28-day public notification period the Council received 16,589 representations.
3. On 27 July 2021 the Council considered the application and resolved to refuse to grant a planning permit.
4. On 11 August 2021 the Appellant filed a notice of appeal in respect to the refusal to grant a permit.
5. Subsequently the Tasmanian Water and Sewerage Corporation Pty Ltd, the Tasmanian Conservation Trust, Residents Opposed to the Cable Car Inc, the Bob Brown Foundation Incorporated, the South Hobart Progress Association, Birdlife Tasmania, the Tasmanian Aboriginal Corporation, Karl Rollings, Geoffrey Law and Graham Murray were joined as parties to the appeal. With the leave of the Tribunal the Tasmanian Water and Sewerage Corporation Pty Ltd did not appear at the hearing. Birdlife Tasmania withdrew from the appeal shortly before the hearing and Mr Murray withdrew on the second day of the hearing.
6. On 24 December 2021 the Tribunal granted an application by the Appellant for orders amending the application by substituting amended architectural and engineering plans.²

¹ The evidence of Dr Dennis Williamson, on behalf of several joined parties including the Tasmanian Aboriginal Corporation, explained that the dual name kunanyi/Mount Wellington has been adopted by the community and the Wellington Park Management Trust. The mountain was called kunanyi by the Muwinina tribe of South East Tasmania, from the palawa kani language, the written form of which has only lower-case letters, and was named Mount Wellington by European settlers in the 1820's.

² See *Mount Wellington Cableway Company Pty Ltd v Hobart City Council & Others* [2021] TASCAT 23

The Tribunal

7. The appeal was instituted with the former Resource Management & Planning Appeal Tribunal prior to the establishment of the Tasmanian Civil and Administrative Tribunal by the *Tasmanian Civil and Administrative Tribunal Act 2020* (the TASCAT Act) on 5 November 2021. Section 152 of the TASCAT Act applies to appeals instituted before that date. Pursuant to s152 this appeal is to be heard and determined by the Tasmanian Civil and Administrative Tribunal (the Tribunal), in accordance with the provisions of the *Resource Management and Planning Appeal Tribunal Act 1993*, and the Tribunal may perform and exercise all the functions of the Resource Management and Planning Appeal Tribunal in respect to the appeal. In addition, the provisions of any Act or instrument of a legislative character that applied to the appeal prior to the commencement of the TASCAT Act will continue to apply to the appeal.

The Tribunal's powers on determination of the appeal

8. Section 23 of *Resource Management and Planning Appeal Tribunal Act 1993* provides that the Tribunal may exercise all the powers that are conferred by relevant legislation of the Council as the planning authority, and provides the determinations that the Tribunal may make:

- (1) For the purpose of determining an appeal, the Appeal Tribunal may exercise all the powers that are conferred by the relevant legislation on the person who made the decision that gave rise to the appeal.
- (2) The Appeal Tribunal must make a decision in writing –
 - (a) affirming the decision appealed against; or
 - (b) varying the decision appealed against; or
 - (c) setting aside the decision appealed against and –
 - (i) making a decision in substitution for the decision appealed against; or
 - (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Appeal Tribunal.

Section 62(1)(c) of the *Land Use Planning and Approvals Act 1993* (prior to the commencement of the TASCAT Act) provided:

62. Determination of appeals

- (1) After hearing an appeal, the Appeal Tribunal may, in addition to its powers under the Resource Management and Planning Appeal Tribunal Act 1993 –
 - (c) in the case of an appeal against a grant of a permit, a refusal to grant a permit or a grant of a permit subject to conditions or restrictions–
 - (i) direct the planning authority to grant the permit; or
 - (ii) direct the planning authority to grant the permit and direct the planning authority that the permit must or must not contain any specified conditions; or
 - (iii) direct the planning authority not to grant a permit;

THE PROPOSAL

9. The proposal comprises several components:

- (a) A base station will be constructed in the foothills of the mountain at South Hobart. It will have three levels and be partially excavated into the slope. The base station will house the machinery for the operation of the cableway and will be the departure point for visitors travelling to the pinnacle. The base station will have 52 car parking spaces, six minibus spaces, three bus spaces, five motorcycle spaces and 20 bicycle spaces.
- (b) A pinnacle centre will be constructed at the pinnacle of the mountain to the east of, and just below, the summit, overlooking Hobart. It will comprise three stepped levels. The building will have a total floor area of 2256m². It will include a rooftop garden and lookouts, a café and lounge with a combined floor area of 393m², a pedestrian walkway from the carpark at the pinnacle to the pinnacle centre building, visitor information and interpretation spaces, a retail area, visitor amenities, staff offices and amenities, and a rangers' office.
- (c) The existing observation shelter at the pinnacle will be partially demolished, with the slab and part of the stone wall to be retained.
- (d) Three towers will be constructed to support the cableway. Tower 1 will be 45 metres high and be located approximately 170 metres uphill from the base station. Tower 2 will be 55 metres high and be located approximately 130 metres further uphill from tower 1. Tower 3 will be 36 metres high and located approximately 70 metres below the proposed pinnacle centre building, and approximately 53 metres from the escarpment of the mountain.
- (e) A cableway comprising six cables spanning a distance of 2.4 kilometres will run between the base station and the pinnacle centre via the three towers. Cable cars will run on three cables: two cables will be track ropes for stability and the third cable will be a haul rope for propulsion. The haul ropes will be controlled from the base station.
- (f) Two cable cars, each 6.8 metres by 3.9 metres with an approximate cabin area of 27 square metres, will ascend and descend on the cables. Each car will have a maximum capacity of 80 people, but the maximum number of patrons per car would be limited to 40. Because the haul rope is controlled from the base station the cars will not contain their own motors. The two cars will be counter balanced and synchronised such that one car would ascend on three cables while the other car descended on the other three cables. The maximum operating speed would enable a one-way journey to be undertaken in 5.7 minutes, but the proposed one-way trip duration will be at a reduced speed, taking 15 minutes. Sewage will be transported by a tank attached to the underside of the cable cars.

- (g) An access road will be constructed to connect the base station to McRobies Road in South Hobart. The access road would extend for approximately 2.3 kilometres from McRobies Road to the boundary of Wellington Park and then a further 100 metres to the site of the base station.

THE SITE

- 10. The proposal will operate on land in Wellington Park and adjoining land owned by the Council, which is adjacent to the Council's McRobies Gully Waste Management Centre.
- 11. The proposed base station will be sited on the lower slopes of the mountain within Wellington Park. That site is generally clear of native vegetation but is surrounded by a variety of native flora including blue gum, silver peppermint and stringy bark trees. The base station site intersects with an existing fire trail. Existing utilisation of the area is predominantly for public recreation.
- 12. The access road to the base station will pass through an area of bushland which currently only has vehicle access through gated fire trails. It will join an existing roundabout on McRobies Road and feed into a road network in South Hobart, which includes McRobies Road, Degraes Street, Apsley Street and Cascade Road.
- 13. The pinnacle centre will be located within the pinnacle area at the summit of the mountain. The summit currently includes a road loop, carpark, observation shelter, elevated walkways and lookouts, public toilets and telecommunication facilities. The existing telecommunication facilities include two buildings and two transmission towers, one being a concrete and steel tower with a height of 130 metres (the Australian Broadcasting Tower) and a shorter steel open lattice tower (the WIN Television Tower).
- 14. The cableway corridor will extend from the base station area directly up the mountain in a westerly direction. For the first 1.5 kilometres the land is generally heavily vegetated. Towers 1 and 2 will be located in areas of dense wet eucalyptus forest. As the cableway corridor rises, vegetation cover becomes less dense and the cableway will cross a geological area known as the Organ Pipes into an elevated peri-glacial area.

PLANNING CONTROLS

Hobart Interim Planning Scheme 2015

- 15. The proposal falls within land subject to the Hobart Interim Planning Scheme 2015 (the Scheme). Section 51(3) of the *Land Use Planning and Approvals Act 1993* provides that an application for a permit is to be determined by a planning authority in accordance with the provisions of the relevant planning scheme in effect on the date that the application was made. Section 62(3) provides that the Tribunal is to determine the appeal according to the Scheme in effect at the time that the planning authority determined the application. References to the Scheme in these reasons are to version 36 of the Scheme as the relevant version, unless otherwise stated.

16. The proposal falls within the Environmental Management Zone of the Scheme, except for part of the access road which falls within the Utilities Zone. Clause 9.6.1 of the Scheme provides:

If an application for use of land includes access that runs through a different zone to the land upon which the use is proposed to take place, the use status of the application is to be determined disregarding the use status of the access in the different zone.

The use status of the road within the Utilities Zone has, therefore, not been separately considered.

Wellington Park Management Plan 2013

17. Most of the proposal falls within the area of the Wellington Park Management Plan 2013 (the Management Plan).

18. Part F of the Scheme deals with specific area plans. Clause F3.0 establishes the Wellington Park Specific Area Plan. By Clause F3.2.1, the Wellington Park Specific Area Plan applies to Wellington Park. Clause F3.3.1 provides:

The purpose of this specific area plan is to ensure that use and development in Wellington Park is undertaken in accordance with the Wellington Park Management Plan.

Clause F3.2.2 provides:

Notwithstanding any other provision of this planning scheme, any use or development of land in Wellington Park must be undertaken in accordance with the provisions of the Wellington Park Management Plan.

19. Wellington Park was created by s5 of the *Wellington Park Act 1993*. That Act established the Wellington Park Management Trust, one function of which is to prepare management plans for Wellington Park, pursuant to Division 1 of Part 4 of the Act.

20. The Management Plan sets out standards for use and development in zones. The proposal falls within the Recreation Zone and the Natural Zone of the Management Plan.

21. The elements of the proposal will fall within those zones as follows:

- The base station, towers 1 and 2 and the part of the access road in Wellington Park in the Recreation Zone.
- Tower 3 in the Natural Zone.
- The pinnacle centre in the Pinnacle Specific Area.
- The cableway will pass through the Recreation Zone, the Natural Zone and the Pinnacle Specific Area.

The Pinnacle Specific Area Plan

22. Within the Recreation Zone is the Pinnacle Specific Area Plan which is regulated by Chapter 8B of the Management Plan. The Pinnacle Specific Area Plan establishes specific use and development standards for the Pinnacle Specific Area.

Relationship between the Scheme, the Management Plan and the Pinnacle Specific Area Plan

23. Section 23(4) of the *Wellington Park Act 1993* provides:

(4) Where a planning scheme in force under the Land Use Planning and Approvals Act 1993 affects the protection, use, development or management of any land contained in Wellington Park –

(a) the relevant provisions of the Management Plan are taken to be included in that planning scheme; and

(b) in the event of conflict between the Management Plan and the planning scheme, the Management Plan is to prevail.

24. The effect of s23(4) is that the proposal is to be assessed under the Scheme as if the relevant provisions of the Management Plan form part of the Scheme. Insofar as there is any conflict between the provisions in the Management Plan and the Scheme, the Management Plan is to be applied.

25. The broader provisions of the Management Plan will apply in the Pinnacle Specific Area, but Clause S2.2.2 of the Management Plan provides that specific provisions in the Pinnacle Specific Area Plan will prevail over the general provisions of the Management Plan:

To the extent of any inconsistency with a standard or other requirement in this Management Plan or any municipal planning scheme, the provisions of this Specific Area Plan shall take precedence.

Interpretation of the Scheme and the Management Plan

26. A planning instrument is to be interpreted in accordance with the ordinary rules of statutory interpretation.³ The starting point of statutory interpretation is to give legal effect according to the plain and ordinary meaning of the text read in the context of the surrounding provisions and the legislative scheme in order to construe the relevant provision consistently with the language and purpose of the legislation when considered as a whole.⁴ The grammatical meaning of the words of a provision will generally establish the legal meaning of the provision, but context, the purpose of

³ *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council* [2022] TASFC 5 at [18] to [21].

⁴ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [4] and *Project Blue Sky Inc. v Australian Broadcasting Authority* [1998] HCA 28 at [69].

the legislation and a purposive approach to construction may require the provision to be read in a different way.⁵

GROUNDINGS OF APPEAL AND GROUNDINGS OF REFUSAL

27. The grounds of appeal challenged the Council's grounds of refusal. In a practical sense it is the grounds of refusal which are considered on the appeal.
28. The original grounds of refusal were subject to enlargement and consolidation during the interlocutory stages of the appeal. By the date of the hearing 26 of 30 grounds remained for determination:
 1. The proposed Transport Depot and Distribution use (the cableway) is not consistent with the values of Wellington Park identified in section 8.2 and section S2.1 of the Wellington Park Management Plan 2013 (as amended October 2015) in that it will diminish the Park's tourism, recreational, cultural and landscape values as a result of its scale, mechanisation and emissions.
 2. The proposed Food Services use is not consistent with the values of Wellington Park identified in section 8.2 and section S2.1 of the Wellington Park Management Plan 2013 (as amended October 2015) in that it will diminish the Park's tourism, recreational and landscape values as a result of its scale, nature and intensity.
 3. The proposal does not meet the acceptable solution or performance criterion with respect to clause 28.3.1, AI or PI of the Hobart Interim Planning Scheme 2015 as the proposed hours of operation will have an unreasonable impact on the residential amenity of land in the residential zones as a result of noise and other emissions.
 4. The proposal does not meet the acceptable solution or performance criterion with respect to clause 28.3.2, AI or PI of the Hobart Interim Planning Scheme 2015 as the proposed noise emissions have the potential to cause environmental harm within the Environmental Living and General Residential zones on McRobies Road.
 5. Ground resolved.
 6. Ground resolved.
 7. Ground resolved.
 8. The proposal does not meet the acceptable solution or performance criteria with respect to clause E10.7.1, AI or PI of the Hobart Interim Planning Scheme 2015 as the proposed access road from McRobies Road to the boundary of Wellington Park involves the removal of high priority

⁵ *Sztal v Minister for Immigration and Border Protection* [2017] HCA 34 at [14].

biodiversity values and special circumstances have not been demonstrated as required by subclause (c)(iv).

9. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 2, P2.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal, due to the clearance associated with the base station, associated bushfire hazard areas and towers 1 and 2, does not avoid or sufficiently remedy the loss of swift parrot habitat values and therefore results in a long-term impact on vegetation values.
10. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 2, P2.2 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal, due to the clearance associated with the base station, associated bushfire hazard areas and towers 1 and 2, does not avoid or sufficiently remedy the loss of swift parrot habitat values and therefore results in a long-term impact on vegetation values.
11. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 2, P2.3 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal does not avoid or sufficiently remedy adverse impacts on the geo heritage values of geo conservation sites: Organ Pipes Columnar Jointing and Wellington Range Periglacial Terrain as listed under the Tasmanian Geo conservation Database.
12. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 5, P5.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal is not designed and sited to minimise or remedy the loss of visual values and impacts on visual character of the affected area that arise from the proposed cableway (including towers).
13. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 5, P5.2 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal does not harmonise with the visual landscape and natural qualities of the site in terms of appearance and proportions and does not follow the Design and Infrastructure Manual in relation to the extent of disturbance on geomorphological features (geomorphological precedents, design principles, page 35) or the siting of Tower 3(paragraph 7.3.4 page 41).
14. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 6, P6.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal will generate noise emissions that will have an adverse effect on the quiet enjoyment of the natural and cultural values of kunanyi/Mount Wellington and which are insufficiently remedied.
15. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 2, P2.3 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal does not avoid or sufficiently remedy adverse impacts on the geo heritage values of geo conservation sites: Organ Pipes Columnar Jointing and Wellington Range Periglacial Terrain as listed under the Tasmanian Geo conservation Database.
16. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 5, P5.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as

the proposal does not sufficiently mitigate or remedy the loss of visual values and impacts on visual character of the affected area that arise from the proposed pinnacle centre.

17. Ground resolved.
18. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 9, P9.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the pinnacle centre will visually intrude into the landscape in relation to local and natural features and views from the Pinnacle area and elsewhere in the Park and the building design does not give consideration to the Design and Infrastructure Manual (paragraph 7.3.5 page 41).
19. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 9, P9.2 of the Wellington Park Management Plan 2013 (as amended October 2015) as the pinnacle centre will cause visual intrusion.
20. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 10, P10.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the pinnacle centre will diminish the values of the site and has not been designed or sited sufficiently to remedy or mitigate the loss of visual values.
21. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 11, P11.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal will generate noise emissions that will have an adverse effect on the quiet enjoyment of the natural and cultural values of kunanyi/Mount Wellington and which are insufficiently remedied.
22. The proposed use is properly classified as Tourist Operation under Table 3 of the Wellington Park Management Plan 2013 (as amended October 2015) (Management Plan) and Table 8.2 of the Hobart Interim Planning Scheme 2015 (the Scheme).

The proposed Tourist Operation use is prohibited by Table 3 of the Management Plan in areas which are a Recreation Zone, a Natural Zone, a Remote Zone and a Drinking Water Catchment Zone.

The proposed Tourist Operation use is prohibited in the Utilities Zone under Table 28.2 of the Scheme.

If the proposed use is properly classified as Transport Distribution and Depot (which is denied), that use is prohibited in the Environmental Management Zone under Table 29.2 of the Scheme.

23. The proposed new buildings and use must, but do not, comply with Management Plan Table 5 Standards for Use and Development (1) Acceptable Solution A2.1 (Native Vegetation) or (2) Performance Criteria P2.1 (Native Vegetation).

Particulars

The proposal involves the clearance of identified Swift Parrot and Masked Owl nesting habitat. It has not been demonstrated that the proposal avoids or sufficiently remedies the loss of Swift Parrot AND Masked Owl habitat and will therefore result in long term impact on vegetation values.

24. The proposed new buildings and use must, but do not, comply with Management Plan Table 5 Standards for Use and Development (1) Acceptable Solution A2.2 (Threatened Species) or (2) Performance Criteria P2.2 (Threatened Species).

Particulars

The proposal involves the clearance of identified Swift Parrot and Masked Owl nesting habitat. It will impact upon both species which are listed under the Tasmanian Threatened Species Act 1995 and the Environment Protection and Biodiversity Conservation Act 1999. The proposal will have an adverse effect on native vegetation and habitat values (Swift Parrot and Masked Owl). It has not been demonstrated that the proposal avoids or sufficiently remedies the loss of Swift Parrot AND Masked Owl habitat and will therefore result in long term impact on vegetation values.

25. The proposed use and development must, but does not, comply with Management Plan Pinnacle Specific Area Plan (1) Acceptable Solution A9.1 or (2) Performance Criteria P9.1.

Particulars

The Pinnacle centre building, which is greater than 3.5m in height, will visually intrude into the landscape in relation to views from settled areas of Hobart and suburbs.

26. The proposed use and development must, but does not, comply with Management Plan Pinnacle Specific Area Plan (1) Acceptable Solution A9.2 and (2) Performance Criteria P9.2

Particulars

The Pinnacle centre building has more than 100m² in floor area and will be a dominant element in the landscape.

27. The proposed facilities for the treatment and disposal of sewerage must, but do not, comply with Management Plan Pinnacle Specific Area Plan (1) Acceptable Solution A7.7 and (2) Performance Criteria P7.7

Particulars

Acceptable Solution A7.7 is not met as the use and development require sewerage facilities. Performance Criteria P7.7 (b) and (c) are not met because as concluded by Robert Casimaty in his independent assessment: (i) odour mitigation downstream of the pinnacle centre has not been adequately addressed; (ii) odour mitigation during abnormal events at the pinnacle centre have not been addressed; and (iii) noise mitigation while loading, transporting sewage and unloading sewage has not been addressed.

28. The application fails to demonstrate compliance with P7.7 clauses (a) of Clause S1.6 of the Wellington Park Management Plan 2013.

29. The proposal must but does not meet the acceptable solution or performance criteria at clause E5.5.1, A3 or P3 of the Hobart Interim Planning Scheme relating to areas subject to a speed limit of 60km/h or less.

Particulars

Acceptable Solution A3 is not satisfied at the junctions of Cascade Road and McRobies Road; McRobies Road Roundabout, McRobies Road and Degrares Street; Degrares Street and Apsley Street; Apsley Street and Cascade Road because traffic at each of them will be increased by more than 20% and by more 40 vehicle movements per day.

Performance Criteria P3 are not satisfied because the increase in traffic at the junctions of Cascade Road and McRobies Road; McRobies Road Roundabout, McRobies Road and Degrares Street; Degrares Street and Apsley Street; Apsley Street and Cascade Road will be unsafe and/or unreasonably impact on the efficiency of the road having regard to factors such as the nature of the junctions and the increase in traffic.

30. The proposed use at the Base Station is properly classified as Tourist Operation under Table 8.2 of the Hobart Interim Planning Scheme. The proposed use at the Pinnacle Centre is properly classified as Tourist Operation and Food Services under Table 8.2 of the Hobart Interim Planning Scheme. The Base Station and Pinnacle Centre are properly classified as a single development. If classified as a single development, the proposal must but does not meet the acceptable solution at clause E6.6.1, A1 of the Hobart Interim Planning Scheme. If the acceptable solution is not met, the proposal must but does not meet the performance criteria at clause E6.6.1, P1 of the Hobart Interim Planning Scheme.

Particulars

The proposed number of car parking spaces does not comply with A1 for Tourist Operation and Food Services by reference to Table E6.1 when the indoor floor areas and outdoor areas of, and associated with, the Pinnacle Centre are included in the calculation. Further particulars to be provided when the appellant discloses the assessable size of the proposed Pinnacle Centre.

The proposed number of car parking spaces does not comply with P1 because there will be insufficient spaces to meet the reasonable needs of users, including users of the Pinnacle Centre. The parking accumulation at the Base Station at peak periods will require parking for over 90 vehicles. Further particulars to be provided when the appellant discloses the size of the proposed Pinnacle Centre and the details of their traffic survey.

29. Grounds 5, 6, 7 and 17 were resolved by agreement prior to the hearing.

Other applicable standards

30. The proposal triggered assessment by the Council, as the planning authority, against standards in the Scheme and the Management Plan additional to those engaged by the grounds of refusal. Although a planning appeal is not ordinary *inter partes* civil litigation and the Tribunal undertakes a hearing *de novo*

to make what it considers to be the correct or preferable decision on the material before it⁶, the Tribunal is not obligated to go outside the issues raised by the parties⁷ and consideration should be narrowed to the real issues in dispute.⁸ Therefore the Tribunal has not considered compliance with standards not invoked by the grounds.

Grouping of the grounds of refusal

31. The grounds can conveniently be ordered into groups giving rise to related considerations as follows:

- Grounds 1, 2 and 22 relate to land use.
- Grounds 3, 4, 14 and 21 relate to noise.
- Grounds 8, 9, 10, 23 and 24 relate to biodiversity.
- Grounds 11 and 15 relate to geoheritage.
- Grounds 12, 13, 16, 18, 19, 20, 25 and 26 relate to visual impact.
- Grounds 27 and 28 relate to sewerage.
- Grounds 29 and 30 relate to traffic and parking.

Some general comments on evidence

32. As noted above, the Tribunal's obligation is to make the correct or preferable decision. The Tribunal is not bound by the rules of evidence. Although the hearing of a planning appeal has many of the familiar characteristics of a court hearing, in determining a planning appeal the Tribunal acts in an administrative capacity. As such, the Tribunal determines matters by reference to the relevant legislation and considerations of natural justice rather than technical rules of evidence and onus of proof.⁹

33. The evidence relevant to consideration of the grounds, led and tendered by the parties and arising in cross-examination, over the course of the hearing was extensive. All of the material has been considered by the Tribunal but is not recited or summarised in its entirety. Key factual matters that were agreed and were in dispute have been referred to in these reasons.

⁶ See *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* [2017] TASSC 14 at [140] and *Tomaszewski v Hobart City Council (No.2)* [2021] TASSC 15 at [17].

⁷ *Sandy Bay Developments v Loring* [1991] TASSC 34 at [36] and [85]

⁸ *Tricare (Bayview) Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 31 at [145] – [147]

⁹ *Re Carmel Elizabeth McDonald v Director-General of Social Security* [1984] FCA 57

34. Evidence for the Appellant by Mr Adrian Bold, a director of the Appellant, was the subject of objection by the Council and joined parties in respect to expressions of opinion by him. The objection was to the entirety of Mr Bold's evidence on the basis that it mixed fact and opinion to such an extent that it would not be feasible to dissect opinion from fact. Mr Bold's evidence was broad in its scope and the Appellant described it as explaining the design journey of the proposal. Mr Bold described his opinions as based on the knowledge and expertise that he had developed and gained in the cable car industry.¹⁰ The extent of that experience was challenged. Except for an annexure to his written evidence which included opinion by a person who was not to be called, Mr Bold's evidence was admitted on the basis that the Tribunal would determine the weight, if any, to be given to any opinion expressed by Mr Bold. Ultimately it has not been necessary to make findings in respect to Mr Bold's expertise.

GROUND 1, 2 and 22 – ISSUES RELATING TO USE

Do grounds 1 and 2 raise proper bases for refusal?

35. Grounds 1 and 2 assert that the proposed uses applied for in the proposal are not consistent with the values of Wellington Park. They raise compliance with Clauses 8.2 and S2.1 of the Management Plan, but do not assert failure to comply with specific standards. The Council did not pursue ground 2 in closing submissions, on the basis that the issues raised would be resolved by conditions agreed with the Appellant. However, it remained a live ground and for the reasons set out below it will fall to a conclusion on the same basis as ground 1.
36. The Council submitted that the assessment of use requires consideration against a broader array of factors than those called up by Clause S2.6 of the Management Plan. Clause S2.6 sets out standards for use and development specifically within the Pinnacle Specific Area of Wellington Park. The Council's approach would also apply to Clause 8.5.7 of the Management Plan, which establishes standards for use and development generally within Wellington Park. Insofar as the Management Plan sets out principles, objectives and values that provide context and meaning to the assessment of a proposal against the standards in the Management Plan, the Council's submission is sound. Insofar as it asserts that the proposal should be assessed against general statements of values in the Management Plan as if those general statements are standards, it is not accepted.
37. Clause 8.5.3 of the Management Plan establishes the procedure for consideration of applications for permits required under the *Land Use Planning and Approvals Act 1993* (LUPAA) (with emphasis added):

8.5.3 Approval Procedures for LUPAA Permits

¹⁰ In cross-examination Mr Bold described experience and expertise in the preparation of visual images and photomontages.

1. An application for a LUPAA permit is required for any use or development within the meaning of s 3 of LUPAA, and listed as either Permitted (P) or Discretionary (D) in Table 3 of this Management Plan.

2. An application for a LUPAA permit is not required for any activity or facility which is listed as Exempt in Table 4 in this Management Plan, unless the proposal fails to satisfy one or more of the listed qualifications.

3. Exempt use and development must comply with the relevant objectives, policies and strategies of the Management Plan.

4. Exempt use and development must receive the relevant permits pursuant to the Regulations and any other legislation that may apply.

5. Where the applicant can demonstrate that the proposed use or development will comply with all applicable Acceptable Solutions in Table 5, Table S1.6 or Table S2.6, the Planning Authority must grant the permit either unconditionally or subject to conditions or restrictions.

6. The Planning Authority has discretion to refuse a permit for an application which relies on one or more Performance Criteria in Table 5, Table S1.6 or Table S2.6, and must deal with the application in accordance with s 57 of LUPAA.

7. The Planning Authority may attach conditions to a permit in respect to:

- Compliance with any applicable objective or policy contained in this Management Plan or standard in Table 5, Table S1.6 or Table S2.6;

- Requirements that specific things be done to the satisfaction of the Planning Authority or any relevant agency;

- Staging of a use or development, including the order and timetable for commencing and completing stages;

- Management of contaminated sites, hazardous materials, solid waste, environmental degradation, landscaping, car parking and signs;

- Management and rehabilitation of construction impacts to a site; and

- Compliance with this Management Plan or other planning strategy prepared in accordance with this Management Plan

38. The procedure requires that a proposal first fit a permitted or discretionary use. If it is not an exempt use it is then considered against acceptable solutions. If it does not satisfy an acceptable solution it is to be assessed against a concomitant performance criterion. If a permit is issued it may be subject to conditions, including conditions in respect to compliance with objectives or policies.

39. Sub-clauses (5) and (6) of Clause 8.5.3 have counterparts in Clauses 8.7.1 and 8.8.1 of the Scheme:

8.7.1 A use or development must be granted a permit if:

(a) the use is within a use class specified in the applicable Use Table as being a use which is permitted;

- (b) the use or development complies with each applicable standard and does not rely on a performance criterion to do so; and
- (c) the use or development is not discretionary or prohibited under any other provision of the planning scheme.

8.8.1 The planning authority has a discretion to refuse or permit a use or development if:

- (a) the use is within a use class specified in the applicable Use Table as being a use which is discretionary;
- (b) the use or development complies with each applicable standard but relies upon a performance criterion to do so; or
- (c) it is discretionary under any other provision of the planning scheme,
- (d) and the use or development is not prohibited under any other provision of the planning scheme.

40. Clause 7.5 of the Scheme deals with compliance with applicable standards:

7.5.1 A use or development must comply with each applicable standard in a zone, specific area plan or code.

7.5.2 A standard in a zone, specific area plan or code is an applicable standard if:

- (a) the proposed use or development will be on a site within a zone or the area to which a specific plan relates, or is a use or development to which the code applies; and 7.5.3 7.5.4 7.6.1
- (b) the standard deals with a matter that could affect, or could be affected by, the proposed use or development.

7.5.3 Compliance for the purposes of subclause 7.5.1 consists of complying with the acceptable solution or the performance criterion for that standard.

7.5.4 The planning authority may consider the relevant objective in an applicable standard to help determine whether a use or development complies with the performance criterion for that standard.

41. These provisions reflect the performance-based nature of the Scheme and the Management Plan. Brett J explained that nature and the process of assessment under a performance-based Scheme in respect to the Clarence Interim Planning Scheme 2015, the structure and relevant clauses of which correspond to the Scheme, in *Boland v Clarence City Council*:¹¹

¹¹ [2021] TASFC 5 at [9] to [10]. This approach can be contrasted to planning systems where assessment is performance based but by retention of a discretion the outcome of a development application is not necessarily determined by the degree of compliance against the assessment benchmarks, for example see *DVB Projects Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 40 [12]-[13].

9. As already noted, the assessment of the proposal by both the planning authority and on appeal by the Tribunal turned on whether the proposal met the performance criteria relevant to certain scheme standards. This approach is in accordance with the intended operation of the Scheme. The nature of this Scheme, and its intended method of operation as a performance based scheme, was described by me in *Clarence City Council v Resource Management and Planning Appeal Tribunal* [2018] TASSC 41 as follows:

"It is common ground that the scheme, in particular, those parts that prescribe its operation, complies with the format set out in Planning Directive 1 (PD1), a Ministerial Directive issued under what was at the relevant time s 13 of the LUPA Act. The respondents submit that the scheme provisions, when read together, clearly evince an overall intention to operate on a performance-based approach, that is, to achieve certainty in respect of the assessment of development, and the exercise of discretion, by reference to the specific scheme standards as defined by the acceptable solutions and performance criterion. I accept this submission. That intended operation of the scheme becomes apparent when one examines its various interacting provisions.

The operation of the scheme is the subject of cl 7.0. Clause 7.5.1 provides that a use or development must comply with each applicable standard in a zone, specific area, plan or code. Clause 4.0 defines 'standard' to mean, '... the objective of a particular planning issue and the means of satisfying that objective through either an acceptable solution or performance criterion presented as a test to meet the objective'. The role of the acceptable solution or performance criterion as a 'test' in respect of the relevant standard is confirmed by cl 7.5.3 which provides that:

'Compliance for the purposes of subclause 7.5.1 consists of compliance with the acceptable solution or performance criterion for that standard'."

10. The relationship between the objective specified in respect of the scheme standard and the test proposed by the acceptable solution and performance criteria was further described by me as follows:

"A performance-based system employs a top-down approach, where the various levels of objectives and principles are eventually distilled into a practical test defined by performance criteria and acceptable solutions. This approach provides a reasonable level of predictability which is the intended operation of such a scheme."

42. The notional incorporation of relevant provisions of the Management Plan into the Scheme does not change this approach. The Management Plan follows the same performance-based system as the Scheme. Like the Scheme, the Management Plan sets out various levels of objectives and principles which are distilled into practical tests defined by acceptable solutions and performance criteria. Like the Scheme, the specific provisions of the Management Plan will override more general objectives.¹² This approach provides a reasonable level of predictability in respect to the assessment of proposals, consistent with the objectives of the resource management and planning system of Tasmania set out in Schedule 1 of the *Land Use Planning and Approvals Act 1993*.¹³ The express power

¹² *Von Witt v Hobart City Council and Others* [1995] TASSC 12 at [13].

¹³ *Clarence City Council v Resource Management and Planning Appeal Tribunal* [2018] TASSC 41 at [56].

in Clause 8.5.3 of the Management Plan to impose conditions to require compliance with objectives and policies of the Management Plan will not raise those objectives and policies to be standards. Rather it simply makes them a proper basis for permit conditions.

43. Grounds 1 and 2 assert that the cableway and the food services use are not consistent with the values of Wellington Park identified in Clause 8.2 and Clause S2.1 of the Management Plan. Clause 8.2 sets out objectives for assessing and managing activities, use and development in the Park. The clause refers to balancing visitation experiences with protection and conservation of the Park's natural and cultural values. Achieving this includes measures to protect the cultural tourism and recreational values of the park. Clause S2.1 applies to Pinnacle Specific Area. It identifies purposes which include maintaining and enhancing environmental, cultural and landscape values.
44. Clause 8.2 falls within chapter 8 of the Management Plan which regulates activities, use and development within the Park. It provides a performance-based top-down approach where objectives are distilled to a use table in Clause 8.4.5, a list of exempt uses in Table 4 of Clause 8.5.7 and a set of standards for use and development in Table 5 of Clause 8.5.7. Table 5 sets out acceptable solutions and alternative performance criteria for the general application of the Management Plan. Clause 8.5.3 of the Management Plan applies these procedures to applications for a use or development within the meaning of s3 of the *Land Use Planning and Approvals Act 1993*.
45. Chapter 8B follows the same general structure, but specifically in respect to the Pinnacle Specific Area. It distils purposes down to a table of uses in Clause S2.5 and a table of standards with acceptable solutions and performance criteria in Clause S2.6.
46. Neither Clause 8.2 nor Clause S2.1, as raised by grounds 1 and 2, provide acceptable solutions or performance criteria as standards against which to assess a proposal.
47. Grounds 1 and 2 do not identify standards against which the proposal is to be assessed. The proposal is only required to comply with the values identified in the grounds insofar as they inform or provide context for acceptable solutions and performance criteria. As neither ground identifies a relevant standard against which the proposal is to be assessed, the proposal is not required to meet grounds 1 and 2.
48. Accordingly, grounds of refusal 1 and 2 are not made out.

Proper characterisation of use

49. Ground 22 raises the proper classification of the proposed use. The Third, Fourth, Seventh and Ninth Joint Parties contend that the proposed use is properly classified as a tourist operation and that use is prohibited in the Recreation Zone and Natural Zone of the Management Plan and the Utilities Zone of the Scheme.

50. The Appellant and the Council agree on the classification of use: as transport depot and distribution within the Wellington Park and as tourist operation outside the Park. At first blush that might seem surprising but it reflects different definitions within the Scheme and the Management Plan
51. The use table set out in Table 3 in Clause 8.2.5 in Chapter 8 of the Management Plan provides that a tourist operation is prohibited in the Recreation Zone and Natural Zone and discretionary in the Pinnacle Specific Area. 'Tourist operation' is described in the table as "use of land specifically to attract tourists, other than for accommodation".
52. In support of their contention that the proposal should be classed as a tourist operation use, the Third, Fourth, Seventh and Ninth Joined Parties point to: evidence by Mr Bold, a director of the Appellant, that the proposal will comprise a single development, and that users of the cable car would include tourists; the Appellant's website, which refers to the development as a tourism destination; evidence of Mr Phil Bayley an economist called by the Appellant, that the predominant use of the cable car would be used to attract visiting tourists; evidence by Mr Keith Midson, a traffic engineer called by the Appellant that the traffic generated by the development would be tourist traffic; and evidence by the planning experts called by the Appellant and the Council Ms Irene Duckett and Ms Emma Riley, that the purpose of the proposal is to attract tourists. They say that all of the land on which the cableway is located, or passes over, will be used for a tourism purpose.
53. Ms Duckett's evidence described the operation of the proposal. The proposed base station would receive visitors arriving to travel on the cableway. They would travel via the cableway to the pinnacle centre, which is the destination facility for the cable car journey. At the pinnacle centre passengers would alight from an ascending car or board a descending car. The pinnacle centre would be open to the public, regardless of whether they travelled on the cable car and would be accessible by a ramp from the existing summit carpark. During daylight savings time periods, the café in the pinnacle centre would provide all day dining, but dinner service would only be available to cable car passengers. The pinnacle centre would include, in addition to the café, a lounge/bar, kitchen, toilets, a foyer area, a control room, park ranger office, staff amenities, an interpretation and retail space, viewing areas, an outdoor amphitheatre and roof garden, a plant room and water and sewerage tanks. She considered that the base station use was 'transport depot and distribution' within the Management Plan. The use of the access road would be subservient to the base station and therefore fall within the use class of the base station. She considered that the towers, cableway and cars were also ancillary to the primary use of transport depot and distribution. She also considered that the use of the pinnacle centre is primarily that of transport depot and distribution as its primary function is to receive and process travellers on the cable car.
54. Ms Duckett considered that the issue of whether other uses were ancillary to that primary use or standalone uses involved a question of the degree to which they would and could function independently of the primary use. She considered that they were ancillary to the transport depot and distribution use. If they were not ancillary they would comprise the uses of 'tourist operation' in respect to the visitor centre, interpretations centre, viewing shelter and associated retail and

‘food services’ in respect to the café. Ms Duckett considered that under the Scheme, as opposed to the Management Plan, the use would properly be classified as tourist operation and food services.

55. Ms Riley reached the same conclusions in respect to classification of use as Ms Duckett. In respect to classification under the Scheme she considered that the proposal is intended to transport people to and from the foothills of the mountain to the pinnacle. She considered this included both a transport and visitor experience function. She considered that the best fit approach to classification of use under the Scheme was as ‘tourist operation’ given that the vision of the cableway is primarily around developing and operating a visitor experience. She considered that the access road should be considered as directly associated with and subservient to that use.
56. In respect to assessment of use under the Management Plan, Ms Riley considered that the proposal best falls under the ‘transport depot and distribution’ use class. She did so based on definitions under the Management Plan, notwithstanding that users of the cableway are most likely to be people seeking a visitor experience.
57. Ultimately the use classification is a mixed issue of fact and law for the Tribunal to determine. That determination is informed by the evidence of the planning experts. The Third, Fourth, Seventh and Ninth Parties Joined did not call evidence from an expert planner. Thus, the only expert planning evidence on this issue is against the position advanced by them. Generally, where expert witnesses are in agreement their opinion should only be rejected if underlying facts are not proved, their process of reasoning is unsound or some other factor casts doubt on validity of the opinion.¹⁴ For the reasons set out below the conclusions of Ms Duckett and Ms Riley on classification of use are correct.

Classification under the Scheme:

58. The Scheme sets out categories of use classes in table 8.2. Clause 8.2 of the Scheme provides for categorising use and development:
 - 8.2.1 Each proposed use or development must be categorised into one of the use classes in Table 8.2.
 - 8.2.2 A use or development that is directly associated with and a subservient part of another use on the same site must be categorised into the same use class as that other use.
 - 8.2.3 If a use or development fits a description of more than one use class, the use class most specifically describing the use applies.
 - 8.2.4 If a use or development does not readily fit any use class, it must be categorised into the most similar use class.

¹⁴ *R v Klamo* [2008] VSCA 75 [44]-[50]

8.2.5 If more than one use or development is proposed, each use that is not directly associated with and subservient to another use on the same site must be individually categorised into a use class.

59. Table 8.2 of the Scheme provides definitions of uses. It includes including:
- “Tourist operation” is “use of land specifically to attract tourists, other than for accommodation. Examples include a theme park, visitor centre, wildlife park and zoo.”
 - “Transport depot and distribution” is “use of land for distributing goods or passengers or to park or garage vehicles associated with those activities, other than Port and shipping. Examples include an airport, bus terminal, council depot, heliport, mail centre, railway station, road or rail freight terminal and taxi depot”.
60. The proposal could fit either use class. Clause 8.2.3 requires categorisation of the use class most specifically describing the use.
61. Given the evidence in respect to the attraction of the cableway as a tourist destination and its anticipated use by visitors, and its inclusion of a visitor centre and related facilities, the proposal more comfortably fits the use of land specifically to attract tourists rather than for distribution of passengers. The purpose of the cable car is not simply to transport passengers between the base station and the pinnacle, but to provide a recreational experience in itself, particularly in respect to unique views of the Organ Pipes, the park and the broader area from the cable cars. The access road is subservient to that use. Insofar as the proposal falls within the area of the Scheme not affected by the Management Plan it is a ‘tourist operation’.

Classification under the Management Plan

62. Notwithstanding classification of the use under the Scheme as ‘tourist operation’, application of the provisions of the Management Plan leads to a different conclusion for the use within the Park. As noted above, where the Management Plan and the Scheme conflict the Management Plan will prevail.
63. Table 3 and Clause s2.5 of the Management Plan each provide that:
- a ‘tourist operation’ use is prohibited in the Recreation Zone and the Natural Zone and discretionary in the Pinnacle Specific Area; and
 - a ‘transport depot and distribution’ use is discretionary in the Recreation Zone, Natural Zone and Pinnacle Specific Area, but in respect to the recreation zone and natural zone only if it is for “infrastructure associated with potential transport modes”.
64. Table 3 of the Management Plan provides a use table for Wellington Park. The Pinnacle Specific Area contains its own use table in Clause S2.5. The provisions of the specific area plan will take precedence over the Management Plan generally in respect to any consistency. Both Table 3 and the table in s2.5 contain almost identical definitions of ‘tourist operation’ and ‘transport depot and distribution’. In table 3 they are:

- Tourist Operation (use of land specifically to attract tourists, other than for accommodation): Visitor centre, interpretation centre, viewing shelter and ancillary uses to the provision of these including limited associated retail.
 - Transport Depot and Distribution (use of land for distributing goods or passengers): Bus terminal, council depot, other Potential Transport Modes.
65. The descriptions of the uses in Clause S2.5 for the Pinnacle Specific Area are identical but for the insertion of the word “only” after the colon in each definition. That difference does not have any relevance for the Tribunal’s consideration of the relevant land use.
66. The definitions of transport depot and distribution in the Management Plan both specifically list ‘potential transport modes’ as examples. There is no equivalent in the Scheme. The Management Plan defines ‘potential transport modes’ identically in table 3 and Clause S2.5 as meaning:
- ...forms of public transport that have the potential to effectively move large numbers of people, but for which little or no infrastructure currently exists in the Park. It includes but is not limited to: shuttle buses; cable cars and aerial rope ways; and funicular rail and cable rail systems.
67. The proposal will be a form of transport, in a category specifically contemplated by the definition of potential transport modes, which has the potential to effectively move large numbers of people, but for which little or no infrastructure currently exists in the Park. The proposed cableway will be available for use by the public. No party suggested that by reason of it being conducted by a private operator rather than a public authority it would not be a form of public transport.
68. The definition of ‘transport depot and distribution’ expressly includes ‘potential transport modes’. The proposal unequivocally fits within the definition of ‘potential transport modes’, which expressly includes cable cars and aerial rope ways. The Management Plan expressly contemplates a cable car use as a potential transport mode and expressly includes that use in the use class of transport depot and distribution.
69. Clause 8.2 of the Scheme will apply to the approach to classification of uses within the Park, as the Management Plan is not inconsistent with that clause. Notwithstanding that the proposal incorporates aspects of the ‘tourist operation’ use, the best fit for the proposal under the Management Plan is as a ‘transport depot and distribution’ use.
70. The proposed use is therefore discretionary in the Recreation Zone, Pinnacle Specific Area and Natural Zone.
71. The pinnacle centre incorporates components that would, in isolation, fall within ‘tourist operation’ and ‘food services’ uses. Insofar as those uses might be at an intensity which is such that they are not merely subservient to the dominant ‘transport depot and distribution’ use, the use table in Clause S2.5 provides that both ‘tourist operation’ and ‘food services’ uses are discretionary in the Pinnacle Specific Area.

72. Accordingly, ground of refusal 22 is not made out.

GROUND 3, 4, 14 and 21 - NOISE

73. Grounds 3 and 4 are concerned with the effect of noise emissions from increased traffic and the base station on residential areas, particularly in the McRobies Road area that have the potential to adversely affect residential receivers outside Wellington Park.
74. Grounds 14 and 21 are concerned with the effect of noise associated with the Base Station and the cableway on acoustic amenity within Wellington Park.
75. The Seventh Joined Party made submissions in respect to noise generated by increased traffic in a wider geographic area of South Hobart. As this is not raised by any of the grounds of refusal, it is not a matter upon which the Tribunal has made findings.

Standards invoked by the grounds

76. Clauses 28.3.1 and 28.3.2 of the Scheme apply to the relevant land outside Wellington Park. They provide:

28.3.1 Hours of Operation

Objective:	
To ensure that hours of operation do not have unreasonable impact on residential amenity on land within a residential zone.	
Acceptable Solutions	Performance Criteria
A1	P1
Hours of operation of a use within 50 m of a residential zone must be within 7.00 am to 7.00 pm, except if: (i) for office and administrative tasks; or (ii) a Utilities use.	Hours of operation of a use within 50 m of a residential zone must not have an unreasonable impact upon the residential amenity of land in a residential zone through commercial vehicle movements, noise or other emissions that are unreasonable in their timing, duration or extent.

28.3.2 Noise

Objective:	
To ensure that noise emissions do not cause environmental harm and do not have unreasonable impact on residential amenity on land within a residential zone.	
Acceptable Solutions	Performance Criteria
A1	P1
Noise emissions measured at the boundary of a residential zone must not exceed the following: (a) 55 dB(A) (LAeq) between the hours of 7.00 am to 7.00 pm; (b) 5dB(A) above the background (LA90) level or 40dB(A) (LAeq), whichever is the lower, between the hours of 7.00 pm to 7.00 am; (c) 65dB(A) (LAm _{ax}) at any time. Measurement of noise levels must be in accordance with the methods in the Tasmanian Noise Measurement Procedures Manual, issued by the Director of Environmental Management, including adjustment of noise levels for tonality and impulsiveness. Noise levels are to be averaged over a 15 minute time interval.	Noise emissions measured at the boundary of a residential zone must not cause environmental harm within the residential zone.

77. Issue 6 of Table 5 of the Management Plan applies to the base station, towers, cableway and cable cars in the Recreation Zone and Natural Zone:

Issue 6: Noise

Objective: To provide for the quiet enjoyment of natural and cultural values, and acoustic amenity of the Park

Acceptable Solution

A6.1 Noise

Noise from point sources must not exceed 50 dB(A) at any point within 50m of the source.

Performance Criteria

P6.1 Noise

Activities which could have an adverse effect on the quiet enjoyment of natural and cultural values must be avoided or remedied to prevent any loss of acoustic amenity in the Park.

78. Issue 11 of Clause S2.6 of the Management Plan applies to the pinnacle centre, cableway and cable cars in the Pinnacle Specific Area:

Issue 11: Noise

Objective: To provide for the quiet enjoyment of natural and cultural values, and acoustic amenity of the Park.

Acceptable Solution

A11.1

Noise from point sources must not exceed 50 dB(A) at any point within 50m of the source.

Performance Criteria

P11.1

Noisy activities which could have an adverse effect on the quiet enjoyment of natural and cultural values must be avoided or remedied to prevent any loss of acoustic amenity in the Park.

Evidence on noise

79. Expert evidence was called by the Appellant from Mr Pearu Terts, who provided noise measurements, and Dr Neil McKenzie who provided a noise impact assessment related to the grounds of refusal. The Council called Mr Darren Tardio who reviewed material and evidence provided by the Appellant. Evidence was also provided by the Eighth Joint Party, Dr Karl Rollings.

Methodology - measurements

80. Noise measurements were by collected by Mr Terts at six locations:

- Two points associated with the area of the base station and towers 1 and 2 (locations 1 Main Fire Trail and location 2 Old Farm Road).
- Three locations (locations 3, 4 and 6) in the Pinnacle area.
- One location (location 5) opposite the climbers' track car park on Pinnacle Road.

Location 2 is outside Wellington Park.

81. The measurements form the basis of Dr McKenzie's evidence and the locations were mapped by him.

82. None of these locations are at any of the multiple points where the cableway crosses walking tracks, at the specific location of any of the three towers, at any residential property boundaries, or at McRobies Road. In cross-examination Mr Tardio referred to making further spot measure observations at the Organ Pipes walking track, the North South walking track, Myrtle Gully walking track and locations associated with the pinnacle, Old Farm Road and Main Fire Trail, and McRobies Road. Many of the observations are similar with respect to the contributing noise elements, including birds and breeze in trees in locations such as Old Farm Road and tracks, save for those that are exposed to human activities, notably traffic.
83. Dr McKenzie did not undertake his own measurements. He commented on problems in obtaining reliable data, once engaged to give expert evidence, because of seasonal conditions, notably winter. Dr McKenzie regards measurement Location I as representative of other Park locations.
84. Mr Terts measured ambient noise monitoring over multiple days. He was not instructed as to the proposed operating hours for the cableway. Details of other noise sources, such as plant and equipment at the base station and pinnacle centre sites, cable car motors, back-up generators and security and gate closure, were not provided to him.
85. Dr Rollings' evidence brought into question whether the measurements comply with the methods in the Tasmanian Noise Measurement Procedures Manual, including adjustment of noise levels for tonality and impulsiveness, but he did not call any expert evidence in this regard. Mr Tardio did not raise any similar concerns. Dr McKenzie commented that there is no indication that the spot measures meet the Noise Management Procedures Manual, including relevant weather conditions or how representative they are of the Park.
86. Dr McKenzie was not aware, before cross-examination of Mr Terts, that the measurements Mr Terts carried out recorded noise sources that were likely within 50 metres of the noise recorder. Dr McKenzie had assumed that the sources were all outside 50 metres from the recorder.
87. Mr Tardio recorded some spot measurements, which he described as a 'high level assessment'.¹⁵ He did not undertake any detailed measurements or survey existing noise.

Methodology - modelling

88. In his assessment of the proposal's response to the grounds of refusal relating to noise, Dr McKenzie used modelling to predict noise levels which he set out in contour maps.
89. He relied on data from a 2007 report in respect to a cableway in Gimmelwald in Switzerland. Dr McKenzie regarded the measurements in the report as conservative for the purposes of the current assessment, given his calibration of measurements, the age of the Gimmelwald facility, subsequent technological innovations, and the proposal's inclusion of only one motor room at the base station rather than two as in the Gimmelwald facility.

¹⁵ A high level assessment being a general macro assessment, rather than a more detailed low level assessment.

90. The relevance, reliability and scope of the measurements associated with the Gimmelwald report were challenged and criticised in cross-examination of Dr McKenzie, and in Dr Rolling's evidence. Among the matters raised were:
- The age of the Gimmelwald report.
 - Uncertainty about the comparability of the Gimmelwald cableway with the proposed cableway.
 - Different cabin designs. The Gimmelwald cable cars are fully enclosed whereas the proposed cable cars have an external balcony where passengers can move outside the main internal cabin area. No assessment has been made of noise generated by people in the balcony area.
 - The absence of measurement of any noise generated by the cables, such as by wind.
91. The material does not establish that the Gimmelwald cableway is directly comparable to the proposal in terms of the noise emissions. No data from other facilities was produced by the acoustic experts.
92. None of the witnesses provided measurements of other cableways in modelling or assessing projected noise emissions from the proposal. Dr McKenzie referred to his experience in other cableway-style facilities and suggested a 1-2 dB(A) reduction for the proposed cableway compared with the Gimmelwald facility. Mr Bold contended that contemporary infrastructure may be quieter. Dr McKenzie agreed, based on information Mr Bold provided to him. However, no expert acoustic evidence or independent measurements of more contemporary facilities was tendered.
93. Aspects of Dr McKenzie's modelling and predictions were challenged, and Dr McKenzie challenged aspects of Mr Tardio's evidence and Dr Rollings' evidence. Among the disputed matters were:
- The modelled tower heights (based on Mr Terts' evidence) which Mr Tardio suggests are higher (and therefore less noisy) than the Gimmelwald data.
 - The use of measures locations that are concentrated in locations which are affected by road noise.
 - The siting of the assessment location at residential receptors, whereas the applicable standards in the Scheme relates to land in the residential zone (28.3.1 P1) and the boundary of the residential zone (28.3.2 P1).
 - The use of background or ambient noise measures for assessment.
 - Whether the noise contours are based on point or linear sources.
 - Elements of the Base Station operation were not included in the modelling, including from activity in the car park. Dr McKenzie said that L_{max} impacts at the base station carpark would be essentially identical to the L_{max} impacts currently experienced at the Pinnacle carpark.

- The impact of noise from passengers descending to the base station leading up to the 9pm closing time.
- The omission of noise relating to sewerage transfer.
- A missed residential receptor, being a residence closer to the base station than the assessed receptors.
- The locations at which measurements were taken relative to the projected noise source, for example, Location 3 is greater than 100 metres from tower 3.
- The lack of inclusion of the contribution of non-cableway uses associated with the proposed pinnacle centre.

94. Dr McKenzie's responses included that:

- The cables comprise plastic twisted through the cable wire that attenuates noise. The cables are not a point source of noise and, are unlikely to be a source of noise from wind. The same applies to the cable cars. If wind noise was generated from these sources, it would not be distinguishable from the wind in trees.
- The existing transmission lines demonstrate that noise through cables is not an issue.
- Noise emissions from carpark activity have been modelled.¹⁶
- Linear sources have been used with respect to Pinnacle Road traffic.
- Mr Tardio's assessment lacks sufficient detail, in that his modelling does not consider terrain effects, modelling algorithms, vehicle source sound power levels and noise from existing traffic using McRobies Road.
- Descriptors of background noise cited by Dr Rollings do not represent ambient noise.
- Adjustments for noise character have been considered and are warranted based on the frequency and impulsive content of noise emissions.

The experts approach to the standards

95. Dr McKenzie and Mr Tardio expressed differing views in respect to:

- the interpretation of the standards;

¹⁶ Based on the Bavarian State Office for the Environment Office for the Environment (Bayerisches Landesamt für Umwelt – BayLfU) "Parking Area Noise – Recommendations for the Calculation of Sound Emissions of Parking Areas, Motorcar Centres and Bus Stations as well as of Multi-Storey Car Parks and Underground Car Parks" (2007) methodology, with an adjustment for Australian conditions made in accordance with "Prediction of parking area noise in Australian Conditions", Nicol, L. & Johnson, P. (2011).

- whether to use L_{eq} (the average sound level over the period of measurement) or L_{max} (the maximum sound level during the period of measurement) noise metrics when assessing the 50dB(A) limit in Clauses 28.3.1 PI and 28.3.2 PI; and
 - the appropriateness of other material that has informed assessments such as 'environmental harm'.
96. They provided detailed commentary on the application of either 50dB(A) L_{eq} or L_{max} as the relevant metric, the implications of using each method and the logic, or otherwise, of the outcomes:
- Dr McKenzie and Mr Tardio both referred to the difficulty in applying 50dB(A) within 50 metres of the noise associated with the proposal. Dr McKenzie considered 50 dB(A) at 50 metres is sensible.
 - Mr Tardio considered that a pragmatic approach would be any point at 50 metres, if his interpretation preferencing L_{max} is accepted. However, Mr Tardio also stated that a level of 50dB(A) L_{eq} would result in an inappropriate noise level at 50 metres, and anywhere else where quiet enjoyment is expected.

Dr Rollings, who did not hold himself out as an expert, suggested that both 50dB(A) L_{eq} and L_{max} have utility in the assessing the proposal's response to the relevant standards.

97. Although there are some points of agreement and pragmatism in the approach to the standards by the experts, matters of interpretation of the standards are for the Tribunal to determine and underpin the Tribunal's consideration of the evidence.

Assessing impacts

98. The implications of degree of change in levels of noise were generally agreed by the experts.
99. Dr McKenzie and Mr Tardio referred to a 'rule of thumb' that a reduction or increase in noise:
- by 3dB(A) is barely discernible or noticeable;
 - by 4 or 5dB(A) will be discernible or noticeable; and
 - by 6 or 7dB(A) is between noticeable and loud.
100. Dr McKenzie and Mr Tardio also agreed that background plus 5dB(A) is typically regarded as intrusive in noise assessments. This is the measure associated with sleep disturbance. Sleep disturbance is not an issue *per se*, as the proposed cableway will not operate for public use after 9pm, or 9.30pm for a final descent by staff, during daylight savings time. Dr McKenzie commented that while the background plus 5 dB(A) method is a general and widely accepted approach in preventing adverse noise effects, it is a conservative approach and therefore exceeding the threshold should not be deemed to be an adverse effect.
101. The Appellant and the Council agreed that it is appropriate to have regard to the Environmental Protection Policy (Noise) 2009 (the EPP), made under section 96K of the *Environmental Management and Pollution Control Act 1994*, in determining whether noise emissions unreasonably

interfere with a person's enjoyment of the environment (for P6.1 of Table 5), or have an unreasonable impact on residential amenity (for Clause 28.3.1 P1). Dr McKenzie's assessment of amenity was informed by the EPP. Mr Tardio agreed with the relevance and use of the EPP, and his evidence included:

The inference is that noise from the proposal should not be emergent above the existing or natural environmental noise. I described in my Referral Comments that in practical terms, this would mean that the proposal would need to generate noise 5 - 10dB less than existing ambient noise (Leq) so as to not be emergent.

102. The EPP sets out acoustic environment indicator levels applicable to listed specific environments, with associated critical health effects.¹⁷ The relevant specific environment for Wellington Park is 'outdoors in parkland and conservation areas', which lists 'disruption of tranquillity' as the critical health effect from noise. No dB(A) limits are listed, but footnote 4 states that:

Existing quiet outdoor areas should be preserved and the ratio of intruding noise to natural background sound should be kept low.

Mr Tardio considered that the two elements of that phrase should be applied conjunctively, that is, in order to preserve existing quiet outdoor areas, the ratio of intruding noise to natural background needed to be kept low. Dr McKenzie's evidence was that the two elements could work together. Both Mr Tardio and Dr McKenzie agreed that this means that the development should not result in emergent noise above the background noise level.

103. Dr McKenzie also referred to the Tasmanian State Road Traffic Noise Management Guidelines (2015). The Guidelines are produced by the Department of State Growth, and are used by the Department to manage traffic noise on State roads.¹⁸ They provide that a level of 45dB(A) (LA_{eq} 8hr) would result in 10 per cent of people experiencing sleep disturbance.¹⁹ That level is the trigger for noise mitigation under the Guidelines. Dr McKenzie considered this consistent with the EPP noise objective for sleep disturbance.
104. In response to contentions by Dr Rollings that the character of natural and human noise and the impact of emergent noises in the very quiet environs of the proposed development experienced by residents and Park users was relevant to noise amenity, Dr McKenzie agreed that machine noise is judged differently from natural sounds, and that natural sounds would be understood to be qualitatively different from machine sounds.

Reduction of traffic and traffic noise on Pinnacle Road

105. Pinnacle Road runs from Huon Road to the pinnacle of the mountain and is the only road access to the pinnacle. A reduction in traffic noise on Pinnacle Road is advanced by the Appellant as a beneficial outcome off the proposal. Dr McKenzie modelled the change and contended that

¹⁷ Table 1, Clause 18 of the EPP

¹⁸ Pages 9 and 15 of the Tasmanian State Road Traffic Noise Management Guidelines (2015)

¹⁹ Figure 2, Clause 5.5 of the Tasmanian State Road Traffic Noise Management Guidelines (2015)

existing noise levels along Pinnacle Road affect a large area of the Park. He considered that the proposal would significantly improve the acoustic amenity along the Organ Pipes track.

106. Dr McKenzie predicted reductions in noise emissions for varying levels of reduced traffic:
- 60 per cent reduction in traffic on Pinnacle Road - 4dB(A) reduction in noise emissions.
 - 50 per cent reduction in traffic on Pinnacle Road - 3dB(A) reduction in noise emissions.
 - 40 per cent reduction in traffic on Pinnacle Road - 2dB(A) reduction in noise emissions.
107. Dr McKenzie accepted that his conclusions would be affected if there are more or less cars on Pinnacle Road than he assessed.
108. The reliability of Dr McKenzie's evidence with respect to noise reductions on Pinnacle Road was challenged, particularly because it relied on tables of traffic counts provided by Mr Midson that were in contention.
109. Ms Duckett's evidence relied on Mr Midson's traffic counts, with an average daily count of 730 vehicles on Pinnacle Road, and a projected 40 per cent reduction. Ms Duckett's evidence also referred to her experience with respect to the Museum of Old and New Art, where she said up to 80 per cent of visitors travel to the attraction by ferry. It was not clear how that figure might compare to the mode of travel of visitors to the pinnacle, nor how that figure should inform or assist the Tribunal in respect to the projected 40 per cent reduction upon which Dr McKenzie and Ms Duckett, relied.
110. Mr Midson conceded that the inputs used by him in the Traffic Impact Assessment for his traffic generation predictions should not be relied on. He conceded that the assumed 730 existing annual average number of vehicles per day on Pinnacle Road was based on traffic counts that are more than 10 years old, and should not be relied on. Ms Riley referred to a more recent daily average of 917 vehicles per day. Mr Midson was not able to quantify what reduction in traffic on Pinnacle Road might follow from the development of the cableway. He conceded that it is possible that the proposal will itself lead to an increase in vehicle traffic on Pinnacle Road, as did Ms Duckett. Notwithstanding this the Council accepted that the proposal would reduce some traffic on Pinnacle Road, however the evidence did not provide a proper foundation to quantify that reduction.

Residential amenity and environmental harm within the residential zones

111. It is convenient to deal with Grounds 3 and 4 together. The grounds address noise impacts from the proposed access and the base station facilities, which are in the vicinity of land used for dwellings in a residential zone. The proposed access to McRobies Road is within 50 metres of existing residential properties with residential zoning. During Australian Eastern Standard Time, the proposed hours of operation of the access road would coincide with the operating hours of the McRobies Gully Waste Management Centre. The focus of the evidence was on noise emissions after 7pm. The acceptable solutions reference emissions between 7am and 7pm. The acceptable solutions are not benchmarks for reasonableness, but can provide context, and the focus by the experts on emissions after 7pm in respect to impact to residential amenity in the circumstances of the proposal was reasonable.

- I 12. Ground 4 raises compliance with PI of Clause 28.3.1. The proposed hours of operation of the proposal are outside the hours that would satisfy A1. The focus in respect to Ground 3 was on the amenity impacts of noise on land in a residential zone. The relevant impacts arise are those that arise from the timing, duration or extent of noise emissions. The relevant zones are the Environmental Living and General Residential zones on McRobies Road.
- I 13. Ground 4 raises compliance with PI of Clause 28.3.2. Based on the evidence referred to below, the proposal will not satisfy the acceptable solution as the noise emissions will exceed the maximum permitted in A1(b).

What do the noise standards in the Scheme mean?

I 14. PI of Clause 28.3.1 requires that hours of operation of a use within 50 metres of a residential zone must not have an unreasonable impact upon the residential amenity of land in a residential zone through emissions that are unreasonable in their timing, duration or extent. Relevant emissions include noise. Only unreasonable impacts will result in non-compliance.

I 15. 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.

I 16. PI of Clause 28.3.2 requires that noise emissions not cause 'environmental harm'. Clause 4.1.3 of the Scheme provides that that phrase has the same definition as it has in the *Environmental Management and Pollution Control Act 1994*. Section 5 of that Act defines environmental harm as:

Environmental harm is any adverse effect on the environment (of whatever degree or duration) and includes an environmental nuisance.

Section 3 of the Act defines 'environmental nuisance' as:

(a) the emission, discharge, depositing or disturbance of a pollutant that unreasonably interferes with, or is likely to unreasonably interfere with, a person's enjoyment of the environment; and

(b) any emission, discharge, depositing or disturbance specified in an environment protection policy to be an environmental nuisance.

Will the proposal cause unreasonable impact on amenity or environmental harm?

I 17. The site of the proposal falls within 50m of a residential zone, being the General Residential Zone, which is the threshold for application of Clause 28.3.1.

I 18. The hours of operation, and hours of noise emission, are relevant for both grounds. The proposed operating hours for the cableway are:

- 9am to 5pm, Monday to Friday, Australian Eastern Standard Time;
- 8am to 5pm, Saturday and Sunday, Australian Eastern Standard Time;
- 9am to 9pm, Monday to Friday, Australian Daylight Saving Time;
- 8am to 9pm, Saturday and Sunday, Australian Daylight Saving Time.

119. The proposed times for final descent are:

- for patrons would be 8.30pm in Daylight Savings periods; and
- for staff would be 6pm (Australian Eastern Standard Time) or 9.30pm (Australian Daylight Saving Time).

120. The acceptable solution A1 in Clause 28.3.1 of the Scheme will not be met, as the hours of operation will be later than 7.00 pm during Australian Daylight Savings Time. Exceptions for specific uses in the standard will not apply.

121. The Appellant relied on Dr McKenzie’s evidence and conclusions. With respect to the lower sections of the project, Dr McKenzie’s modelling includes residential receptors, described by him as the nearest sensitive (residential) receivers at the boundary between the Utilities Zone and the Residential Zone (identified as R1 and R2), at the façade of the nearest dwelling within the Residential Zone (R3), and at the nearest dwelling within the Environmental Living Zone along McRobies Road (R3).

122. Dr McKenzie produced tables to summarise existing and predicted noise levels. His Table 3 summarises the predicted average noise levels ($LA_{eq, 15min}$) at R1, R2 and R4 in his Figure 1, and Table 4 summarises the predicted maximum (LA_{max}) noise levels at the same receivers:

Table 3 Predicted average ($LA_{eq, 15min}$) noise levels at the Residential / Utilities Zone boundary (R1 and R2) and at the dwelling on the boundary (R4) within the Environmental Living Zone

Boundary Receiver	Day (7am to 7pm)		Night (7pm to 7am)	
	Existing	Existing + Future	Existing*	Existing + Future**
R1	57	59	32	43
R2	59	61	37	44
R4	62	64	41	47

* One vehicle pass-by. ** Based on 50% expected traffic movement occurring in a 15-minute period.

Table 4 Predicted maximum (LA_{max}) noise levels at the Residential / Utilities Zone boundary (R1 and R2) and at the dwelling (R4) within the Environmental Living Zone

Boundary Receiver	Day (7am to 7pm)		Night (7pm to 7am) - **	
	Existing*	Existing* + Future	Existing	Existing + Future
R1	67	68	52	53
R2	70	70	55	55
R4	74	74	59	59

*The existing LA_{max} during the daytime is based on a truck pass-by (accessing the WMC). ** Assume no buses using the access road and no trucks using McRobies Road.

Dr McKenzie’s evidence was that there will be no change or an imperceptible change (less than 1dB(A)) in the daytime noise levels at the residential receivers.

123. Dr McKenzie’s evidence shows that the acceptable solution A1 of Clause 28.3.2 will not be satisfied, as the noise emissions will exceed the maximum permitted in A1(b).

124. With respect to night-time noise, which is the main area of dispute between the parties, Dr McKenzie concluded from Table 3 that:

- there is potentially a significant change (up to 11dB(A)) in the average noise levels at residential receivers along McRobies Road during the night-time due to the proposed development; and
- it is apparent that there is no change or an imperceptible change (less than 1dB(A)) in the maximum noise level at the residential receivers along McRobies Road.

125. Dr McKenzie further assessed amenity by reference to the Scheme and the EPP. He observed that the Scheme provides a lower night-time noise limit, being the lower of the background+5 or 40dB(A) outside bedrooms at night-time, which is significantly lower than the EPP limit of 45dB(A) (average noise level over 8 hours).

126. Dr McKenzie stated that the predicted LA_{eq} noise level from cable and cable car movement over towers, at the closest dwelling outside Wellington Park, approximately 320m away on Old Farm Road, would be 33 dB(A). The predicted total noise level including noise from the base terminal building and peak traffic volumes would be 40 dB(A). These predicted noise levels easily comply with the EPP criteria that apply outside dwellings during the day and night-time periods.

127. Dr McKenzie's summary of his conclusions includes:

- a. Existing amenity along McRobies Road is already compromised by industrial activities at the end of McRobies Road, with existing noise levels at the boundary between the Residential and Utilities zone already exceeding the noise limits proposed for that interface.
- b. There is no change or an imperceptible change (less than 1 dB(A) noting 3dB(A) is barely noticeable) in the maximum noise level (referred here as the LA_{max}) at the residential receivers along McRobies Road, at any time.
- c. Average noise levels (referred here as the $LA_{eq,15min}$) at night-time (7pm to 7am) may increase if multiple cars leave the proposed development during a 15-minute period. Regardless, average noise levels comply with the Environment Protection Policy (Noise) 2009 (EPP) and World Health Organisation (WHO) Guidelines for limits of noise levels at the façade of residential buildings.
- d. There is an imperceptible change (less than 2dB(A), noting that 3dB(A) is just perceptible) in the average noise levels at residential receivers along McRobies Road during the daytime (7am to 7pm) due to the proposed development.

Therefore, in my opinion, refusal on the grounds of "the proposed hours of operation will have an unreasonable impact on the residential amenity of land in the residential zones as a result of noise" is unjustified given there is an imperceptible change in average noise levels during the daytime, no change or an imperceptible change at any time in maximum noise levels, and night-time noise levels comply with limits appropriate to preserve acoustic amenity at the façade of residential buildings.

128. Dr McKenzie's opinion is founded on the use of 50dB(A) at 50 metres:

... the Performance Criteria allows for further consideration of any residual noise effects, taking into account the existing noise levels in the environment; and the expected level of amenity that should be afforded based on the type and nature of the impacted receivers. Notwithstanding, the Acceptable Solution applicable to this proposal is provided in the Management Plan, that is to not

exceed 50 dB(A) at 50m from any point source which I have assessed and demonstrated to be achieved.

The correct approach to PI of 28.3.1 requires assessment of impact on the amenity of land in a residential zone within 50 metres of a noise emitting use, not at 50 metres from the source of noise, and not limited to residential buildings.

129. There are also outstanding issues about the adequacy of the noise sources that have been modelled. It is possible, but unknown, that noise sources that have not been included in the assessment would increase those noise levels. Either way, based on Dr McKenzie's modelling, noise emissions within 50 metres associated with vehicle movements for the commercial operation and the base station exceed an average of 50dB(A).
130. Dr McKenzie modelled noise contours, based on average level of noise emissions, L_{eq} . The model showed emissions would exceed 50dB(A) L_{eq} within 50 metres of point sources associated with the base station. Predicted noise levels associated with the base station, shows noise of 50dB and above within much of a 50 metre radius around the base station.
131. Mr McKenzie's evidence was that that car park noise would be similar to the pinnacle. The existing L_{max} measurements at the pinnacle carpark exceed 50dB(A) at distances greater than 50 metres.
132. Dr McKenzie evidence included:

As per the noise modelling carried out to inform "Ground of Refusal 3", it is noted for night-time noise emissions that:

- a. The background (LA90) noise level has not been measured along McRobies Road, however with reliance on measurements made by Mr Terts it is about 25dB(A) (evening). On this basis the night-time criterion would be 30dB(A) (being the lower of background+5dB(A) or 40dB(A)).
- b. Average noise levels from existing traffic on McRobies Road are predicted to be 32-41dB(A), and therefore already exceed the night-time limit of 30dB(A). Future traffic movements associated with the proposed development, are not predicted to increase this level unless multiple cars leave at once, in which case (based on up to 7 vehicle movements in any hour after 7pm) the increase in noise would be noticeable (greater than a 5dB(A) increase).

As per the noise modelling carried out to inform "Grounds of Refusal 3", there is no change or an imperceptible change in maximum noise levels at any-time due to the proposed development. Noting however that at night-time maximum noise levels comply with the limit of 65dB(A), while during the daytime this limit is already currently exceeded.

133. Dr McKenzie concluded that average noise levels from existing traffic on McRobies Road already exceed the day-time and night-time noise limits. While the proposed development will result in an increase in average noise levels, he considered that the increase will be compliant with the EPP, World Health Organisation Guidelines, and the Tasmanian State Road Traffic Noise Management Guidelines. He therefore concluded that the proposal will not cause environmental nuisance or harm. However, the Tribunal is not persuaded that noise emissions less than the traffic noise limit in the Tasmanian State Road Traffic Noise Management Guidelines cannot have an unreasonable impact upon the residential amenity of land in this residential zone.

134. Ms Duckett relied on Dr McKenzie's evidence that there will be an imperceptible change in the average noise levels at residential receivers along McRobies Road during daytime due to the proposal, and that night-time noise levels comply with limits appropriate to the preservation of acoustic amenity at the façade of residential buildings. Dr McKenzie's opinion regarding environmental nuisance or harm considered the proximity and activity associated with the Waste Management Centre, its hours of operation, and traffic movement data sourced from Mr Midson (data which is problematic, as set out elsewhere in these reasons). Ms Duckett considered that, given that McRobies Road services the Waste Transfer Station, the addition of coaches and commercial truck movements to and from the base station is unlikely to have an unreasonable impact upon residential land.²⁰ That was not demonstrated by any evidence. Commercial vehicle movements can be conditioned to comply with hours of operation, but how that might affect the operation of the proposal is not apparent from the evidence.
135. Dr McKenzie conceded in cross-examination that noise within 50 metres of the base station as a consequence of the proposal would be seriously annoying using the critical health effects scale in the EPP of 55dB(A) L_{eq} , and that this equated to background noise plus as much as 20 dB(A), which he conceded would be an extreme change of an intrusive nature compared to existing background noise levels. Accordingly, the EPP indicator would not be met.
136. Mr Tardio's evidence was that the impact of the noise emissions, based on Dr McKenzie's modelling (without taking account of any adjustment that might be required to respond to criticisms that have been noted earlier), would be dramatic.
137. Regardless of the differing opinions and regardless of which metric should be applied, the modelling shows noise emissions to land in a residential zone will be noticeably above background and ambient levels. This is significant given the low existing noise environment in the evening.
138. The predicted average noise levels at the residential zone boundary between 7pm and 7am would exceed the existing average noise levels by up to 11 dB(A). The change in Location 1 is projected to rise substantially to some 50 dB(A), against a measured evening L_{eq} of 25 dB(A).
139. The evidence demonstrates that the level of maximum noise emissions would be significant and excessive having regard to the existing acoustic environment. A level of 65 dB(A) will be a significant change and will be noisy in the location.
140. The proposal will result in a material change in the noise environment, both in terms of noise levels and the nature of the noise. The residential land is in an area that is quiet bushland, which contributes to the land being pleasant and enjoyable. There will be noise impact on the conditions that contribute to making the land pleasant or enjoyable. The impact will be unreasonable because of the extent to which noise associated with the proposed use, after 7pm, within 50 metres of a residential zone, exceeds background noises levels, whether using an average or maximum noise metric.
141. The Tribunal is not persuaded that the presence of trucks during the period 7am – 7pm, and a modest numerical estimate of vehicles after 7pm via McRobies Road and to the base station, are

²⁰ Ms Duckett did not refer to Dr McKenzie's evidence with respect to the change in noise.

reasons to find that the residential amenity will not be unreasonably impacted. Truck noise is not an existing condition after 7pm, where the environment is quiet and natural. The presence of trucks during the daytime is not an appropriate or fair basis to disregard or downplay the level of amenity impact.

142. The hours of operation of the proposal, which will be within 50 metres of a residential zone, will have an unreasonable impact upon the residential amenity of land in the residential zone through noise emissions that are unreasonable in their timing and extent.
143. Noise emitted by the proposal is likely to unreasonably interfere with a person's enjoyment of the environment within the residential zones. It will have an adverse effect on that environment and will constitute relevant environmental harm within the residential zone.
144. The proposal does not satisfy the criteria P1 in Clause 28.3.1 or P1 in Clause 28.3.2. Accordingly grounds of refusal 3 and 4 are made out.

Adverse effect on quiet enjoyment of the Park

145. It is convenient to deal with grounds 14 and 21 together.
146. Ground 14 asserts an adverse impact from noise generated by the base station, towers, cableway and cable cars in the Recreation and Natural Zones in Wellington Park.
147. Ground 21 applies to the pinnacle centre, cableway and cable cars in the Pinnacle Specific Area.

What do the noise standards in the Management Plan mean?

148. The objectives of both Issue 6 of Table 5 and Issue 11 of S2.6 are in identical terms:

To provide for the quiet enjoyment of natural and cultural values, and acoustic amenity of the Park.

149. The acceptable solutions in Table 5 A6.1 and S2.6 A11.1 of the Management Plan each refer to a maximum limit of 50dB(A) within 50 metres of the source of noise. If taken as read, it would be very difficult to comply with the condition, particularly using the L_{max} metric. Mr Terts' measurements at Locations 1 and 2 include existing L_{max} levels greater than 50dB(A), locations that he described as being notable for low background noise in calm weather.
150. The Appellant submits the requirement that noise not exceed the limit at any point within 50 metres of the source should be read as a requirement that the limit is not exceeded at any point at 50 metres from the source. Any emission measured at 50dB(A) at 50 metres from the source must exceed that level within 50 metres of the source, as noise reduces with distance away from a noise source. The Appellant's position reflects the evidence of Mr Tardio and Dr McKenzie who both sought to resolve what they considered was an unreasonable standard by adopting an agreed and practical approach of at 50 metres.
151. Mr Tardio's evidence was that, using attenuation algorithms for distance, 50dB(A) at 50 metres would be 84 dB(A) at one metre from source. Dr McKenzie says that the proposal will not exceed 50dB(A) at 50 metres from any point source. However, the point sources are limited in number and location. There is no evidence to show that Location 1 represents all other land within the Park.

152. The Council and the Third Fourth, Seventh, Eighth and Ninth Joined Parties say that there is no basis to depart from the plain and ordinary meaning of the words and, consequently, what must be demonstrated is that no noise exceeds 50dB(A) at any point within 50 metres. They contend that it would not be impossible to satisfy the acceptable solution interpreted in accordance with the plain meaning of its words, because a new noise source could be shielded such that no average or maximum noise level of 50dB(A) was measurable at any point within 50 metres of the source. Nonetheless, they acknowledged that for a development like the proposal, the solution would be very difficult to satisfy.
153. The general principles of interpretation are referred to earlier in these reasons. In *A Wyminga v Glamorgan Spring Bay Council and Spring Bay (Tasmania) Pty Ltd*²¹ the Tribunal observed:

Unfortunately, it is not unknown for planning schemes to be drafted without the rigour applied to statutes.²² In *AAD Design Pty Ltd v Brisbane City Council*²³ Chesterman JA observed that:

“Planning schemes, and the definitions found in them, often lack clarity, contain ambiguities and sometimes appear contradictory. The attempt to make sense of them gives rise, on occasions, to expressions of judicial exasperation.”

His Honour cited Thomas J in *ZW Pty Ltd v Peter R Hughes and Partners Pty Ltd*²⁴:

*“To arrive at the so-called proper construction of such provisions involves a good deal of guesswork. In the end courts endeavour to give some meaning to such provisions and endeavour to adopt a common sense approach, or the approach which seems to make the most sense out of provisions which may be contradictory as well as obscure (cf. *Pacific Seven Pty Ltd v City of Sandringham* [1982] VicRp 14; [1982] VR 157, 162; *Brown v Idofill Pty Ltd* [1987] NTSC 55; (1987) 64 LGRA 218, 227; *Tainui Pty Ltd v Brown* (1988) 65 LGRA 22, 27).”*

A practical approach to interpretation is required, but as observed by Robson J in *Elimatta Pty Ltd v Read and Anor*:²⁵

*“...while environmental planning instruments should be interpreted in a practical manner (such that meticulous examination of language is avoided), it is clear that this does not override general principles of statutory interpretation nor require “laxity or flexibility” when construing environmental planning instruments: *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379 at [54]; *Wingecarribee Shire Council v De Angelis* [2016] NSWCA 189 at [20]; *4nature Incorporated v Centennial Springvale Pty Ltd* (2017) 95 NSWLR 361; [2017] NSWCA 191 at [45].”*

While the provision might be onerous to comply with, it is not ambiguous, and it is capable of application. If the provision is clear, the fact that compliance with it might be difficult or burdensome is immaterial.²⁶ A requirement that “noise from point sources must not exceed 50dB(A) at any point within 50 metres of the source” means precisely what it says. There is no

²¹ [2022] TASCAT 41

²² For example, see the comments of Blow J in *AAD Nominees Pty Ltd v Resource Management and Planning Appeal Tribunal* [2011] TASFC 5 at [2] – [3]

²³ [2012] QCA 44 at [18]

²⁴ [1992] 1 Qld R 352 at 360

²⁵ [2021] NSWLEC 75 at [44]

²⁶ *Timber World Pty Ltd v Meander Valley Council* [2020] TASSC 27 [15]-[17]

licence to read into the provision that the only relevant point for measurement is at 50m from the source, regardless of whether that might seem more sensible.

154. Notwithstanding that the Management Plan states Acceptable Solutions are expressed “in measurable terms that can be used to assess compliance”,²⁷ the phrase “must not exceed 50dB(A) at any point” in A6.I and A11.I of the Management Plan has no defined noise metric. It does not identify whether the measurement is to be LA_{eq}²⁸ or L_{max}²⁹. As already indicated, the witnesses disagree as to the applicable or appropriate metric.
155. For the reasons set out below, the proposal will not satisfy A6.I and A11.I. It must therefore be assessed against P6.I and P11.I.
156. The Appellant submitted that it is not reasonable to construe the performance criteria as preventing any noise-emitting activity in any location within the Park, and that the acoustic amenity of the Park does not demand silent activity. Clearly that is so. P6.I and P11.I relate to noisy activities which could have an adverse effect on the quiet enjoyment of natural and cultural values. ‘Adverse effect’ is a protean expression that will vary with circumstances.³⁰ Any introduced noise could be seen as adverse, but the general purpose of the standards is to regulate development not to prevent it, and the acceptable solution contemplate that some noise will be acceptable.
157. ‘Quiet enjoyment’ has a particular meaning in law that does not fit its use in the Management Plan.³¹ The natural meaning of that phrase³² connotes a tranquil or peaceful pleasure or satisfaction gained from the natural and cultural values. This sets a ‘high bar’ for compliance with the performance criteria.
158. P6.I and P11.I of the Management Plan require that activities which could have an adverse effect on the quiet enjoyment of natural and cultural values must be ‘avoided or remedied’ to prevent any loss of acoustic amenity in the Park. ‘Avoided’ and ‘remedied’ are not defined. Although a word in a statutory provision will not necessarily correspond with its dictionary meaning,³³ unless the purpose or context of the provision indicates a different meaning the usual meaning of words may be applied.³⁴ The Macquarie Dictionary definition of ‘avoid’ includes, relevantly, “to keep away from; keep clear of”. The Macquarie definition of ‘remedy’, in its verb form, includes “to put right, or restore to the natural or proper condition” and “to counteract or remove”.
159. The Appellant submits the requirement to avoid impacts is not absolute, and that the requirement to avoid adverse impacts does not require that impacts are eliminated. No other parties asserted a contrary position.

²⁷ Table 5 and S2.6

²⁸ The average sound level over the period of measurement.

²⁹ The maximum sound level during the period of measurement.

³⁰ *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 [2]

³¹ The right to the undisturbed use and enjoyment of real property.

³² Using the most apt definitions of ‘quiet’ as an adjective and ‘enjoyment’ as a noun in the Macquarie Dictionary

³³ *South Western Sydney Local Health District v Gould* [2018] NSWCA 69 per Leeming JA at [78-81]; *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44 at [26 - 30]

³⁴ *Wilderness Society (Tasmania) Inc v Wild Drake Pty Ltd* [2021] TASFC 12 [115]

160. On close consideration, P6.1 and P11.1 are curiously phrased. On a plain reading it is the noise producing activity which must be avoided or remedied. An activity can be avoided, but it cannot be remedied, although its consequences might be remedied. Alternatively the adverse effect caused by a noise producing activity can be either avoided or remedied. Accordingly it must be the adverse effects that are to be avoided or remedied rather than the activity.
161. The performance criteria provide the basis to measure and assess noise impacts. If an impact 'could' have an adverse effect on quiet enjoyment it must be avoided or remedied. 'Could' is the past tense of 'can'. It is less prescriptive than 'would' and its use in the standards indicates a potential rather than certain adverse effect.

Environmental Protection Policy (Noise)

162. The EPP indicator level for 'outdoors in parkland and conservation areas' is noted above. It is that:

Existing quiet outdoor areas should be preserved and the ratio of intruding noise to natural background sound should be kept low.

Mr Tardio and Dr McKenzie agreed that this means that the development should not result in any emergent noise above the background noise level.

The natural and cultural values that are enjoyed

163. Consideration of P6.1 and P11.1 requires identification of the natural and cultural values which might be enjoyed, the quiet enjoyment of could be adversely effected.
164. The natural and cultural values of the Park are identified in Clause 2.3 of the Management Plan, which is headed 'Defining the Park's Values' and provides (with emphasis added):

The key qualities of Wellington Park have been identified in section 2.2 (above). These qualities are valued by the community in a number of ways, and to describe them involves categorising them to some degree. The broad categories used in this Management Plan are inclusive of all the key values of the Park identified through research and public consultation.

The identified values can be divided into: Use Values (recreation, tourism, water supply, research and education); Natural Values (geodiversity, biodiversity); and Cultural Values (Aboriginal history and culture, European history and culture, landscape, sense of place). The Trust's website provides significant information on the values described in this chapter.

P6.1 and P11.1 address quiet enjoyment of natural and cultural values, but do not refer to the third category, use values. The values from which enjoyment may be obtained relevant to the performance criteria will be geodiversity, biodiversity, Aboriginal and European history and culture, landscape and sense of place. The effect of noise on recreation and tourism *per se* will not be a consideration.

165. Natural and cultural values are extensively defined in Clause 2.3 of the Management Plan. Clause 2.3.2 and 2.3.3 expand on the significance of natural values and cultural values respectively, including observing the following:

- Protection of natural values is important both for the intrinsic worth of those values, and for the sustainable realisation of the various community uses of the Park. While it is not possible in a practical sense to manage the intrinsic values of nature directly, these values must be protected given they contribute to the heritage, aesthetic and community importance of the Park, are the basis for the pursuit and quality of recreational and tourist experiences within the Park, are of scientific interest, and ensure good quality drinking water. Furthermore, the self-regulating nature of the Park's ecological processes means that it is not so much the natural values themselves that need management, but rather human activity and impacts which may threaten those values.
- The high diversity of vegetation types and communities, with the associated diversity of vegetation structure and composition, and therefore habitat, is largely responsible for a correspondingly high diversity of flora and fauna species within the Park.
- One of the most distinctive features of the Wellington Range is that, after 40 000 years of Aboriginal occupation and 200 years of European settlement, the area is a cultural landscape as well as a biophysical one. Archaeological data concerning the specific use of the Park and its place in Aboriginal culture is limited. As such, it is impossible to compare the relative significance of the Park, either in a spiritual or scientific sense, with other areas in Tasmania. Consequently, all sites and evidence of the history of Aboriginal occupation and use of the Park are of importance for the information they provide about Aboriginal lifestyles and culture, and for their personal value to the present day community of Aborigines and other people with an interest in the historic roots of human occupation of the island.
- Since European settlement, the Park has been a source of clean water, food, timber, recreational pursuits and tourism. Much evidence of these past uses remains. These sites and artefacts, together with memories of their use, provide some understanding of the activities which have shaped the Park.
- The visual beauty of Wellington Park is one of the most important factors shaping people's perception of it. The geology, striking landform, cultural history, running waters and diverse vegetation all contribute to its aesthetic beauty.
- The Park is more than a biophysical reserve, and more than the historical parts that make it up. It is, in fact, part of the community's 'extended sense of self' (Fox, 1990). That is, it is inextricably linked into the psyche and perhaps the being of the community of southern Tasmanians who live in its shadow.

166. The range of quiet enjoyment which could be adversely affected by noise is not amenable to exact definition, but the values identified by the Management Plan include aesthetic, cultural, historic and spiritual enjoyment of a largely undeveloped natural area. The Management plan refers to "the quietness, solitude and sense of wildness that many value in the Park"³⁵.

Noise effect in the Recreation and Natural Zones

167. The proposal must satisfy the standards in Issue 6 of Table 5 in the Recreation and Natural Zones.

³⁵ Clause 4.6

168. The base station and towers 1 and 2 are in the Recreation Zone. Tower 3 is in the Natural Zone. Pinnacle Road traverses the Recreation and Natural Zones before reaching the Pinnacle Specific Area. The cableway will traverse sections of the Park in those zones that include walking tracks and the Organ Pipes, which is an area used by rock climbers.
169. Dr McKenzie considered that noise emitted from the towers will not impact any walking tracks in the vicinity of the towers and that noise at 50 metres from the towers at ground level would not exceed 50dB(A). Applying Dr McKenzie's evidence and the Gimmelwald data, the movement of the cable car and cables over towers would exceed 50 dB(A) within 50 metres of the towers. This is the case for all three towers. The base station also exceeds 50 dB(A) within 50 metres, as identified earlier.
170. Accordingly, the acceptable solution A1 in Issue 6 is not met for these parts of the development in the Natural and Recreation Zones. The proposal must therefore satisfy performance criterion P6.1.
171. The noise emitting activities of the proposal which could have an adverse effect on the quiet enjoyment of natural and cultural values will, self-evidently, not be avoided.
172. Other than the base station and towers, there is a lack of quantitative noise data in relation to the Recreation and Natural Zones. Dr McKenzie regards Location 1 as representing other Park locations, but the Tribunal was not assisted by evidence of existing noise levels associated with tracks and tracks away from examples that are influenced by road noise. Mr Tardio cited some spot surveys. He noted that a detailed analysis has not been undertaken for areas under the cableway alignment that are removed from existing traffic noise.
173. The Appellant's contentions with respect to the potential for adverse noise impacts outside the Pinnacle Specific Area included:
- A different acoustic amenity is to be expected along the fire trail as compared to walking tracks in bush settings. Different user groups may expect different levels of acoustic amenity, and bike riders may reasonably be regarded as less sensitive than walkers due to the nature of their recreational pursuit, therefore indicating a further differentiation in the treatment of different tracks.
 - It is not unreasonable for noise emissions to emerge from the background environment as one approaches the noise source, particularly on the heavily modified fire trails. At more distant locations, the evidence of Dr McKenzie shows that noise levels reduce in line with the background environment, particularly where they intersect walking tracks, and are well below 50dB(A) (L_{eq}) at these points. There is no opportunity for exposure to any emissions associated with towers 1 and 2. These emissions are limited to the noise of the cables and the cable cars passing over the towers, and the towers are set in the bush and separated from any tracks.
 - There are limited opportunities for people to be exposed to noise emissions from the pinnacle centre or tower 3 due to their location in areas where no formal tracks presently exist, although there is an informal track used by rock climbers to access the escarpment that will provide some proximity to emissions, particularly from tower 3.

The exposure would be brief and experienced when enroute to the recreational opportunity rather than when engaged in it.

- Mr Tardio did not undertake his own assessment and limited his analysis to a critique of the material provided by the Appellant. He presented no positive case for refusal of the application and his evidence is of limited assistance.

174. The Tribunal is not persuaded by the Appellant's submissions and evidence on this matter. Noise associated with the cableway and associated infrastructure in the Natural and Recreation Zones will result in intrusion on the quiet enjoyment of the Park, particularly in those locations around the Park that are not exposed to traffic noise, that could have an adverse effect. The Appellant's evidence addresses the Organ Pipes track but not other tracks.
175. The Park environs, away from road traffic and places where people congregate, is agreed to be quiet and influenced by noises associated with nature and the environment. The proposed cableway crosses multiple tracks, as well as the face of the Organ Pipes, which is used by climbers. People using parts of the Park will themselves make noise. Further, the intersections between Park users and the cableway in parts of the Park may be brief, with the potential passing of a cable car overhead at any single point at an average of once every 7.5 minutes. This does not, however, represent the full scope of locations in the Park where the proposed activities could have an adverse impact on the acoustic amenity of the Park in the Natural and Recreation Zones. The Appellant's evidence cites the Organ Pipes track, but there are others tracks where the cableway would intersect at varying heights. Even if the activities were limited to track crossings, the Tribunal finds that the proposed activities could have an adverse effect on the quiet enjoyment of the natural and cultural values, and have not been avoided.
176. The adverse effect on that quiet enjoyment will not be avoided and the Appellant has not adequately demonstrated that it will be remedied. The Appellant relies on a reduction in traffic on Pinnacle Road. The current noise levels in some locations along this road exceed 50dB(A). There are significant and material issues with respect to the traffic volumes relied on by Dr McKenzie and Mr Midson, but even the projected 40 per cent decrease in Pinnacle Road traffic would only result in an estimated 2dB(A) reduction in noise emissions. A decrease by 3dB(A) is less than barely discernible or noticeable.
177. The Tribunal does not accept that there is a significantly improved acoustic amenity for the Organ Pipes walking track and the Pinnacle Road and the summit observation point. No other remedies have been identified by the Appellant relating to the lower areas of the Park or the Pinnacle Specific Area.
178. The proposal does not satisfy the criterion that activities which could have an adverse effect on the quiet enjoyment of natural and cultural values must be avoided or remedied to prevent any loss of acoustic amenity in the Park so as to satisfy P6.1.

Noise effect in the Pinnacle Specific Zone

179. The proposal must satisfy performance criterion P11.1 in the Pinnacle Specific Zone.
180. Dr McKenzie modelled predicted average level of noise emissions at the pinnacle. His contour mapping showed predicted reduced emissions still exceeding 50dB(A) L_{eq} within 50 metres of

Pinnacle Road. It also showed predicted emissions exceeding 50dB(A) L_{eq} within 50 metres of point sources around the pinnacle centre.

181. In respect to Dr McKenzie's model:

- Issues about the reliability of projections with respect to traffic reductions have been referred to previously.
- Not all noise likely to be emitted from the new pinnacle centre has been modelled.
- Tower 3 is not within the Pinnacle Specific Area although it has been modelled and assessed as part of the Pinnacle Specific Area.
- Adopting L_{max} as the metric rather than L_{eq} would be likely to demonstrate higher levels within 50 metres.

182. The pinnacle area has higher existing noise levels than other locations measured by the experts. Modelling of the proposal shows significant reduction of average noise levels in the area impacted by noise from traffic along the entire extent of Pinnacle Road, thereby improving the acoustic amenity within the Park. It also shows the increase associated with the pinnacle centre (and tower 3).

183. The reduction in traffic noise projected by Dr McKenzie is underpinned by an assessment of traffic data that is problematic and cannot be properly relied on. Moreover, the modelling shows the activities will introduce new noise at significant levels in parts of the Pinnacle Specific Area where there are not existing noises, other than, logically, natural noises. The proposal will represent a significant increase and change to the current environment that could have an adverse effect on the quiet enjoyment of natural and cultural values in the Pinnacle Specific Area. The Appellant has not adequately demonstrated that the loss of acoustic amenity will be remedied to prevent any loss of acoustic amenity in the Park so as to satisfy P11.1.

Conclusion regarding noise standards

184. The proposal will not meet the acceptable solutions A1 of Clause 28.3.1 and A1 of Clause 28.3.2 or the performance criteria P1 of Clause 28.3.1 and P1 of Clause 28.3.2 of the Scheme. Nor will it meet the acceptable solutions A6.1 and P11.1 or the performance criteria P6.1 and P11.1 of the Management Plan.

185. Accordingly, grounds of refusal 3, 4, 14 and 21 are sustained.

186. Although the appeal may be determined by these findings, in accordance with the Tribunal's usual approach to appeals, all the grounds of refusal have been considered and determined in these reasons.

GROUND 8, 9, 10, 23 and 24 - BIODIVERSITY

Special circumstances

187. Ground 8 brings into consideration compliance of the proposal with the Biodiversity Code in the Scheme in connection with vegetation clearance associated with construction of the proposed access road to the base station.

188. The relevant standard is Clause E10.7.1, which provides:

E10.7.1 Buildings and Works

Objective:	
To ensure that development for buildings and works that involves clearance and conversion or disturbance within a Biodiversity Protection Area does not result in unnecessary or unacceptable loss of priority biodiversity values.	
Acceptable Solutions	Performance Criteria
<p>A1</p> <p>Clearance and conversion or disturbance must comply with one of the following:</p> <ul style="list-style-type: none"> (a) be within a Building Area on a plan of subdivision approved under this planning scheme. (b) the development is for a single dwelling on an existing lot within the Low Density Residential Zone, Rural Living Zone or Environmental Living Zone and: <ul style="list-style-type: none"> (i) clearance and conversion or disturbance is confined to Low Priority Biodiversity Values; (ii) the area of clearance and conversion is no more than 3,000 m²; (iii) the area of disturbance is no more than 3,000 m²; (c) the development is other than for a single dwelling on an existing lot within the Low Density Residential Zone, Rural Living Zone or Environmental Living Zone and: 	<p>PI</p> <p>Clearance and conversion or disturbance must satisfy the following:</p> <ul style="list-style-type: none"> (a) if low priority biodiversity values: <ul style="list-style-type: none"> (i) development is designed and located to minimise impacts, having regard to constraints such as topography or land hazard and the particular requirements of the development; (ii) impacts resulting from bushfire hazard management measures are minimised as far as reasonably practicable through siting and fire-resistant design of habitable buildings; (b) if moderate priority biodiversity values: <ul style="list-style-type: none"> (i) development is designed and located to minimise impacts, having regard to constraints such as topography or land hazard and the particular requirements of the development;

<ul style="list-style-type: none"> (i) clearance and conversion or disturbance is confined to Low Priority Biodiversity Values; (ii) the area of clearance and conversion is no more than 1,000 m²; (iii) the area of disturbance is no more than 1,000 m²; 	<ul style="list-style-type: none"> (ii) impacts resulting from bushfire hazard management measures are minimised as far as reasonably practicable through siting and fire-resistant design of habitable buildings; (iii) remaining moderate priority biodiversity values on the site are retained and improved through implementation of current best practice mitigation strategies and ongoing management measures designed to protect the integrity of these values; (c) if high priority biodiversity values: <ul style="list-style-type: none"> (i) development is designed and located to minimise impacts, having regard to constraints such as topography or land hazard and the particular requirements of the development; (ii) impacts resulting from bushfire hazard management measures are minimised as far as reasonably practicable through siting and fire-resistant design of habitable buildings; (iii) remaining high priority biodiversity values on the site are retained and improved through implementation of current best practice mitigation strategies and ongoing management measures designed to protect the integrity of these values; (iv) special circumstances exist;
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189. It was common ground that the acceptable solution AI is not met by the proposal. It therefore requires assessment against the performance criteria PI.
190. It was also common ground that the relevant priority biodiversity for the purposes of PI is that the site is in an area of high priority diversity values.³⁶
191. The live issue between the parties was whether special circumstances exist for the purposes of PI(c)(4).
192. Clause E10.3 defines 'special circumstances' as:
- particular circumstances associated with the proposed use or development that justify loss of high priority biodiversity values.
193. The clause sets out certain situations where special circumstances are considered to exist. The circumstance relevant to the appeal is that:
- the use or development will result in significant long term social or economic community benefits and there is no feasible alternative location.
194. The first step is to determine whether significant long term social community benefits or significant long term economic community benefits will result. If either will result from the proposal, then the next step is to consider whether there is no feasible alternative location.

Economic community benefit

195. In relation to economic community benefit, Mr Philip Bayley provided evidence expert evidence for the Appellant. Mr Bayley limited his evidence to the economic community benefit aspect of the special circumstances test. He explicitly did not provide a cost benefit analysis, but rather an economic impact analysis of the proposal during the construction phase and the first year of operations.
196. Ms Ellen Witte provided evidence for the Council. Her evidence was a critique of Mr Bayley's evidence and his methodology rather than an independent economic analysis of the proposal. Whilst Ms Witte raised a number of points of concern in her critique of Mr Bayley's evidence, her primary criticism was that a cost benefit analysis (CBA) was not performed which, in her opinion, was essential to determine net economic benefit to the community.
197. In respect to Mr Bayley's evidence:
- his opinion was based on his own assessment of key parameters and industry knowledge;

³⁶ See the definition of priority biodiversity values in Clause E10.3 and table E10.1

- the patronage and average spending assumptions relied upon in his analysis were his own assumptions;
- his analysis was based upon a single operating year of operations;
- he assumed a weighted average fare of \$40 for a round trip on the cable care (factoring in a discount of 50 per cent for local and intrastate patrons);
- his analysis presented two scenarios incorporating various patronage spending and economic multipliers: a low case scenario, estimating the proposal's economic impact would be \$64.4 million per annum; and a high case scenario estimating \$89.9 million per annum; and
- he estimated that in the construction phase the proposal would generate over 200 jobs and contribute over \$50 million to Tasmania's gross state product.

198. The parameters that formed the basis for Mr Bayley's ultimate conclusions as to the projected economic impact of the proposal were summarised by him in the following table:

Table 1: Key parameters

Parameter	Low scenario	High scenario	Source
Core patronage	<ul style="list-style-type: none"> ▶ 81,000 local ▶ 240,000 independent (interstate and international), 7 per cent stay an extra night due to MWCC ▶ 21,000 cruise ▶ 342,000 total 	<ul style="list-style-type: none"> ▶ 81,000 local ▶ 240,000 independent (interstate and international), 10 per cent stay an extra night due to MWCC ▶ 21,000 cruise ▶ 342,000 total 	▶ Strategy 42 South
Mountain bike enthusiasts patronage	<ul style="list-style-type: none"> ▶ 40,000 patrons, all interstate/international ▶ 40% pull factor 	<ul style="list-style-type: none"> ▶ 60,000 patrons, all interstate/international ▶ 50% pull factor 	▶ Strategy 42 South
Other patrons	<ul style="list-style-type: none"> ▶ 700,000 pa (including MWCC riders) ▶ 358,000 (excluding MWCC core market) ▶ 20% capture rate 	<ul style="list-style-type: none"> ▶ 700,000 pa (including MWCC riders) ▶ 358,000 (excluding MWCC core market) ▶ 20% capture rate 	▶ Hobart City Council ▶ Strategy 42 South
F&B capture rates (café)	<ul style="list-style-type: none"> ▶ 75% local/intrastate ▶ 75% independent ▶ 90% cruise ▶ 0% MTB ▶ 50% other 	<ul style="list-style-type: none"> ▶ 75% local/intrastate ▶ 75% independent ▶ 90% cruise ▶ 0% MTB ▶ 50% other 	▶ Strategy 42 South
F&B capture rates (bar)	<ul style="list-style-type: none"> ▶ 10% local/intrastate ▶ 10% independent ▶ 10% cruise ▶ 0% MTB ▶ 10% other 	<ul style="list-style-type: none"> ▶ 10% local/intrastate ▶ 10% independent ▶ 10% cruise ▶ 0% MTB ▶ 10% other 	▶ Strategy 42 South
F&B patronage (dinner service)	<ul style="list-style-type: none"> ▶ 20,000 total 	<ul style="list-style-type: none"> ▶ 20,000 total 	▶ Strategy 42 South
Retail capture rates	<ul style="list-style-type: none"> ▶ 25% local/intrastate ▶ 50% independent ▶ 75% cruise ▶ 0% MTB ▶ 0% other 	<ul style="list-style-type: none"> ▶ 25% local/intrastate ▶ 50% independent ▶ 75% cruise ▶ 0% MTB ▶ 0% other 	▶ Strategy 42 South
Average MWCC fares	<ul style="list-style-type: none"> ▶ \$20 local/intrastate ▶ \$40 all other riders 	<ul style="list-style-type: none"> ▶ \$20 local/intrastate ▶ \$40 all other riders 	▶ Strategy 42 South
Average F&B spending	<ul style="list-style-type: none"> ▶ \$12 café ▶ \$15 bar ▶ \$50 dinner service 	<ul style="list-style-type: none"> ▶ \$16 café ▶ \$20 bar ▶ \$50 dinner service 	▶ Strategy 42 South
Average retail spending	<ul style="list-style-type: none"> ▶ \$10 	<ul style="list-style-type: none"> ▶ \$15 	▶ Strategy 42 South
Transport(a)	<ul style="list-style-type: none"> ▶ 0% local/intrastate ▶ 50% independent ▶ 100% cruise ▶ 25% MTB enthusiasts ▶ \$15 ave spend pp 	<ul style="list-style-type: none"> ▶ 0% local/intrastate ▶ 50% independent ▶ 100% cruise ▶ 25% MTB enthusiasts ▶ \$15 ave spend pp 	▶ Strategy 42 South ▶ Uber/Strategy 42 South
Average pull factor spending	<ul style="list-style-type: none"> ▶ \$250 per night 	<ul style="list-style-type: none"> ▶ \$250 per night 	▶ Strategy 42 South and Tasmanian Visitor Survey

(a) Transport only to MWCC

(b) Only applicable to those who purchase transport, retail and/or F&B products

199. He then applied multipliers to these parameters to conduct an ‘input-output’ analysis, describing the methodology employed as follows:

7.1. My analysis uses a methodology known as input-output analysis, which is widely recognised as appropriate for economic impact studies. This approach essentially applies multipliers to measure the direct and indirect effects of additional expenditure associated with a project (in this case, the cableway and associated facilities) on the broader economy of Greater Hobart. The multipliers show how \$1 of additional expenditure contributed to key economic outcomes, including GSP and employment, both directly and indirectly through links with other sectors.

7.2. Multipliers reflect the direct, indirect and induced effects from increased spending associated with triggers for economic activity (such as construction or operation of a facility):

7.2.1. Direct effects are changes in production that are connected with immediate effects of increasing expenditure. This includes the consumption of goods and services, which cover the cost of supplying those goods and services (including overheads such as salaries and taxes)

7.2.2. Indirect (secondary) effects are those changes in production resulting from the direct consumption in connected parts of the supply chain ie increased sales of goods and services amongst all the suppliers that ultimately lead to the final products being sold.

7.2.3. Induced effects describe those changes in economic activity that result from the spending of employee incomes throughout the community.

7.3. The total of these effects is known as the output, or production, impact.

7.4. These multipliers are based on input-output tables published by major statistical agencies, such as the Australian Bureau of Statistics, or derived through quantitative analysis from similar sources.

200. The multipliers employed in Mr Bayley's analysis were summarised in Table 2 of his statement of evidence:

Table 2: Economic multipliers by market segment and scenario

	Low case	High case
Local and intrastate		
MWCC (fare, retail, F&B ex dinner service)	1.00	1.00
Dinner service	1.00	1.00
Transport	1.00	1.00
Accommodation etc	na	na
Independent		
MWCC (fare, retail, F&B ex dinner service)	1.75	1.90
Dinner service	1.00	1.00
Transport	1.75	1.75
Accommodation etc	na	na
Cruise		
MWCC (fare, retail, F&B ex dinner service)	1.38	1.45
Dinner service	na	Na
Transport	1.75	1.75
Accommodation etc	na	na
MTB enthusiast		
MWCC (fare, retail, F&B ex dinner service)	1.75	1.90
Dinner service	na	na
Transport	1.75	1.90
Accommodation etc	1.75	1.90
Other patrons		
MWCC (fare, retail, F&B, ex dinner service)	1.44	1.53
Dinner service	na	na
Transport	na	na
Accommodation etc	na	na

201. The economic impact of the proposal per annum, predicted as a low case scenario, and a high case scenario, was summarised as being derived from the following users of the proposed cable car once relevant multipliers had been applied:

Table 3: Economic impact of the MWCC (\$m)

	Low	High
Local & intrastate	2.9	3.1
Independent (interstate and international)	34.6	39.5
Cruise	2.3	2.5
MTB enthusiasts	24.1	44.0
Other patrons	0.6	0.8
Total	64.5	89.9

202. During cross-examination, My Bayley conceded that he had not engaged in any independent market research to develop his projections. Further, despite the statement in his evidence that all patronage assumptions were his own, this was in fact not correct, and he had relied upon patronage assumptions developed by the Appellant in some cases. Mr Bayley also acknowledged that a significant proportion of his economic impact analysis, being \$24.1 million of the \$64.5 million low

case projection (37 per cent) and \$44 million of the \$89.9 million high case projection (49 per cent), was derived from projections relating to mountain bike enthusiast patronage, notwithstanding that there are currently no mountain bike tracks from the summit of kunanyi/Mt Wellington and no current intention on the part of the Council to develop such tracks.

203. Ms Witte was critical of the analysis provided by Mr Bayley, arguing that the applicable test required that a cost benefit analysis be conducted:

In relation to paragraph 3.7.1., Mr Bailey confirms that a Cost Benefit Analysis (CBA) has not been undertaken. To meet the requirements of the Test, one would need to establish the merit of a project. And CBA is the appropriate method for that. To meet the conditions of the Test, as a minimal this would require the benefits to outweigh the costs (i.e. a net benefit), and arguably it should be more than that in order to meet the requirement of 'significant economic and community benefits'. If costs (social, economic and environmental) were not considered, the outcomes of any large development project would meet the test while at the same time potentially having devastating impacts. That would obviously be a perverse public outcome. The analysis as undertaken by Mr Bailey, is not the appropriate type of economic appraisal as it only measures the direct and flow on impacts (not benefits) of an economic shock to the rest of the economy. It simply is the wrong type of analysis to use to meet the Test.

204. Further concerns raised by Ms Witte in respect to Mr Bayley's analysis included that:

- the source of Mr Bayley's assumptions as to patronage of the proposal was unclear and not based on market research, which is best practice for such a metric;
- his assumption that 24 per cent of all interstate and international visitors will use the cable car is not validly based, and again, required market research;
- it was unreasonable to assume that the proposal would attract significant mountain bike enthusiasts given there is no current mountain bike track connection to the summit and nor are connections likely to be developed given previously stated intentions of the Council;
- given the current level of activity in the construction industry in Tasmania, the project would be competing with other projects rather than growing the economy (redirecting economic activity rather than growing it);
- his analysis was deficient as it did not provide detail of how the proposal would result in net new visitors travelling to Tasmania because of the cableway, or how visitors generally would extend their stay or spend additional funds as a result of the cableway; and
- the concluding assessment by Mr Bayley that the proposal would result in an economic impact of \$64.5 million to \$89.9 million was overstated as it did not only include net

additional spending/revenue to Tasmania, but also included economic activity diverted from existing attractions in Tasmania.

205. The Tribunal disagrees with Ms Witte that, to satisfy the special circumstances test provided in of Clause E10.7.1 PI, a cost benefit analysis illustrating that there will be a resultant significant net benefit to the community once all identifiable social, economic and environmental costs have been considered is required. To take this approach ignores the disjunctive nature of the special circumstances that must exist to satisfy the criterion, that is, either a significant long term economic community benefit or a significant long term social community benefit.
206. However, something more than the analysis provided by Mr Bayley, is required to satisfy the test in question. He undertook an ‘input output’ analysis, which provides a projection of the economic impact of the proposal. Economic impact is not the same as economic benefit to the community. Apart from the application of multipliers to patronage, the basis of which was essentially conjecture by him, Mr Bayley’s analysis does not provide any detailed examination of how the economic impact of the proposal might result in negative economic benefit to the community by redirecting expenditure that visitors would otherwise have spent on existing attractions or activities. For example, Mr Bayley projects that there would be an economic impact of \$2.3 to \$2.5 million per annum due to cruise ship passengers electing to utilise the proposal. From the contents of Mr Bayley’s report, it was unclear how the proposal would result in additional economic benefit to the Tasmanian community derived from cruise ship passengers, rather than redirecting expenditure they might have made in any event.
207. Separate to the methodology utilised, the degree to which reliance could be placed upon Mr Bayley’s projections was validly brought into question given that some of his underlying patronage assumptions were not based upon his own independent assessment but rather from projections provided by the Appellant. The economic benefit he attributed to the mountain bike enthusiast segment of the market was of particular concern in terms of reliance that may be placed on the analysis. As Mr Bayley conceded during cross-examination, there are currently no mountain bike tracks from the summit of kunanyi/Mt Wellington and there was evidence before us that the controlling authority, the Council, has relatively recently determined that it does not intend to develop such tracks. To attribute almost half of the projected economic activity in his high case assessment to what could best be described as the highly speculative increase in the mountain bike enthusiast segment undermines Mr Bayley’s projections.
208. The Appellant has not adequately demonstrated that the proposal will result in a significant long term economic community benefit that will justify the loss of high priority biodiversity values. The expert evidence presented by the Appellant lacked transparency and failed to adequately illustrate economic benefit to the community that could be attributed to the proposal.

Social community benefit

209. The only expert evidence for the Appellant that touched upon social community benefit from the proposal was provided by Ms Duckett. Ms Duckett made it clear that the Appellant relied upon the economic benefit limb of the special circumstances test to satisfy the performance criteria P1 of Clause E10.7.1.
210. The social benefits that Ms Duckett considered could be attributed to the proposal consisted of: greater accessibility at the pinnacle through the upgrading of boardwalks to make them accessible to wheeled craft; a 40 per cent reduction in traffic to the pinnacle, resulting in reduced impact on residential amenity, reduced runoff pollution into water catchments and reduced carbon monoxide emissions; safer access to the pinnacle for mountain bike enthusiasts; and improvements to potable and wastewater management.
211. None of the social benefits raised by Ms Duckett were supported by any detailed analysis or assessment as to how they were significant. Ms Riley, in response to the social benefits suggested by Ms Duckett, noted that the parts of the pinnacle were already accessible to wheel chair users, questioned the evidentiary basis of the suggested 40 per cent reduction in traffic, and suggested there was currently no evidence of road runoff polluting water catchments or evidence to justify claims as to reduced carbon monoxide omissions.
212. It was evident from Ms Duckett's commentary and lack of substantial analysis as to social benefits that the Appellant's focus in term terms of special circumstances was upon economic community benefits. There was no argument advanced by the Appellant as to how the identified social benefits could be demonstrated to be significant.
213. The Appellant has not adequately demonstrated that proposal will result in a significant long term social community benefit.

Conclusion regarding special circumstances

214. For assessment against Clause E10.7.1, if the Tribunal found that the proposal would result in a significant long term economic community benefit or a significant long term social community benefit, the next step would be consideration whether there is no feasible alternative location for the proposal which would avoid the risk of loss of high priority biodiversity values.
215. Given the determination of the Tribunal that the Appellant has failed to adequately demonstrate either a significant long term economic community benefit or a significant long term social community benefit, it is not necessary to consider whether there is no feasible alternative location.
216. The proposal will not satisfy P1 of Clause E10.7.1. Accordingly ground of refusal 8 is sustained.

Vegetation clearance and vulnerable fauna

217. Grounds 9, 10, 23 and 24 can be dealt with together. They arise under Issue 2 in Table 5 of the Management Plan:

- Grounds 9 and 23 raise compliance with performance criteria P2.1 in connection with clearance of native vegetation related to the base station, the associated bushfire hazard areas and towers one and two.
- Grounds 10 and 24 raise compliance with performance criteria P2.2 in connection with adverse effects of vegetation clearance on swift parrot and masked owl habitat.

218. The relevant acceptable solutions and performance criteria are:

Issue 2: Flora and Fauna Conservation, Geoconservation and Natural Processes	
Objective: To conserve flora, fauna, geological and geomorphological values, and to protect natural processes.	
Acceptable Solution	Performance Criteria
<p>A2.1 Native Vegetation The proposal does not involve removal or damage to terrestrial or aquatic native vegetation which: (a) is listed as significant in this Management Plan, or any planning strategy or Trust endorsed scientific assessment prepared in accordance with this Management Plan; or is a Threatened Vegetation Community under the <i>Nature Conservation Act 2002</i>. (b) supports or forms habitat for any species of fauna listed in the <i>Threatened Species Protection Act 1995</i> or the <i>Environment Protection and Biodiversity Conservation Act 1999</i>.</p>	<p>P2.1 Native Vegetation Any adverse affects on terrestrial or aquatic native vegetation or habitat values must be avoided, or remedied to ensure no long term impact on vegetation values.</p>
<p>A2.2 Threatened Species The proposal does not impact upon any threatened species listed under the <i>Threatened Species Protection Act 1995</i> or the <i>Environment Protection and Biodiversity Conservation Act 1999</i>.</p>	<p>P2.2 Threatened Species Any adverse affects on nationally or State listed rare, threatened or endangered species, communities or habitats must be avoided or remedied to ensure no long term impact on vegetation values.</p>

219. It was common ground that the acceptable solutions A2.1 and A2.2 were not satisfied by the proposal.
220. Much of the proposed access road will pass through areas of low biodiversity values, however, in parts, clearance for the road alignment will impact areas of high priority diversity values. The native vegetation communities affected include *Eucalyptus globulus* (blue gum) forest and woodland and *Eucalyptus tenuiramis* (silver peppermint) forest and woodland.
221. Threatened fauna species that may be consequentially impacted, relevantly to the appeal, are the swift parrot, which is listed under the *Environment Protection and Biodiversity Act 1999* as critically endangered, and the Tasmanian masked owl, which is listed as vulnerable.
222. There were significant areas of broad agreement between the biodiversity experts, Mr Andrew North called by the Appellant and Mr Andy Welling called by the Council:
- There will be impacts on habitat that cannot be avoided as a result of removal of trees.

- Lost habitat and forage trees should be replaced by offset planting, at a ratio of 5:1 old to new.
 - The offset planting should be located in swift parrot breeding areas.
 - There should be a cap on the number of trees that can be removed, with allowance for additional trees identified by an arborist as requiring removal during construction.
 - Replacement trees should be monitored for at least five years, and any trees that die during that period should be replaced.
 - There should be an assessment of nesting hollows in the effected trees.
223. In cross-examination Mr North said that the Appellant had not secured land for offset planting and that no land had actually been identified for that purpose. He observed that offsets were commonly provided in areas other than the sites of developments.
224. Mr Welling observed that the offset planting would not provide actual habitat for, perhaps, 25 years. A Habitat Enhancement Plan in the development application provides for natural nesting hollows to be preserved and re-sited and for the creation of artificial tree hollows. He said that artificial hollows might have some advantages over natural hollows in terms of restricting predation of swift parrots by sugar gliders, an introduced species. If offset planting was undertaken outside Wellington Park he would recommend some form of protection to avoid subsequent removal of trees, such as by way of an agreement under Part 5 of the *Land Use Planning and Approvals Act 1993* establishing covenants to bind the owner of the land.

Vegetation values, adverse effects and threatened fauna

225. Performance criteria P2.1 is directed at avoiding or remedying adverse effects on vegetation or habitat values to ensure that there is no long-term impact on vegetation values. The term ‘vegetation values’ is not defined in the Management Plan, or the Scheme. Chapter 5 of the Management Plan deals with maintaining Park values. Clause 5.2.3 provides context in respect to biodiversity and refers to the high diversity of vegetation types, communities and habitat as responsible for a correspondingly high diversity of flora and fauna species within the Park. The key desired outcomes in respect to biodiversity in that clause include no loss of native vegetation other than for approved management purposes. Vegetation values can be understood in this context.
226. Performance criteria P2.2 is headed ‘Threatened Species’. It refers to adverse effects on listed species, communities or habitats being avoided or remedied to ensure no long-term impact on vegetation values. At first glance, this seems to restrict consideration of adverse effects to that on threatened species of flora, ignoring the effect on fauna. However, the meaning of vegetation values can be extended to include vegetation that supports or forms habitat for any species of listed fauna. That reflects paragraph (b) of the acceptable solution A2.1, which restricts removal or damage to native vegetation that supports or forms habitat for any species of fauna listed in the *Threatened*

Species Protection Act 1995 or the *Environment Protection and Biodiversity Conservation Act 1999*. While an acceptable solution will not establish a benchmark for assessment of performance criteria, it can provide context to performance criteria.³⁷ Taking a purposive approach to interpretation and having regard to surrounding provisions and the legislative scheme means that an acceptable solution can aid in the interpretation of performance criteria. Long-term adverse impact on vegetation which provides breeding or foraging habitat for the swift parrot or masked owl is a relevant impact on vegetation values and means that the performance criterion is not satisfied.

227. The performance criterion require that adverse effects must be avoided or remedied to ensure no long term impact. The relevant native vegetation in respect to breeding habitat is hollow-bearing trees that provide nesting habitat for swift parrots and masked owls, and blue gums that provides foraging habitat for swift parrots. Adverse effects on vegetation cannot be avoided if trees are removed for road widening and bushfire mitigation. The Appellant proposes to remedy the loss of hollow bearing trees by relocation of tree hollows and installation of artificial tree hollows in the same number and alignment as those that are lost, and to monitor them for at least five years. The experts agree that this will provide an appropriate remedy.
228. In respect to the loss of foraging habitat, the relevant native vegetation is blue gums. The proposal would remove 21 mature trees, and the experts recommend that no more than 25 should be permitted to be felled. At a replacement ratio of 5:1, planting of at least 125 trees will be required. If not replaced within Wellington Park, those trees should be at a location suitable for blue gum growth with security of tenure. The evidence identified no suitable location within the Park. Mr North suggested the McRobies Road Waste Management Centre site. That site is owned by the Council and there was no evidence that it would agree to planting. No other prospective sites were identified.
229. Adverse effects for the purposes of P2.1 and P2.2 cannot be avoided because trees must be removed. In the absence of an appropriate site with security to ensure long-term survival of planted trees it cannot be said that the loss of swift parrot foraging habitat would be redressed. Therefore the long term impact on vegetation values, insofar that they form habitat for threatened species will not be remedied
230. In *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council*³⁸ the Full Court found that a condition requiring a developer to provide offsets to compensate for loss high priority biodiversity values could be validly imposed. The Court determined that this did not offend the finality principle in that case. Significantly, in that case the proposed offset was capable of application within the area of the site and an appropriate area could be identified and quarantined. Therefore, the proponent could undertake replacement planting without the approval of a third party landowner and maintenance

³⁷ *Boland v Clarence City Council* [2021] TASFC 5

³⁸ [2022] TASFC 5

of the planting could be ensured by conditioning of the site of the proposal. By contrast, in respect to Appellant’s proposal, no land within the publicly owned sites of the proposal has been identified as suitable or available for offset. No land owned by the Appellant has been identified as available for offset. The only potential land identified is the McRobies Road Waste Management Centre and there was no evidence that that land would be available or suitable for offset. In the absence of an appropriate site with no means of ensuring long-term survival of offset planted trees the performance criteria P2.1 and P2.2 will not be satisfied and in the circumstances of uncertainty about possible sites the Tribunal does not consider it reasonable to address the issue by conditioning of the permit.

231. Accordingly, grounds of refusal 9, 10, 23 and 24 are made out.

GROUND 11 and 15 – GEOHERITAGE

232. Grounds 11 and 15 relate to preservation of geoheritage values under Issue 2 of Table 5 in Clause 8.5.7, and Issue 2 of Clause S2.6 of the Management Plan.

233. Issue 2 of Table 5 applies generally in Wellington Park. It is headed “Flora and Fauna Conservation, Geoconservation and Natural Processes”. The objective of the issue is “to conserve flora, fauna, geological and geomorphological values, and to protect natural processes”.

234. Issue 2 of Clause S2.6 applies in the Pinnacle Specific Area. Its heading and objective are identical to the heading and objective of Issue 2 of Table 5.

The geoheritage standard in the Recreation Zone and the Natural Zone

235. Ground 11 brings into issue compliance of the proposal with Issue 2 in Table 5 in respect to geoheritage. This standard applies to the parts of the proposal within the Recreation Zone and the Natural Zone, being the base station, the towers, the cableway and the cable cars. The standard provides:

Issue 2: Flora and Fauna Conservation, Geoconservation and Natural Processes	
Objective: To conserve flora, fauna, geological and geomorphological values, and to protect natural processes.	
<p>A2.3 Geoheritage</p> <p>The proposal does not impact upon any sites which are listed as significant in this Management Plan or in a Trust endorsed scientific assessment or listed on the Tasmanian Geoconservation Database.</p>	<p>P2.3 Geoheritage</p> <p>Any adverse impacts on any geoheritage values must be avoided, remedied or mitigated</p>

236. It was common ground that the acceptable standard A2.3 was not met, and that the proposal must be assessed against the performance criterion P2.3.
237. P2.3 provides that “any adverse impacts on any geoheritage values must be avoided, remedied or mitigated”.

The geoheritage standard in the Pinnacle Specific Area

238. Ground 15 brings into contention Issue 2 of clause S2.6 in respect to geoheritage, which applies to the portion of the proposal within the Pinnacle Specific Area, which includes the pinnacle centre, cableway and cable cars. The standard provides:

Issue 2: Flora and Fauna Conservation, Geoconservation and Natural Processes	
Objective: To conserve flora, fauna, geological and geomorphological values, and to protect natural processes	
A2.3 Geoheritage The proposal does not impact upon any geoheritage sites listed as significant in this Management Plan or in a scientific assessment endorsed by the Trust, or listed on the Tasmanian Geoconservation Database	P2.3 Geoheritage Any adverse impacts on any geoheritage values must be avoided or remedied to ensure no long term impact on geoheritage values.

239. It was common ground that the acceptable standard A2.3 was not met, and that the proposal must be assessed for compliance with the performance criterion P2.3 Geoheritage.
240. P2.3 provides that “any adverse impacts on any geoheritage values must be avoided or remedied to ensure no long-term impact on geoheritage values”.

Comparison of the performance criteria

241. Comparing the performance criteria, it can be seen that adverse impacts on geoheritage values must be:
- ‘avoided, remedied or mitigated’ in the Natural Zone and the Recreation Zone (P2.3 of Table 5); and
 - ‘avoided or remedied to ensure no long-term impact on geoheritage values’ in the Pinnacle Specific Area (P2.3 of S2.6).

The performance criterion in the Pinnacle Specific Area cannot be satisfied by mitigation of impact, but in that area the focus is on long term impact. In the Natural and Recreation Zones impact can be addressed by mitigation, but impact is not limited to long term impact.

What is geoheritage?

242. Mr Joseph Geidl gave expert opinion in respect to geoheritage for the Appellant. Mr Mark Williams gave expert evidence for the Council.

243. Mr Geidl defined geoheritage and its component terms in the following terms:

- Geoheritage means “the values and benefits that society derives or may derive from the elements of geodiversity”.
- Geodiversity is “the complete range of natural abiotic earth features and processes. This includes physical geology, geomorphology and both active and ancient geological/geomorphic process”.
- Geology means “the physical components of the earth and earth process”.
- Geomorphology means “the way in which our landscape has been shaped and continues to be shaped by earth processes, both ancient and active, and which can have a significant effect on our interaction with landscape and elements of geodiversity”.

244. In respect to geoheritage values, Mr Geidl’s evidence included:

Note that any individual in society may derive more than one (or no) benefit from any particular element of geodiversity and that the categories of values below may overlap in terms of derived benefits and are a [sic] simply a contemporary set of values useful in the assessment process. Some values/benefits may be quite tangible and measurable, for example tourism expenditure, and others may be intangible, for example the benefits of non-financial interactions with and among tourists.

245. Mr Williams used definitions recommended by the International Union for Conservation of Nature World Commission for Protected Areas which produces guidelines for geoconservation in protected and conserved areas. He said that those definitions are accepted as best-practice terms by geoscientists. Those terms are:

- Geoheritage is “those elements and features of the earth’s geodiversity, either singly or in combination, that are considered to have significant value for intrinsic, scientific, educational, cultural, spiritual, aesthetic, ecological or ecosystem reasons and therefore deserve conservation”.
- Geodiversity is “the variety of rocks, minerals, fossils, landforms, sediments and soils, together with the natural processes that form an autonym. It includes past and present geological and geomorphological features and processes that record the history of the earth and the evolution of life forms as represented in the geological record, including plants and animals and their habitats. The elements of geodiversity provide the foundation for life on earth, and they maintain natural capital and ecosystem services”.

246. The performance criteria are directed at impacts on geoheritage values. Clause 2.3 of the Management Plan identifies the Park's values. It includes a statement of significance in respect to geodiversity:

The landforms and geomorphic processes which have shaped Wellington Range are well expressed, accessible and representative examples of landform systems which occur widely in eastern and central Tasmania. 'This representative geomorphology has geomorphological value and provides a foundation for the Park's ecosystems. Further, the geomorphology has a major influence on the visual landscape, the Park's ecosystems and the character for which the Range is valued. Although the landforms of the Wellington Range are not unique in Tasmania, they are in some respects outstanding from a scientific perspective e.g. the Range is probably the most extensive single high altitude periglacial landform system in the State which has not also been affected by glacial processes. 'This has scientific significance in that it provides an ideal location to study periglacial processes without the need to distinguish strictly glacial effects from periglacial ones.

247. Clause 2.3.2 of the Management Plan expands on geodiversity in respect to values to be protected, given their contribution to the heritage, aesthetic and community importance of the park as follows (omitting reference to sites unrelated to the appeal):

Geodiversity, that is the full range of geological, landform and hydrological processes and soil types which occur or operate, is a fundamental component of the natural values of the Park. In establishing the significance of the Park's geodiversity, its earth features have been classified as being significant as either outstanding or representative examples of their type, in a context which may range from local to global significance (see Sharples, 1993). In ascribing significance to geodiversity, it is also important to focus attention on identifying good representative examples of features.

In these latter terms, the Park is comprised of a well-expressed assemblage of earth features characteristic of much of eastern and central Tasmania. However, the earth systems of the Wellington Range are outstanding in a number of ways including:

- The scientific value of the high altitude periglacial landforms, the most extensive in the State which have not also been affected by glacial processes;
- Extensive dolerite boulder fields and boulder streams;
- The Organ Pipes, a spectacular example of an exposed large-scale columnar dolerite sill; - The Rocking Stone, a large perched dolerite boulder;
- Toppling dolerite columns along the eastern escarpment of the Mountain;

In addition to these particular values, the earth systems of the Park are the physical foundation of the landscape, ecosystems and the character of the Range.

The relevant geosites

248. Two geosites relevant for consideration of impact on geoheritage values by the proposal were identified by Mr Geidl and Mr Williams, being the Wellington Range periglacial terrain and the Organ

Pipes columnar jointing. Both are listed in the Tasmanian Geoconservation Database (the TGD) maintained by the Department of Natural Resources and Environment Tasmania. The TGD identifies their geodiversity values:

- the Wellington Range periglacial terrain is described in the TGD as having geodiversity values of state level significance for both active and inactive periglacial processes; and
- the Organ Pipes columnar jointing is described in the TGD as having geodiversity values of district level significance for both active and inactive periglacial processes and district level significance for inactive polythematic landscape processes.

Tower 3 and the Organ Pipes geosite

249. The element of the proposal relevant to the Organ Pipes geosite is tower 3, which will sit within the geosite in the Natural Zone. The relevant geoheritage values identified by Mr Williams were active and inactive periglacial processes, inactive polythematic landscape processes, scientific value and value for touristic and educational use. Mr Geidl's assessment differed in substance only as to whether there was active periglacial processes aside from weathering.
250. P2.3 of Table 5 requires that any adverse impacts on geoheritage values arising from the construction of tower 3 must be avoided, remedied or mitigated. The construction of tower 3 would involve earthworks with a very small footprint relative to the entire geosite. Mr Geidl estimated the disturbance area of the tower build would be around 15 metres x 15 metres. Construction would require drilling, but would not require blasting. That, coupled with the highly resilient nature of the dolerite formations, means that damage to the physical integrity of the Organ Pipes is extremely unlikely.
251. Mr Williams described the impact ranking of the proposal on the Organ Pipes columnar jointing as moderate, which would result in a minor impact on the geoheritage values. He agreed that the cableway would not significantly reduce the visibility of the Organ Pipes and might enhance educational and touristic values.
252. The relatively small footprint of tower 3 within the wider area of the Organ Pipes will have an adverse impact which cannot be avoided. That impact will be permanent and as such it cannot be remedied. However, the impact of tower 3's construction, using relatively non-invasive construction techniques by drilling and the absence of blasting, and its small area of impact will mitigate the impacts of the development.
253. Accordingly, ground of refusal II is not made out.

The pinnacle centre and the periglacial terrain geosite

254. Mr Geidl described periglacial terrain as historically meaning peripheral to glacial terrain, but that it is now widely accepted as meaning any area where seasonal freeze-thaw cycles have a pronounced effect on the geology of soils of a location or region.
255. Mr Williams identified the values associated with the Wellington Ranges periglacial terrain as including active and inactive periglacial processes, scientific value and value for touristic and educational use. Once again, Mr Geidl's only disagreement was in respect to the existence of the value of active periglacial processes aside from weathering.
256. Mr Geidl observed that listing on the TGD does not automatically imply that a geoheritage site is significant, and that the pinnacle area has been partially developed. However, he did not assert that the periglacial terrain in the pinnacle area has no geoheritage value. It was not contended, to use Mr Williams' definition of geoheritage, that the existing development at the pinnacle means that periglacial terrain in the pinnacle area does not have significant value for intrinsic scientific, educational, cultural, spiritual, aesthetic, ecological or ecosystem reasons such that it does not deserve conservation, or to use Mr Geidl's definitions, that society derives no value or benefit from the elements of the range of natural abiotic earth features and processes comprised by the periglacial terrain in the pinnacle area.
257. Mr Williams considered that the impact would be extreme given the destruction of landform features, fragmentation of site integrity, loss of relationship between landform features, loss of relict geomorphological processes, disruption of current geomorphological processes and loss of visibility to and access to key features and sediment exposures.
258. Mr Geidl estimated the area of ground disturbance by the proposal as 3,600m² in a total area of 160,000m². He considered that, as a matter of scale, the impact of such a relatively small area would not be significant.
259. The area of adverse effect by the construction of the pinnacle centre might be modest in footprint compared to the broader area of periglacial terrain, but it cannot be said that the area is too small to be significant or to be taken into consideration. As well as the footprint, construction will involve excavation into the terrain, up to three metres deep, with the stone to be used to face the building's base perimeter. While Mr Geidl took issue with Mr Williams' assessment, he accepted that there would be partial destruction of landform features. The site for construction is near areas of existing disturbance and modification of the landscape at the pinnacle by the existing road, car park, buildings and communication towers. However, there was no evidence that the proposed site for the pinnacle centre is disturbed or modified. It might be that a *de minimis* impact will not be an adverse impact, as suggested by Mr Geidl, but the area of impact by the pinnacle centre on the geoheritage values identified by the experts and the Management Plan will not be *de minimis*. It will be an adverse impact on the geoheritage values for the purposes of P2.3 of S2.6.
260. To satisfy P2.3 of S2.6 the adverse impact must be avoided or remedied to ensure no long-term impact on geoheritage values. Construction of the pinnacle centre would result in long term or

permanent changes to, and loss of visibility of landform features. The adverse impact will not be avoided. Mr Geidl considered that the adverse effects could be mitigated, but unlike P2.3 of Table 5, mitigation will not satisfy the performance criterion. He conceded the self-evident point that the adverse impact could not be remedied.

261. Accordingly, ground of refusal 15 is made out.

GROUND 12, 13, 16, 18, 19, 20, 25 and 26 – VISUAL IMPACT

262. Grounds 12, 13, 16, 18, 19, 20, 25 and 26 are concerned with visual amenity and impact. Each of the grounds arises under the Management Plan. The grounds rely on standards that adopt, in many respects, different or differently nuanced tests in different locations.

Standards engaged by the grounds

263. Issue 5 in Table 5 of the Management Plan establishes standards relating to visual quality and amenity which will apply to the base station, the towers, the cableway and cable cars in the Recreation Zone and Natural Zone, and to the pinnacle centre, the cableway and cable cars in the Pinnacle Specific Area:

Issue 5: Landscape, visual quality and amenity	
Objective: To protect and enhance the landscape and visual quality of Wellington Park.	
Acceptable Solution	Performance Criteria
<p>A5.1 Visual Sensitivity Buildings and structures (other than park furniture or park signage) are not located within areas identified as of High or Moderate Visual Sensitivity shown in Map 4 of this Management Plan.</p>	<p>P5.1 Visual Sensitivity Buildings and structures (other than Park furniture or replacement of an existing building or structure of the same size and location) in prominent locations visible from within or outside of the Park, or identified as of High or Moderate Visual Sensitivity in Map 4 of this Management Plan, must be designed and sited to minimise or remedy any loss of visual values or impacts on the visual character of the affected area. Note: Satisfaction of this Performance Criterion may include a Visual Impact Analysis, prepared by a suitably qualified person, demonstrating how the building or structure can be designed and located to harmonise with the site.</p>
<p>A5.2 Building Design and Light Effects The maximum building height is 3.5m and any building is not more than one storey, and is designed in accordance with the requirements of the relevant Management Zone and this Management Plan, and the Trust's Design and Infrastructure Manual where relevant. Associated services, access and parking must not be prominent. External lighting must assist orientation only and will be focussed towards the ground.</p>	<p>P5.2 Building Design and Light effects Development must be designed to harmonise with the visual landscape and natural qualities of the site in terms of appearance, scale and proportions and follow the Trust's Design and Infrastructure Manual where relevant. Lighting and reflection must be managed to avoid adverse impacts on natural and cultural values.</p>

264. The Pinnacle Specific Area Plan establishes additional standards relevant to visual intrusion in Issue 5 which relate to visual sensitivity in connection with buildings and structures, and Issue 9(a) and (b) and Issue 10, which relate to building height, size and siting. They will apply to the pinnacle centre, cableway and cable cars in the Pinnacle Specific Area.

265. Issues 5, 9(a) and (b) and 10 provide:

Issue 5: Landscape, visual quality and amenity

Objective: To protect and enhance the landscape and visual quality of Wellington Park.

Acceptable Solution

A5.1 Visual Sensitivity

The proposal does not involve a building or structure, apart from Park furniture or Park signs.

Performance Criteria

P5.1 Visual Sensitivity

Buildings and structures (other than Park furniture or replacement of an existing building or structure of the same size and location) in prominent locations visible from within or outside of the Park, or identified as of High or Moderate Visual Sensitivity in Map 4 of this Management Plan, must be designed and sited to minimise or remedy any loss of visual values or adverse impacts on the visual character of the affected area.

Note: Satisfaction of this Performance Criterion may include a Visual Impact Analysis, prepared by a suitably qualified person, demonstrating how the building or structure can be designed and located to harmonise with the site.

Issue 9: Building Design – (a) Building Height

Objective: To ensure that buildings do not cause visual intrusion due to excessive height.

Acceptable Solution

A9.1 Building Design

The maximum building height is 3.5m and any building is not more than 1 storey.

Performance Criteria

P9.1 Building Design

For any building greater than 3.5m in height it must be shown that the building will not visually intrude into the landscape in relation to:

- (a) Local natural and environmental features;
 - (b) Views from either the Pinnacle or elsewhere in the Park, and
 - (c) Views from settled areas of Hobart and suburbs through the preparation of a Visual Impact Analysis conducted by a suitably qualified person.
- Any building design must give consideration to the Wellington Park Infrastructure and Design Guidelines.

Issue 9: Building Design – (b) Building Size

Objective: To ensure that buildings are of a size and dimension that fits in with the overall nature of low key development of the Pinnacle.

Acceptable Solution

A9.2 Building Size

Maximum floor area of any building is 100m².

Performance Criteria

P9.2 Building Size

Any proposal for a building of more than 100m² in floor area is to show that the building will not:

- (a) Cause visual intrusion,
- (b) Require infrastructure that cannot be provided in accordance with the infrastructure provision standards, or
- (c) Be a dominant element in the landscape through the preparation of a Visual Impact Analysis conducted by a suitably qualified person.

Issue 10: Building Siting

Objective: To ensure that buildings are located in areas where they do not cause a reduction in the values associated with the Pinnacle.

Acceptable Solution	Performance Criteria
A10.1 There is no Acceptable Solution for this element.	P10.1 Proposals for buildings facing on to or directly visible from the Pinnacle Road must show that there will be no diminution of values of the site either during the construction of the building or in its use and operation. Buildings and structures (other than Park furniture or replacement of an existing building or structure of the same size and location) in prominent locations visible from within or outside of the Park, or in areas identified as of High or Moderate Visual Sensitivity in Map 4 of this Management Plan, must be designed and sited to avoid, remedy or mitigate any loss of visual values through the inclusion of a Visual Impact Analysis conducted by a suitably qualified person.

Consideration of terms used in the performance criteria

266. Performance criterion P5.1 in Table 5 requires design and siting of buildings to ‘minimise’ or ‘remedy’ visual impact. P10.1 in S2.6 requires design and siting of buildings to ‘avoid, ‘remedy’ or ‘mitigate’ visual impact. P5.1 and P5.2 require that development must be designed to ‘harmonise’ with the visual landscape.
267. The meaning of ‘avoid’ ‘mitigate’ and ‘remedy’ are considered above in respect to P6.1 of Table 5 and P11.1 of S2.6. They would have the same meanings in P5.1 and P10.1.
268. With respect to the obligation to ‘minimise’, in *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* Porter AJ said:³⁹

Minimisation does not mean reduce to nothing or to something negligible, nor in this context is it to be examined in the abstract. The concept is relative to the situation. Assessments need to be made about the environs; and whether proposed measures for minimisation are appropriate given the situation.

269. The requirement to avoid adverse impacts will also be something less than absolute, and will not require that impacts are eliminated. In respect to minimisation and mitigation, it is the result that will be the important consideration. Minimising and mitigating impacts cannot reasonably be seen to be an end in themselves, such that efforts to minimise or mitigate impacts results in a favourable exercise of the relevant discretion irrespective of the impact. Even though minimisation or mitigation

³⁹ [2017] TASFC 14 [80].

might be achieved, a permit might still be refused, given the extent of the effects after minimisation or mitigation.⁴⁰

270. In respect to ‘harmonise’, the relevant ordinary meaning is “to bring into harmony, accord, or agreement”.⁴¹ ‘Harmony’ means “a consistent, orderly, or pleasing arrangement of parts; congruity”.⁴² In *Tasmanian National Parks Association Inc v. Tasman Council and Miff Pty Ltd*⁴³ the Resource Management and Planning Appeal Tribunal observed that to harmonise does not mean to be invisible. That approach is consistent with the use of ‘harmonise’ in the Management Plan. Clause 7.5.2 of the Management Plan sets out policy for facilities location and siting. It lists 13 items, with item 5 including (with emphasis added):

Design facilities to harmonise (not necessarily understood to mean ‘camouflage’) with their surroundings and utilise landforms, landscape elements, orientation and views

Visual values and sensitivity

271. P5.1 and P10.1 refer to loss of visual values. P5.1 also refers to impact on visual character. ‘Visual values’ and ‘visual character’ are not defined in the Management Plan. Chapter 5 details the natural and cultural values of the Park, including aesthetic values, which would equate to visual values, in Clause 5.3.3. Under the heading ‘Context’ it provides:

The visual beauty and presence of Wellington Park is one of the most important factors shaping people’s perception of it. Its setting on the edge of Hobart, its height and shape and geology, striking landforms, running waters, steep altitudinal cline on the eastern face and diverse natural vegetation all contribute to its aesthetic beauty. Temporal changes of lighting, climate and atmospheric effects further reinforce the Park’s visual qualities.

The highly significant visual value placed on the broader Wellington Range, is directly attributable to the scale and prominence of the Range and its features and to the integrity of its ecosystems (McConnell, 2012).

Intrinsically linked to the visual beauty of the Park (but also to many of its other values) is the strong community ‘sense of place’ that the Park, primarily Mount Wellington, contributes to Hobart and other nearby towns and properties.

272. Visual character was not defined by any of the experts. Based on their assessments of visual character, it might be regarded as the overall impression created by the scale and combination of visual aspects and features in the landscape.

⁴⁰ *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* at [73]

⁴¹ Macquarie dictionary

⁴² Macquarie dictionary

⁴³ [2008] TASRMPAT 217

273. The Management Plan identifies visual management sensitivity areas based on the Wellington Park: Landscape and Visual Character and Quality Assessment (2011). That report describes the landscape character of various parts of the Park. It provides a Landscape Sensitivity Map for the Park which identifies areas of high, moderate and low visual sensitivity. The proposal will be located in both the high and moderate areas. The base station, towers 1 and 2, and part of the cableway will be in the area of moderate visual sensitivity. The pinnacle centre, tower 3 and parts of the cableway are in the area of high visual sensitivity.

274. The Pinnacle Specific Area is an area of high sensitivity and a Park focal point. Clause 7.5.3 of the Management Plan says:

Consistent with this Management Plan, the two principal areas for visitor facilities, services and activities are The Springs Specific Area and the Pinnacle Specific Area. The Springs is the favoured area for a visitor centre and for services facilitating longer visits, while the Pinnacle is favoured for facilities supporting sightseeing and shorter visits.

275. The purpose of the Pinnacle Specific Area is set out in Clause S2.1. It includes to:⁴⁴

Maintain and enhance the following values of the Pinnacle Specific Area and Wellington Park:

- The landscape values and visual amenity of the Pinnacle Specific Area and, in particular, the eastern face of Mount Wellington.

Evidence in respect to visual intrusion

276. Expert evidence was provided for the Appellant by Mr Andrew Strugnell, who prepared photomontages, and Mr David Moir, who prepared a visual impact assessment. Dr Dennis Williamson prepared photomontages and a visual impact assessment for the Third, Fourth, Seventh and Ninth Parties Joined. Mr Chris Goss prepared photomontages and a visual impact assessment for the Council.

277. The Fifth Joined Party provided evidence responding to Mr Moir's evidence that focuses on the specific visual impact of the development on South Hobart residents. It does not address other localities or compliance with the details of the relevant Scheme and Management Plan provisions.

278. During the hearing the Tribunal undertook views at several of the locations shown in photomontages and viewpoints.

Methodology – viewpoint locations

279. Mr Moir undertook a viewpoint analysis from 14 locations. Mr Strugnell provided photos and prepared photomontages. The locations used by Mr Strugnell were chosen in consultation with Mr

⁴⁴ Clause S2.2.2

Moir and a colleague of Ms Duckett. Mr Moir stated that the selection of viewpoints used in his assessment was generally informed by topographical analysis and other relevant influences, such as key areas of accessible public open space, areas frequently visited by residents or tourists, areas of high visual value and landscape character and the popular local vantage points. Viewpoints were selected to illustrate a combination of: present landscape character types; areas of high landscape or scenic value; visual composition (e.g., focused or panoramic views, simple or complex landscape pattern); range of distances; varying aspects and directions; various elevations; various extent of development visibility (full and partial visibility); and sequential along specific routes. Mr Moir described the viewpoints as being taken from publicly accessible locations surrounding the site and to represent the areas from where the proposal would appear most prominent, based on the degree of exposure or the number of people likely to be affected.

280. The locations were criticised by other parties on the basis that:

- of the 14 locations, 12 are taken from outside Wellington Park so that the sensitivity rating is automatically negatively weighted as low, as a consequence of distance;
- none of the 14 viewpoints are in the near foreground (between 0 – 500 metres); and
- none are from walking tracks or climbing areas within the Park.

281. Some limitations in the scope of assessment locations appear to have been influenced by the timing of Mr Moir's engagement in June 2022. This affected when he could inspect kunyoni/Mount Wellington due to weather conditions, including his ability to inspect from locations such as walking tracks. Mr Strugnell also stated taking photos in ideal lighting conditions has been difficult.

282. Mr Strugnell provided a photographic survey of multiple tracks and locations within the Park. He accepted that there would be view locations on those tracks where the cableway would be visible, both in filtered and unfiltered views.

283. In cross-examination, Mr Moir indicated that as a consequence of the additional photos provided by Mr Strugnell, he had an appreciation of the scenic, environmental and cultural values of those tracks, but he did not present the same level of analysis as for the 14 viewpoints assessed by him.

284. Mr Goss' viewpoints were derived from a viewshed analysis. He stated that the viewpoints were selected to illustrate a combination of: visual character zones; valued scenes; varying proximity from the proposal; and varying elevation relative to the proposal. Mr Goss referred to his opportunity to review the site and surrounds at various times of the year and at different times of day to consider the seasonal and temporal effects of climate, lighting and atmospheric effects.

285. Dr Williamson presented the most extensive range of viewpoints. He used these to illustrate types of viewpoints possible from public locations in the near foreground and broader areas from various distances and angles of view. These were categorised by distance to the foreground, middle ground and background, which were further broken into near, mid, and far in each category. Dr

Williamson's assessment was accompanied by 40 cross-sections and has been informed by field work. Dr Williamson's viewpoints include the areas of the base station and towers 1 and 2.

286. Mr Goss' and Dr Williamson's viewpoint locations were criticised by Mr Strugnell and Mr Moir in respect to the degree to which the viewpoints could be regarded as representative and accessible to the public.

Methodology – photomontages

287. Photomontages were prepared by Mr Strugnell, Mr Goss and Dr Williamson. The photomontages are from 14 locations in Mr Strugnell's evidence, nine locations in Dr Williamson's evidence and 12 locations in Mr Goss' evidence.⁴⁵ The images do not model the same locations although some are near to one another, for example at the Old Springs Hotel site and in the Pinnacle Specific Area.

288. Modelling was based on the architectural plans provided by the Appellant. The experts explained how they applied render and colour. Dr Williamson explained that, based on the engineer's report, minor adjustments have been made to the supplied renderings in relation to the cable car colour and to take account of the absence of wastewater delivery tanks attached to the cars. The lack of plan details with respect to rock cladding caused Dr Williamson to model the likely exterior treatment. It is noted that this has not generally been criticised by Mr Moir or Mr Strugnell. Further, Mr Strugnell observed that the proposed towers are not identical in form although they are uniformly modelled.

289. The experts variously commented on or criticised each other's approach with respect to matters such as the resolution of images, inconsistency in elements such as: the cables; representation of pathways around the pinnacle centre; accuracy of depictions and proportionality of buildings; accuracy of structure location and filtering elements such as vegetation; and whether there is an overrepresentation of modelled elements, for example, cables. There were criticisms that images used by Dr Williamson from the Rocking Stone Lookout are from a location where access is difficult. Further, Mr Strugnell's evidence refers to inaccurate information and an over-representation of the proposal upon which Dr Williamson has formed a belief as to the impact of the proposal on track users.

290. There are additional detailed and technical matters including camera lens and focal lengths from specific locations. Relevantly, Mr Strugnell stated that Dr Williamson's photomontages have been difficult to assess for accuracy for the following reasons:

- No coordinates were provided for camera positions.

⁴⁵ The Tribunal viewed all images at the scale and in the form provided through the evidence, not the smaller scale reproduced form in these reasons.

- No methodology was provided for camera setup within the model (position and direction),
- No methodology was provided for scaling and positioning of renders to fit photographs that are in panoramic format (i.e., stitched together).
- No indication has been provided of whether the model of cables are altered.

291. The Fifth Jointed Party submitted that the Appellant's images adopted a favourable position to minimise visual impact. They contrast them with photographs of facilities overseas, but in sunlight. Mr Strugnell disagreed, referring to Mr Goss' images in bright conditions and the lack of information to provide a proper basis to translate the example to the current case.

292. None of the static images can show movement associated with the proposed cableway. Mr Moir agreed that the fact that the cableway would move would change the effect of the impacts, because of the tendency of the human eye to pick up movement.

Assessment of the visual impact evidence

293. Performance criteria P5.1, P9.1, P9.2, P10.1, each refer to visual impact analysis by a suitably qualified person. P5.1 states that satisfaction of the criterion may include a visual impact analysis. P9.1, P9.2 and P10.1 each require a visual impact analysis. The Management Plan provides a context for this:⁴⁶

A Visual Impact Analysis and/or a Conservation Policy Statement or Conservation Plan, including specific assessment of significance, will be prepared before any decisions about major works, use, or development, are made within areas considered to have significant landscape and/or cultural heritage values. Such statements or plans will be prepared in accordance with the principles outlined in the Burra Charter, using the methodology outlined in Kerr (1990).

294. It was common ground between the experts that visibility does not equate to, or presume, visual impact. Mr Moir described visual impact as the visible impacts of a proposal through the combination of its scale, contrast and magnitude upon the existing landscape character of a view. The extent of visual impact, whether negative or positive, is determined by how much the proposal impacts upon the defining character elements of a view, and to what extent the proposal may influence the existing landscape character of the view to change. Changes can be described in various ways including whether they are positive, neutral or negative.

295. There were differences between the assessment methods. They included:

⁴⁶ Clause 5.3.3 of the Management Plan. The Burra Charter is noted in the bibliography of the Management Plan as The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance (The Burra Charter). Australia ICOMOS is the Australian branch of the International Council on Monuments and Sites.

- The viewpoints used to reach conclusions, although there are some common locations.
- Different approaches to a baseline, different sensitivity levels, different factors (and application of factors) to assess the scale and magnitude of change, different consideration of the landscape and scenic significance of some Park infrastructure and features, and different weighting to the significance of values.
- Varying descriptions and bases for the identified landscape character, scenic quality and sensitivity.
- The adoption of different approaches to performance assessment, for example the use of visual performance standards by Dr Williamson with five listed visual performance issues, and with respect to contrasts.
- Application of different weightings, such as with respect to visual sensitivity and magnitude.
- Varying analyses of the relevant values for assessment including the direct application of values identified in the Management Plan.
- The extent of visual influence of the existing structures on the scenic quality and/or Park values.
- Whether the assessment considers the development in parts, or as a whole – this being relevant to distance and consequent ratings that have been applied.
- Where the greater impact will be – whether from within Wellington Park or locations outside the Park.

296. The assessments vary in the extent to which they are founded on or refer back to the performance criteria. In respect to Mr Moir:

- He accepted that the analysis required under the Management Plan is for the three different zones, but his analysis does not provide a distinct assessment of how the proposal affects each of those zones separately. He conceded that he had not set out a conclusion about whether the base station, towers and cableway would satisfy P5.1 in the Recreation Zone and the Natural Zone. Mr Moir expressed an opinion that the pinnacle centre meets P5.1, but not the other components of the proposal in the Recreation Zone and Natural Zone.
- He conceded that he had not “directly” done what was required by 5.1 – although said that he had considered the impacts in context of the views and how tower 3 would be perceived in context of the existing character.
- He conceded that he had not addressed in his evidence how the proposal had been designed and sited to minimise loss of visual values and adverse impacts on visual character.

- In relation to mitigation of impacts in relation to his viewpoints VP7 at the Old Springs Hotel site and VP14 at Sphinx Rock, he conceded that his view was that the impacts from the proposal could not be mitigated.
 - In terms of the siting of the proposal, he agreed that if the objective was to minimise the visual impacts of the cableway, it should not be up the most visible part of the mountain.
 - He agreed that the visual impacts on viewpoints VP7 and VP14 were negative impacts and did not meet Performance Criterion 5.1 from these locations. Although efforts had been made for the proposal to harmonise, and it would be viewed in context of the transmission towers, it would always be a visible element.
297. Mr Moir made an assessment of Landscape Character Units, identified by him as being the Mount Wellington Summit Precinct, the Wellington Park Ranges and the Hobart Plains. Those Landscape Character Units do not directly coincide with the zones in the Management Plan. For example, his Landscape Character Unit Mount Wellington Summit Precinct extends beyond the Pinnacle Specific Area to include the Natural Zone and Organ Pipes. Mr Moir's assessment of values is more confined compared with Mr Goss and Dr Williamson who take account of the values ascribed in the Management Plan and Pinnacle Specific Area.
298. The issues addressed by Dr Williamson in his visual impact assessment partially reflect the performance criteria.
299. Neither Dr Williamson nor Mr Moir referred to the Wellington Park Design and Infrastructure Manual (2003) (the Manual). Mr Goss and both planning witnesses commented on the proposal's response to elements cited in the performance criteria.⁴⁷ The Appellant's written submission addresses the manner in which the proposal responds appropriately to the design and siting principles in the Manual.
300. Based on their varied methodology, the experts reached different conclusions with respect to:
- The extent to which the development is found to be seen above the ridgeline or skyline in near and wider range views and whether the proposed development is intrusive, dominant, prominent or results in a loss of values.
 - The influence of existing development in the Pinnacle Specific Area as part of the context.
 - The extent to which proposed elements are reflective of the existing character elements of the transmission towers and their associated structures.

⁴⁷ Mr Goss and Ms Duckett referred to the 2006 version of the document. Ms Riley cited the 2nd edition dated 2007.

- The question and relevance of cumulative effects having regard to the existing broadcast towers, associated man-made structures on the summit, and the proposed development.
 - The relevance and weight given to the Management Plan's commentary, key desired outcomes and policies with respect to the existing telecommunications facilities.
301. Mr Moir described Dr Williamson's evidence as overstating the visual quality of the summit and ignoring the influence of the existing communication towers, roads and car parking when assessing the development in the near foreground. He considered that Mr Goss' evidence overstated the ratings of sensitivity applied to each location, as they only considered the natural aspects of the character of mountain and ignore the other elements that define the landscape character of each viewpoint.
302. Mr Goss and Dr Williamson disagreed with Mr Moir. They considered that Mr Moir relied upon the existing infrastructure within the Pinnacle Specific Area, notably the telecommunications facilities, to justify the scale of the pinnacle centre and tower 3. Mr Goss said that this is problematic given that the Management Plan discusses the visual impact of the telecommunications facilities and that the telecommunications facilities could be seen as inconsistent with the purposes for which the Park has been set aside. The Management Plan states that the mountain will continue to be used for broadcasting until such time as alternative technologies makes the towers obsolete.
303. The Appellant submitted that the proposal does not rely on the existing broadcast towers and other infrastructure, and would be acceptable if the broadcast towers did not exist. However, Mr Moir's evidence included the following:
- the transmission towers are a defining character element on the pinnacle that shifted it from a natural to a manmade character;
 - for all his viewpoints, other than VP2, the summit, the other man-made elements were inconsequential;
 - if there were no obvious man-made structures, the impact of the proposal would have a high rating;
 - the transmission towers would not satisfy the performance criteria, and their impact would be high for all of the viewpoints, would be adverse, and would result in a loss of visual values and in visual intrusion, and they would not harmonise with the visual landscape and natural qualities;
 - although the transmission towers had modified the landscape it was not the case that any further change was necessarily acceptable, and that it was necessary to consider the increment of change, and cumulative change; and

- the transmission towers should not be relied on to entrench more visually intrusive infrastructure, but he qualified his answer to say that visually the mountain is defined by those towers, and whatever else goes up has to be considered in that context.

304. Mr Goss and Dr Williamson drew attention to the key desired outcomes in the Management Plan to rationalise the existing telecommunications facilities to reduce their impact.⁴⁸ Neither considered that the Management Plan supports reliance on the existing infrastructure to justify an increase in visual impact but rather consolidation and over time a reduction in the infrastructure.

Evidence by the planning experts on visual impact

305. Both Ms Duckett and Ms Riley gave evidence in respect to visual impact.

306. Ms Duckett relied on Mr Moir's assessment. Ms Duckett noted the manner in which the proposed pinnacle centre is tiered and stepped, that the façade is broken responding to the nature of the rocky slope, and the use materials and finishes that will add visual interest and accord with the Manual. Ms Duckett's evidence was that the consideration of tower location and design was considerate of minimising impact of site disturbance and maximising restoration, noting that tower 3 will be located on rocky substrate.

307. Ms Duckett considered that the development will not be visually dominant. She observed that the proposed pinnacle centre will be located within the high sensitivity area of the visual management sensitivity mapping in the Management Plan, and is also in the same visual catchment as the existing transmission towers. Ms Duckett's evidence was that from most viewpoints assessed by the experts, impact on the existing landscape character of the summit precinct has been minimised by the design, materials and siting of the pinnacle centre.

308. Ms Duckett noted that it is an objective of the Management Plan to consolidate visitor facilities in the Pinnacle Specific Area by enhancing or removing them.⁴⁹ She referred to the proposed partial demolition of the existing observation shelter as significant, because:

- the observation shelter is an important visual feature associated with the mountain's visual character; and
- the existing structure extends above the skyline, removing this feature will effectively reduce the existing visual impact on the skyline and the proposed pinnacle centre will be located below the skyline and is designed to respect the topography.

⁴⁸ Clause 5.4.3 of the Management Plan

⁴⁹ Clause 3.2.2 of the Management Plan

309. Ms Duckett considered that the base station has been designed in accordance with the Manual, in its use of materials and finishes and minimisation of reflectance. Mr Moir also considered that towers 1 and 2 will visually integrate with the landscape, and that the base station will not diminish or erode the existing landscape character.
310. Ms Riley relied on Mr Goss' evidence. Referring to the Management Plan, she considered that the existing buildings, including the transmission towers, are not regarded in the Management Plan as desirable from a visual impact perspective. They are an undesirable precedent and cause a negative impact. Ms Riley considered they should not be a core element in defining the visual values of the area, nor a basis on which to demonstrate that a visual intrusion does not occur as a consequence of the proposed development.
311. Ms Riley also referred to the proposal's response to the Manual. Her opinion was that the proposal has not considered the Manual as demonstrated by:
- the extent of disturbance on geomorphological features having regard to the evidence of Mr Williams;
 - the development of a new site in the Park, without a demonstrated community need;
 - the siting of tower 3 in a very sensitive location; and
 - the design of the pinnacle centre exceeding two storeys in a visually sensitive location.

Consideration of visual impact

Use of photomontages

312. Photomontages are an assessment tool to assist decision-making and are not determinative. They cannot be guaranteed to represent as-built views, they do not replicate what a person sees, and they do not represent the level of detail of what one sees. They are focused on a specific view and do not show peripheral views.
313. The accuracy of photomontages needs to be carefully considered. The Tribunal has considered the technical criticisms and other commentary respectively provided through evidence and submissions. It is relevant to the Tribunal's assessment of the material and the weight it is to be given that:
- The architectural plans are annotated to refer to the location of cableway components such as towers as approximate, and with respect to pathways at the pinnacle centre, as indicative.
 - None of the images can take account of the influence of movement of cable cars and the cables.
 - There was little information with respect to potential glare and reflection.

- There was a lack of information about proposed lighting with respect to structures, including the pinnacle centre, and there are no photomontages illustrating a night-time view.
- The photomontages cannot model all conditions that will be influenced by factors such as weather (e.g., clouds, snow, lighting conditions through sun and shade), atmospheric conditions, and seasonal considerations (as effected by sun height and position).

Visual impact assessments

314. Visual impact assessments are inherently subjective, and reasonable minds can differ on the appropriate methodology, and the scale and effect of impact. The three expert assessments seek to understand the landscape, landscape views and scenic attributes and significance, and to assess changes (and the degree or extent of change) as a result of visual contrasts (being new development). They show how there can be legitimate differences in professional opinion.
315. The evidence can assist the Tribunal to assess visual impact of the proposal, but it does not take account of the full spectrum of variables such as the size, relative scale, form/shape, linearity, materiality and colour of the proposed development assessed against the many variables that influence the impact including weather conditions and snow, seasonal differences, foreground and background elements that could include structure vegetation and terrain, distance, and elevation. Some intervening elements can have filtering effects, such as vegetation.
316. An individual's level of tolerance to change in the landscape and to ascribed values may be influenced by their opinion about the cause and utility of the change. For example, they may consider a communication tower is intrusive but be tolerant of it because of the benefits it provides. Subjective opinion is not the proper basis for evaluation and judgment.
317. The experts are qualified and experienced. They are confident that their own assessment is underpinned by robust, sound and authoritative methodology. They agree that there is not a definitive guideline document for landscape or visual assessment in Australia. The use of different tools is, therefore, understandable.
318. The Appellant submits the fact that the proposal will be prominent when viewed from some locations is not reason to refuse it, having regard to the specific requirements of the Management Plan.
319. There are material differences between the assessment methods, as noted earlier. Neither Mr Moir nor Dr Williamson provided a complete assessment against the performance criteria cited in the grounds of refusal. The analysis by Mr Goss, which responds to the Management Plan, is to be preferred. This is not to say that the evidence of Mr Moir and Dr Williamson has not been of assistance to the Tribunal. The Tribunal has been assisted by various aspects of their evidence

including viewpoints, descriptions and assessment considerations that have various common elements across the three methodologies.

320. Mr Goss explained his objective as being to undertake an empirical evidence-based approach utilising a sound methodology customised to address the Management Plan and the provisions that make up the grounds of refusal. For example, he had regard to the zones, drew values from the Management Plan, determined viewpoints from an analysis involving viewshed mapping, assessed viewpoints from within and outside the Park, considered factors including scale, form, colour and texture, assessed the contrast and reached a conclusion based on the relevant performance criteria and the grounds of refusal.
321. The two existing telecommunications towers and other human interventions are part of the existing context. They are seen in the Pinnacle Specific Area, seen from within the Park and seen in a very wider area outside of the Park in settled areas of Hobart. The Management Plan describes the facilities as follows: ⁵⁰

There are two major communications installations on Mount Wellington on leaseholds: the main facility owned and operated by Broadcast Australia (leased until 2057), and the smaller facility owned by WIN TV (leased until 2059). Both facilities include a transmission tower and transmitter buildings, while the Broadcast Australia site includes satellite receiver dishes and a small microwave tower for use in relaying land mobile transmissions by Telstra and as an uplink from the Australian Broadcasting Corporation city studios.

322. The Management Plan refers to them as negative visual elements, while acknowledging that the provision of these types of utilities is part of the mountain's role and explaining their role and future expectations:⁵¹

Community concerns have consistently been raised about the visual impact of telecommunications facilities at the Pinnacle. In this regard, the use of the Park for telecommunications could be seen to be inconsistent with the purposes for which the Park has been set aside under the Wellington Park Act. However, the expectation is that the Mountain will continue to be used for broadcasting until such time as alternative technologies make the towers obsolete.

323. The Park's defined values are recognisable and distinct, even with the presence of the telecommunications towers. The Management Plan states that protection of environmental and cultural values is a primary objective for the Park, and that development of facilities and infrastructure can potentially conflict with that aim.⁵² There is a focus in the Management Plan on avoiding or minimising conflict with Park values.

⁵⁰ Clause 5.4.3 of the Management Plan

⁵¹ Clause 5.4.3 of the Management Plan

⁵² Clause 7.3.2 of the Management Plan

324. The Management Plan includes key desired outcomes, which in respect to development include that:⁵³

Visitor services and facilities [are] appropriately located in the zones and areas most suited to such use and avoiding or (where required) minimising conflict with environmental and cultural values of the Park.

325. The telecommunications infrastructure is not included as elements in the values and qualities for which the Park is identified and which are to be protected, which include the natural, landscape and aesthetic qualities as set out in the Management Plan.⁵⁴

326. Mr Goss described the basis for identifying areas of high sensitivity:

A high sensitivity rating indicates a high concern for visual values and that the landscape character must be fully retained through appropriate prohibitions on development in key locations or the very strictest visual management in terms of visibility scale, form line, colour and texture of development when it is to occur.

327. The communications installations and other existing infrastructure are modifications to the natural environment and are part of the visual catchment for assessment. The Tribunal agrees with Mr Moir that the presence of the largest tower, constructed as a vertical element, diminishes the naturalness of the landscape and setting. However, the Tribunal is not persuaded that these elements, and most notably the existing communications installations, should be weighed as heavily as reflected in the visual impact assessment evidence upon which the Appellant's case relies.

328. Assessment of the proposal will reflect the following:

- the Management Plan sets a 'high bar' with respect to the design and siting of new buildings and structures whereby, depending on the site and the applicable standard, any loss must be minimised, remedied, mitigated or avoided;
- notwithstanding the modified nature of the summit/pinnacle area, including the site of the pinnacle centre and tower 3 are within an area of designated high visual sensitivity by the Management Plan;⁵⁵
- the transmission towers and associated transmitter buildings are not regarded by the Management Plan as a positive influence or precedent for future development; and

⁵³ Clause 7.4.2 of the Management Plan

⁵⁴ Clause 2.3 of the Management Plan

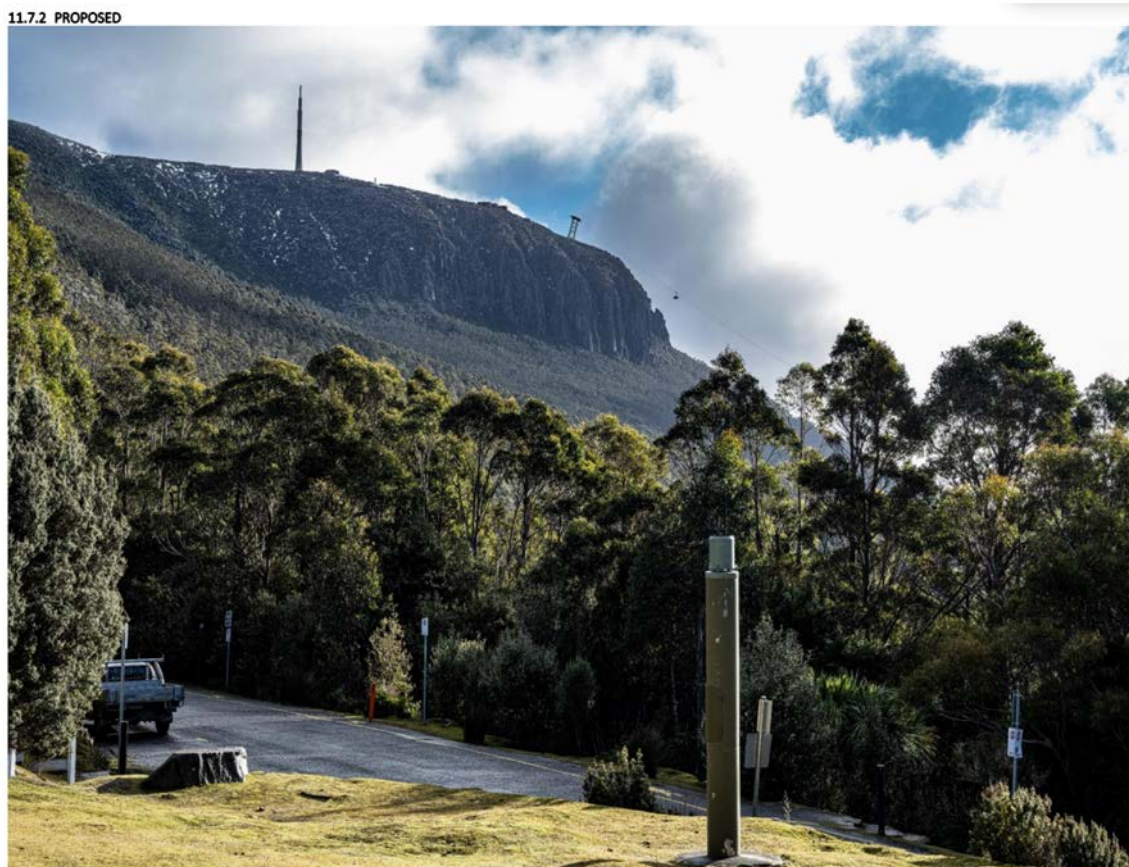
⁵⁵ Clause 5.3.3 and Map 4 of the Management Plan

- cumulative effects are a relevant consideration in assessing the visual impacts of the proposal against the relevant performance standards.

Design and siting of buildings below the pinnacle

329. Ground 12 applies to base station, towers 1, 2 and 3, the cableway and cable cars, in the Natural and Recreation Zones.
330. The parties agree that the acceptable solution A5.1 is not met by the proposal as buildings and structures are located within areas identified as of high or moderate visual sensitivity shown in Map 4 of the Management Plan.
331. The proposal must therefore satisfy performance criterion P5.1. P5.1 requires that buildings and structures (other than Park furniture or replacement of an existing building, or structure of the same size and location) in prominent locations visible from within or outside the Park, or in areas identified as of high or moderate visual sensitivity in Map 4 of the Management Plan, must be designed and sited to minimise or remedy or mitigate any loss of visual values or impacts on the visual character of the affected area.
332. P5.1 notes that satisfaction of the performance criteria may include a visual impact analysis prepared by a suitably qualified person demonstrating how the building or structure can be designed and located to harmonise with the site.
333. The ground of refusal is that the proposal is not designed and sited to minimise or remedy the loss of visual values and impacts on visual character of the affected area that arise from the proposed cableway (including towers).
334. Referring to Mr Moir's assessment, the Appellant submits that in distant views from the City and surrounding suburbs the proposed development will not be a significant element in the view. To the extent that it can be discerned in the view, it will be seen in the context of the mountain backdrop, such as from Victoria Dock and Salamanca Place in Hobart. Tower 3 will be seen to protrude above the skyline from viewpoints to the far north and south.
335. The Appellant accepted that in closer range views, particularly those within the Park, the development will be seen from some locations. Notable locations include Sphinx Rock and the Old Springs Hotel site which, because of their orientation, provide a profile view with tower 3 seen to protrude above the skyline. The Appellant submitted that it is inevitable that a tower servicing a cableway will be visible in this manner from some locations. It is possible to place oneself in a position where the development is seen in profile and thus protrudes above the edge of the mountain and into the skyline. The fact that such views exist needs to be weighed in the context of all the available views. The angled form of tower 3 reflects the design necessary for the cable car ascending the mountain and arriving at the pinnacle centre. The angle is observed in profile views generally only in proximate views within the Park.

336. Mr Moir agreed that it could not be said that the proposal meets the performance criteria from the locations of Mr Strugnell's photomontages VP7 at the Old Springs Hotel Site and VP14 at Sphinx Rock, although efforts had been made to harmonise, and the development would be viewed in context of the existing transmission tower, which would be a visible element. Mr Strugnell's photomontages at VP7 and VP14 respectively are:





337. In respect to minimising or mitigating impacts the Appellant's case included the following:

- Mr Bold's evidence about the evolution of the design and siting process for the cableway project.
- Photographs in Mr Strugnell's response evidence demonstrate the limited available views towards the summit or the cableway along the relevant walking tracks. Opportunities to view the cableway over tracks are significantly limited by vegetation, track orientation and topography or geological features.
- Tower 3 is sited to be seen against the mountain backdrop from key vantage points within the Hobart area and is predominately located below the skyline when viewed from most vantage points.
- The base station has been sited on an existing fire trail, making use of the existing disturbed area to minimise tree removal and loss of canopy. Towers 1 and 2 are sited on the lower slopes of the park to minimise visibility.
- Towers 1 and 2 are situated within the moderate sensitivity area. The towers are open frame in structure and from all viewing locations assessed were either concealed by topography or viewed against the backdrop of dense bushland.

- The proposed minimal clearing of vegetation for the construction of the towers 1 and 2 and the retention of tall canopy trees surrounding the towers assist in visually integrating the towers into the landscape.
338. The Appellant submitted that the proposed development harmonises with the visual landscape and natural qualities of the site by adopting a colour palate that is consistent with the surrounding environment. Tower 3 is proposed to be finished with an oxidising agent or similar and the cables and aerial tramway are finished in dark and muted tones.
339. There will be locations in the Park's Natural and Recreation Zones where the development will not result in any loss of visual values or impacts on the visual character. This is because it may not be visible or may not have an appreciable impact on the visual values or the visual character of the affected area.
340. The base station and towers 1 and 2 will have a lesser or limited impact compared with tower 3, the cableway and cable cars in the upper portion of the mountain. Towers 1 and 2 are of a proportion and scale that are generally in keeping with the scale of electricity transmission towers that run north and south along the eastern Park boundary. The Tribunal accepts Mr Goss' conclusion that, on balance towers 1 and 2 in the lower area of the Park, close to the transmission lines will be in harmony with the natural qualities of the site in terms of proportions. Permit conditions would be necessary to address matters such as lighting, landscaping and to confirm building materials, colours and finishes.
341. There would be a localised visual impact associated with the base station, including by vegetation removal. The access road would further contribute to that. However, given the location is in a disturbed area, if mitigated by landscaping and limited reflective glass, the base station would not diminish the visual values and would mostly be unseen from outside viewpoints.
342. The Tribunal reaches a different conclusion with respect to the design and siting of tower 3 and the cableway and cable cars in the mid and upper sections of the mountain. There will be a loss of visual values and negative impacts on the visual character from those elements:
- The loss is demonstrated by the manner in which tower 3 and the cables (with or without cable cars) project from the landform above the Organ Pipes escarpment and the cables traverse over the face of the Organ Pipes from a wide range of public and well-used locations. The greatest impacts arise when viewed from the south-west to the south and the north-east to north, in close, middle and distant views as demonstrated in the visual impact analyses.
 - Tower 3 and the cables will be silhouetted against the sky in various views where other infrastructure is not seen. They would be a dominant element in closer views within the Park compared with more distant locations. In distant locations they still have negative impacts on the visual character by their siting, form and scale. The impacts reduce moving

down the Mountain where there is a more consistent backdrop of vegetation, albeit the cableway will be an obvious linear element.

- There are many locations where there will be a loss of visual values and impacts on the visual character from multiple walking tracks that are not affected by the presence of man-made structures on the summit or Pinnacle Road. These include locations with significant public use.

343. The introduction of the cables, cable cars and tower 3, has not been minimised, mitigated or remedied in any meaningful or material way. Even with the minimisation and mitigation measures relied on by the Appellant, there will be unacceptable adverse impact on visual values and impact on the visual character of the area most notably in connection with tower 3 and the cableway. There is no evidence that that loss will be remedied.

344. The proposal will not satisfy P5.1. Ground of refusal 12 is made out.

Appearance scale and proportion of buildings below the pinnacle

345. Issue 5.2 of Table 5 relates to building design and light effects. It will apply to the base station, towers 1, 2 and 3, the cableway and the cable cars in the Recreation Zone and the Natural Zone.

346. The acceptable solution A5.2 will not be met by the proposal. This is because proposed buildings and structures are located within areas identified as high or moderate visual sensitivity shown in Map 4 of the Management Plan.

347. The proposal must therefore satisfy the performance criterion P5.2. P5.2 requires that development must be designed to harmonise with the visual landscape and natural qualities of the site in terms of appearance, scale and proportions, and follow the Manual where relevant. Lighting and reflection must be managed to avoid adverse impacts on natural and cultural values.

348. The ground of refusal is that the proposal does not harmonise with the visual landscape and natural qualities of the site in terms of appearance and proportions, and that the proposal does not follow the Manual in relation to the extent of disturbance on geomorphological features or the siting of tower 3.

349. The Appellant submitted that the proposed development harmonises with the visual landscape and natural qualities of the site by adopting a colour palate that is consistent with the surrounding environment. In response to Mr Goss' concern about the angled form of tower 3, the Appellant submitted the angled form reflects the design necessary for the cable car ascending the mountain and arriving at the pinnacle centre. The angle is only observed in profile views and generally only in proximate views within the Park that produces this apparent contrast. Mr Moir describes the scale of tower 3 as being kept to 36 metres in height and to be constructed as a steel lattice structure that is non-reflective and finished in colours that match the natural colours of the local dolerite rock.

350. With respect to the Manual, the Appellant contends that impacts will be appropriately minimised:

- The proposal follows the Manual by siting elements to reinforce and showcase geomorphological features. The siting to one side of the Organ Pipes reduces the impact, particularly by ensuring that the route traverses the escarpment at a point separated from that where the Organ Pipes Track traverses in proximity to the Organ Pipes themselves. In this manner views of the Organ Pipes from the Organ Pipes track remains unhindered by the presence of the cables.
- Tower 3 is setback from the edge of escarpment, thereby enabling views to the escarpment from below to remain unhindered by the presence of the tower. While the tower is seen in profile above the Organ Pipes, it is predominately viewed against the background of the Mountain terrain when viewing the presentation or the Organ Pipes from the east.
- The cable and the cable cars will be finished in non-reflective materials and colours that match the natural colours of the rock escarpment.
- Tower 3, the cable and the cars will be visible from Sphinx Rock and the Old Springs Hotel site, however the proposed structure's scale, materials and colour will assist in harmonising the introduced elements with the existing landscape character.
- The proposal has been sited to minimise disturbance of geomorphological features. The proposal relies on previously undisturbed areas however complies with the objective of siting the tower in an area that is environmentally resistant. The site is underlain by dolerite.
- The central issue is whether the proposal adopts the methodology of minimum impact and maximum restoration.

351. There will be locations in the Park's Natural and Recreation Zones where the development will not be visible or, where it can be seen, can be said to harmonise with the visual landscape and natural qualities of the site in terms of appearance, scale and proportions. This appears to be accepted by the expert witnesses. Lighting and reflection were not addressed in the evidence in any detail.

352. Where the cableway traverses the lower section of the Park, and sits within a well-vegetated area in a location with lower visual sensitivity, the cables will not be a discordant element from a range of viewing locations.

353. However, the scale of tower 3, and its proposed materials and colours, will not harmonise with the visual landscape and natural qualities of the site in terms of appearance and proportions in the mid and upper sections of the Park:

- As the cableway traverses toward the higher and more visible parts of the Park, within the Recreation Zone where it is in an area of high visual sensitivity, and then into the Natural

Zone, the cableway would be a disproportionate form contrasting with existing infrastructure such as power lines.

- Tower 3 and the cables (with or without cable cars) project from the landform above the Organ Pipes escarpment and the cables traverse over the face of the highly sensitive Organ Pipes. This is particularly so when viewed from the south-west to the south and the north-east to north, from close, middle and distant viewpoints, as demonstrated in the visual impact analyses. Tower 3 and the cableway would blend better when seen from greater distances and with the mountain behind them, such as from the east, but this does not overcome the concern about the lack of harmonious relationship when seen from and within locations with high visual management sensitivity in the Park.
- Tower 3 and the cableway appreciably extend the skyline alterations and landscape interruptions which are currently confined to the Pinnacle Specific Area.
- The environmental resistance or resilience of the Organ Pipes, and the aim to showcase the geomorphological features to passengers of the cableway, will not overcome the incompatibility, and lack of harmony, with the high scenic values, sensitivity and natural qualities of this part of the Park. This is the case even though the cableway does not physically attach to the important geomorphological features in this part of the eastern face of the Mountain.
- The use of materials and colours that are regarded as blending with or compatible with the landform do not overcome the impact of the scale, form and proportions of tower 3 and the cableway in locations with high scenic values and sensitivity of this part of the Park when viewed from near or more distant parts of the Park, and beyond.
- There are multiple locations, such as walking tracks and climbing routes throughout the Organ Pipes⁵⁶ that are not affected by the presence of man-made structures on the summit or associated with Pinnacle Road. These are locations with significant public use. The form, scale and height of the visible parts of the proposed development in these locations will not harmonise with the visual landscape and natural qualities.
- There is little evidence with respect to lighting, and the degree of reflectivity associated with the cable cars, to conclude that adverse impacts on natural and cultural values will be avoided.

354. The form, scale, design and location of the pinnacle centre does not harmonise with the site. The building and structures have not been demonstrated through the visual analyses to show they have

⁵⁶ Clause 7.3.3 of the Management Plan states that the Organ Pipes is considered to be one of the premier rock climbing locations in Tasmania, with over 125 recorded climbing routes.

been designed and located to harmonise with the site. The proposal's response to the Manual, such as in its use of materials and finishes and minimisation of reflectance, will not overcome the findings that the appearance, scale and proportions of the cableway, cable cars and tower 3 in the Natural and Recreation Zone do not meet the harmonisation with the visual landscape as required to satisfy P5.2. Ground of refusal 13 is made out.

Effect on visual values and character at the pinnacle

355. Ground 16 raises compliance with P5.1 of S2.6 which relates to visual sensitivity in the Pinnacle Specific Area with respect to the pinnacle centre, cableway and cable cars.
356. The acceptable solution A5.1 is not met by the proposal because the proposed buildings and structures (pinnacle centre, cableway and cable cars) are located within areas identified as high or moderate visual sensitivity shown in Map 4 of the Management Plan.
357. The proposal must therefore satisfy P5.1. P5.1 requires that buildings and structures (other than Park furniture or replacement of an existing building, or structure of the same size and location) in prominent locations visible from within or outside the Park, or in areas identified as of high or moderate visual sensitivity in Map 4 of this Management Plan, must be designed and sited to minimise or remedy or mitigate any loss of visual values or impacts on the visual character of the affected area.
358. P5.1 notes that satisfaction of the performance criteria may include a visual impact analysis prepared by a suitably qualified person demonstrating how the building or structure can be designed and located to harmonise with the site.
359. The ground of refusal asserts that the proposal does not sufficiently mitigate or remedy the loss of visual values and impacts on visual character of the affected area that arise from the proposed pinnacle centre.
360. The evidence demonstrates that there will be a loss of visual values and negative impacts on the visual character. The Appellant relies on the evidence of Mr Moir and Mr Strugnell's photomontages to demonstrate that any loss of visual values or adverse impact to landscape character is minimised. It submitted that the siting and design of the pinnacle centre is one way in which this is achieved, including taking account of views in close proximity to the summit or at a distance when viewed from locations in the City or its surrounds. Evidence from Mr Moir and Ms Duckett addressed this. Further, the evidence referred to sensitive and high-quality architectural outcomes that would provide additional amenity for visitors and so contribute positively to the character of the summit and would be in keeping with its function as a renowned tourist destination.
361. In respect to the requirement in P5.1 that the development is designed and sited to minimise or remedy any loss of visual values or impacts to the visual character of the affected area, the Appellant relied on a number of design and siting features including:

- The proposal has been sited below the ridgeline to ensure that it does not influence the horizon line.
- The form of the pinnacle centre's architecture has been arranged to follow the natural topography of the east-facing slope with articulated façades that are reflective of the ragged columns and boulders of dolerite that are the defining character element of the summit landscape.
- Colours and materials that are non-reflective and are sympathetic to the natural colours of the summit landscape have also been chosen to visually integrate the proposal into the site.

362. Ms Duckett referred to the partial demolition of the existing observation shelter as significant in this regard and consistent with the Management Plan.

363. The pinnacle centre and the cable components in the Pinnacle Specific Area have been sited downslope of Pinnacle Road in a low point of the Pinnacle Specific Area and will sit lower in this part of the landform. The building is staggered, and its design expression references physical forms and seeks to blend, in a contemporary manner, with this landscape and setting. Changes to the existing observation shelter would assist to remove skyline protrusions.

364. Notwithstanding the modified landscape in the Pinnacle Specific Area, the visual sensitivity rating there is rated by the Management Plan as high. While there have been efforts to minimise the loss of visual values or impacts on the visual character of the affected area by the proposed development, the design and siting do not achieve this end. This is a function of the scale of the building, including the height and form of the associated cableway structure. When viewed from within the Pinnacle Specific Area, notwithstanding that the building would be a foreground element and not break the horizon line in multiple views, it will be dominant, interrupt views and reduce the visual quality of the area. The Tribunal does not accept Mr Moir's evidence that, because it will be viewed in the context of the existing transmission, access and car parking infrastructure that occupy the summit, the development will not diminish the landscape character of the summit when viewed from locations on the summit. Not only are there locations where the infrastructure is not viewed with the proposed building, in other places, there is a cumulative loss with respect to the visual values and impacts on visual character of the affected area. The multi-level profile of the pinnacle centre will be evident in viewpoints from multiple locations within the Pinnacle Specific Area where the telecommunications towers would not appear in the field of view, such as when the focus of viewing is to the north-east, east and south-east toward Hobart and the Derwent River. It would be a dominant form, breaking the skyline in places. These are locations where the proposal has not minimised or mitigated any loss of visual values or impacts on the visual character of the affected area.

365. There is no scope to remedy the impacts of the loss of visual values or impacts on the visual character of the affected area.

366. The form, scale, design and location of the pinnacle centre will not sufficiently minimise or remedy the loss of visual values and impact on visual character so as to satisfy P5.1. The building and structures have not been demonstrated through the visual analyses to show they have been designed and located to harmonise with the site.

367. The proposal will not satisfy the requirements in P5.1. Ground of refusal 16 is made out.

Building height at the pinnacle

368. Grounds 18 and 25 arise under Issue 9(a) of S2.6 which provides standards for building design relating to height. They apply to the pinnacle centre, the cableway and cable cars, in the Pinnacle Specific Area.

369. The acceptable solution A9.1 is not met by the proposal. A9.1 provides for a maximum building height of 3.5 metres, and a limit of one storey. The pinnacle centre comprises multiple levels, with up to three levels above natural ground level at any single point, and a maximum height above natural ground level, on its eastern elevation, of 11.9 metres.

370. The proposal must therefore satisfy the performance criterion P9.1. P9.1 requires that for any building greater than 3.5 metres in height it must be shown that the building will not visually intrude into the landscape in relation to:

- Local natural and environmental features;
- Views from either the pinnacle or elsewhere in the Park; and
- Views from settled areas of Hobart and suburbs through the preparation of a Visual Impact Analysis conducted by a suitably qualified person.

Any building design must give consideration to the Wellington Park Infrastructure and Design Guidelines. This is the only reference to the 'Wellington Park Infrastructure and Design Guidelines' in the Management Plan. No document of that description was tendered or referred to at the hearing. The Manual provides guidelines for infrastructure and design. It is likely that the reference to the Wellington Park Infrastructure and Design Guidelines is intended to be to the Manual. If not, then the Manual will in any event provide the relevant guidelines.

371. Ground 18 asserts that the pinnacle centre will visually intrude into the landscape in relation to local and natural features and views from the pinnacle area and elsewhere in the Park. It is contended that the building design does not give consideration to the Manual.

372. Particulars of ground 25 are that the pinnacle centre building, which is greater than 3.5 metres in height, will visually intrude into the landscape in relation to views from settled areas of Hobart and suburbs.

373. The Appellant submitted there is no view from the Pinnacle area in which the proposed development causes visual intrusion. The development will be visible from existing vantage points, including the Trig Point⁵⁷ and roadside amongst others, however it is sited below the summit and below the view. Moreover, the proposal seeks to provide new and improved locations from which to enjoy the scenic values of the summit, weakening the argument that its visibility from existing vantage points is intrusive. By comparison, a 3.5 metre tall building could be located on the summit, visible above the skyline and satisfy the acceptable standard in respect to height for the purposes of visual intrusion, but have a greater visual prominence than the proposal.
374. The Appellant submitted that, when viewed from elsewhere in the Park, the pinnacle centre is a small element in the landscape, adopts design methods to complement the landscape and generally reads as an element located below the skyline.
375. In views from outside the Park, the Appellant submitted that similar considerations apply, and that Mr Strugnell's photomontages demonstrate that there is no intrusion by the pinnacle centre into the landscape.
376. Mr Moir's assessment included:
- The pinnacle centre has been sited below the ridgeline to ensure that it does not influence the horizon line. The architecture has been arranged to follow the natural topography of the east facing slope with articulated façades that are reflective of the ragged columns and boulders of dolerite that are the defining character element of the summit landscape.
 - Colours and materials that are non-reflective and are sympathetic to the natural colours of the summit landscape have also been chosen to visually integrate the proposal into the site
 - The natural and environmental features that surround the pinnacle centre proposal are characterised by rocky, steep to undulating lands with generally low alpine heath vegetation.
 - Views looking towards the pinnacle from within and outside the Park will offer opportunities to view the pinnacle centre. In assessing these views, it was determined that the pinnacle centre would not diminish the visual character of the summit due to its design and siting.
377. Ms Duckett considered that the pinnacle centre does not introduce a new character on the mountain, and that the built form references existing patterns and forms on the mountain summit and is not intruding into this landscape.

⁵⁷ The highest point on the summit.

378. There will be locations from the pinnacle, from elsewhere in the Park and from settled areas of Hobart and its suburbs where the proposed building will not visually intrude into the landscape and will not intrude on local natural and environmental features. There are locations where, for example, the pinnacle centre might not be seen at all, it is a very distant element, or it is back-dropped by the mountain and might be in shadow.
379. However, it has not been shown that the pinnacle centre will not visually intrude into the landscape in relation to the local natural and environmental features, views from either the pinnacle or elsewhere in the Park, and views from settled areas of Hobart and its suburbs.
380. Some findings with respect Ground 16 are relevant to the finding that the building will intrude into the landscape in relation to the local natural and environmental features, having regard to the manner in which it will be viewed in the environs of the Pinnacle Specific Area. The significant excavation and the impact of scale in the low-profiled terrain add to this. The building's colours and materials are among factors that may align with the Manual, however, these do not overcome the extent to which the building and associated structures visually intrude into the landscape with respect to local natural and environmental features.
381. The evidence of Mr Moir and Ms Duckett does not place sufficient weight on the local natural and environmental features compared to the existing intrusions into the local natural and environmental features by the communications towers and other infrastructure.
382. Outside the Pinnacle Specific Area, there are a range of locations, including tracks and The Springs, where the position, size, form and profile of the pinnacle centre building will be apparent and intrude upon the skyline. The material contained in the assessments demonstrates the building will visually intrude into the landscape, such as is clearly evident from the Old Springs Hotel site and Sphinx Rock. It will variously be seen as an element sitting just under, on, or above the skyline around the higher reaches and highly exposed eastern face of the mountain. The impact of snow, sun and lighting may exacerbate the visual contrast.
383. When considering a wider area, the pinnacle centre will cause visual intrusion and will be a dominant element in the landscape from a wide range of views, including the following cited in Mr Goss' evidence (using his key observation points as numbered):
- KOP3 from Huon Road shows that the pinnacle centre will visually intrude into the landscape in relation to local and natural features and views from just outside the Park.
 - KOP 4 from Cascade Brewery shows that the pinnacle centre will visually intrude into the landscape in relation to local and natural features and views from just outside the Park.
 - KOP 5 from Battery Point shows that the pinnacle centre will visually intrude into the landscape in relation to local and natural features and views from the City.

384. The same conclusions are reached using other photomontages, including those of Mr Strugnell, where the pinnacle centre appears as additional infrastructure atop the summit, and appreciably adds to the visual impact of man-made forms in the local landscape, intruding on the natural and environmental values. It will add to skyline and built form alterations in the highest part of the mountain, notwithstanding that it is lower than the existing telecommunication structures. The proposal will visually intrude into the landscape in respect to the local natural and environmental features and in relation to views from the pinnacle and elsewhere in the Park.
385. The proposal will not satisfy the requirements of performance criterion P9.1. Grounds of refusal 18 and 25 are made out.

Building size at the pinnacle

386. Grounds 19 and 26 arise under Issue 9(b) of S2.6 which provides standards for building design relating to building size. The standard applies to the pinnacle centre, the cableway and cable cars, in the Pinnacle Specific Area.
387. The acceptable solution with respect to building size, A9.2, is not met by the proposal. The Acceptable Solution limits the building size to a floor area of 100m². The proposed pinnacle centre has a floor area of 2,256m².
388. The proposal must therefore satisfy performance criterion P9.2. The relevant objective is to ensure that buildings are of a size and dimension that fits in with the overall nature of low key development at the pinnacle.
389. P9.2 requires that any proposal for a building more than 100m² in floor area is to show that the building will not:
- cause visual intrusion;
 - require infrastructure that cannot be provided in accordance with the infrastructure provision standards; or
 - be a dominant element in the landscape through the preparation of a visual impact analysis conducted by a suitably qualified person.
390. Ground 19 asserts that the pinnacle centre will cause visual intrusion, invoking P9.2(a). Ground 26 asserts that the pinnacle centre building will be a dominant element in the landscape, which raises P9.2(c). The grounds do not raise issues with associated infrastructure pursuant to P9.2(b).
391. The Appellant contended that the pinnacle centre building is not a dominant element in the landscape, and that the photomontages demonstrate the success with which the building has been designed and sited to sit comfortably in its environment and not stand out. Further, the footprint

of the pinnacle centre is modest and contained in multiple levels, albeit the height is consequently increased to accommodate the floor area.

392. The building may not cause visual intrusion or be a dominant element in the landscape in all circumstances. For example, its visibility and impact would be lessened in weather conditions or at times of the day or year when it is in shadow and it appears as being nestled into the landscape.
393. Aligning with the findings in respect to Grounds 18 and 25, there will be locations from the pinnacle, from elsewhere in the Park and from settled areas of Hobart and suburbs where the building will not cause visual intrusion or be a dominant element. These are locations where, for example, the pinnacle centre might not be seen at all, is a very distant element, or is back-dropped by the mountain and in shadow.
394. However, the pinnacle centre will cause visual intrusion or be a dominant element in the landscape as viewed from many locations, at close range in the Pinnacle Specific Area within the Park, and outside the Park, as demonstrated in the visual impact assessments and photomontages.
395. Comparing the proposal's footprint with those of existing infrastructure, Ms Riley observed that the observation shelter is around 140m², with the Broadcast Australia transmitter building at around 1050m² and the Win TV transmitter building at 500m². Those structures all have different forms related to their function, but these comparisons show the comparative scale of the proposed building.
396. While the building may not break the distant horizon, it will be dominant in the pinnacle area. It will intrude into views from Pinnacle Road, the Trig Point and from pathways associated with the proposal where the massing and scale will be highly dominant in the landscape setting. The presence of the existing structures in the Pinnacle Specific Area does not reduce or counter this impact. Rather, the building will have a cumulative negative impact, by adding dominant and intrusive forms into the landscape, further undermining its values.
397. Moreover, there are a range of other locations, such as from tracks and The Old Springs Hotel site, where the position, size and form and profile of the pinnacle centre building will cause it to be intrusive upon the skyline.
398. When considering a wider area, the pinnacle centre will cause visual intrusion and will be a dominant element in the landscape from a wide range of views including as assessed in Mr Goss' evidence and cited in relation to Grounds 18 and 25.
399. The same conclusions are reached using other photomontages, including those of Mr Strugnell where the pinnacle centre appears as an additional infrastructure atop the summit and appreciably adds to the visual impact of man-made forms in the local landscape, intruding on the natural and environmental values. It will evidently and materially add to skyline and built form alterations in the highest part of the mountain, even though it is lower than the existing telecommunication structures.

400. The proposal will cause visual intrusion and be a dominant element in the landscape and so not satisfy the requirements of performance criterion P9.2. Grounds of refusal 19 and 26 are made out.

Building siting at the pinnacle

401. Ground 20 arises under Issue 10 of S2.6, which provides standards relating to building siting. The standard applies to the pinnacle centre, the cableway and cable cars, in the Pinnacle Specific Area.

402. There is no acceptable solution in the standard. The objective of the standard is to ensure that buildings are located in areas where they do not cause a reduction in the values associated with the pinnacle.

403. The proposal must satisfy performance criterion P10.1. P10.1 requires that proposals for buildings facing on to or directly visible from the Pinnacle Road must show that there will be no diminution of values of the site either during the construction of the building or in its use and operation. Buildings and structures (other than Park furniture or replacement of an existing building, or structure of the same size and location) in prominent locations visible from within or outside the Park, or in areas identified as of high or moderate visual sensitivity in Map 4 of the Management Plan, must be designed and sited to avoid, remedy or mitigate any loss of visual values through the inclusion of a Visual Impact Analysis conducted by a suitably qualified person.

404. Ground 20 asserts that the pinnacle centre will diminish the values of the site and has not been designed or sited sufficiently to remedy or mitigate the loss of visual values.

405. For the reasons set out above, there will be a loss of visual values at the site during its use and operation. There was limited evidence about construction, but it appears inevitable that the proposal will cause a diminution of the visual values for the time of construction.

406. The proposed development in the Pinnacle Specific Area does not avoid any loss of visual values. All three expert witnesses giving visual impact evidence expressed the view, or conceded, that there will be a loss of visual values.

407. Mr Moir considered that the pinnacle centre has been designed and sited to avoid loss of visual values and successfully meets the criteria of the P10.1 when viewed in close proximity from the summit or at a distance when viewed from locations in the City or its surrounds as demonstrated in the photomontages by Mr Strugnell. His opinion is that, considering the modified nature of the summit, the proposal will not diminish the landscape character of the summit when viewed from locations on the summit as it will be viewed in the context of the existing transmission, access and car parking infrastructure that occupies the summit. His opinion included that:

- The contribution of sensitive and high-quality architectural outcomes that also provide additional amenity for visitors would contribute positively to the character of the summit and would be in keeping with its function as a renowned tourist destination.

- The proposal has been sited below the ridgeline to ensure that it does not influence the horizon line. The form of the pinnacle centre's architecture has been arranged to follow the natural topography of the east facing slope with articulated façades that are reflective of the ragged columns and boulders of dolerite that are the defining character element of the summit landscape.
- Colours and materials that are non-reflective and are sympathetic to the natural colours of the summit landscape have also been chosen to visually integrate the proposal into the site.

408. The Appellant contended that, though visible, the pinnacle centre will not be an intrusive or obtrusive element in the landscape, and that its impact will be mitigated through its form, siting and external detailing. However, the pinnacle centre, the cableway and cable cars will be a readily apparent visual intrusion in the Pinnacle Specific Area, such as at locations shown in photomontages, for the reasons advanced by the Council and joined parties and Mr Goss' evidence that:

- The construction, use and development of pinnacle centre will be visible in multiple views from the Pinnacle Road. It will result in a loss in visual values given the currently unmodified state of the land that it is proposed to occupy, the size and design of the large multi-level building. There will be a material diminution of values of the site.
- The pinnacle centre is not designed to avoid any loss of visual values. It is a large built form that will intercept the foreground when seen from higher in the landform, such as from Pinnacle Road. Depending on the viewing position in the Pinnacle Specific Area, the building and structures will appear against the skyline when viewed a lower position such as from some of the proposed new pathways. Materials and finishes, as well as lighting at night, may accentuate the loss in values.
- The construction, use and development of pinnacle centre is not designed and sited to mitigate the loss of visual values. The pinnacle centre is positioned at a lower topographic position, is staggered in its form, and adopts material and colours that seek to respond to the natural physical characteristics. Further, the architectural response, position below the ridgeline, materials and colours might lessen the loss of values compared with the use of a disturbed and more elevated location in the Pinnacle Specific Area. However, these factors do not mitigate the loss of visual values that are caused by the scale, massing and form of the multi-level building and the associated structures, as designed and sited. This is evident in multiple photomontages and through the visual impact assessments.
- The factors or considerations relied on by the Appellant will not remedy the visual loss created by the construction and ongoing use and operation of the pinnacle centre and its associated infrastructure.

- Nor does the partial demolition of the observation shelter, even though that can be regarded as one mitigating element. It does not overcome the substantial loss of visual values associated with the pinnacle centre and cables, even if it was to be accepted that the new pathway network is generally acceptable.

409. The pinnacle centre will be directly visible from Pinnacle Road. It will be in a prominent location and in an area of high visual sensitivity. The evidence does not establish that it will avoid or sufficiently remedy or mitigate the loss of visual values. The proposal will not satisfy the requirements of performance criterion P9.1. Ground of refusal 20 is made out.

Conclusion regarding visual impact

410. Grounds of refusal 12, 13, 16, 18, 19, 20, 25 and 26 are sustained as the proposal does not meet the standards raised in the grounds.

GROUND 27 and 28 – SEWAGE

411. Ground 27 was raised by the Third, Fourth, Seventh and Ninth Parties Joined, but was not the subject of evidence called by them or submissions by them in closing. Ground 28 was raised by the Eighth Party Joined.

412. The relevant standard for sewage management are in Chapter 8-B of the Management Plan, which relates to use and development in the Pinnacle Specific Area. Ground 28 refers to Clause S1.6 of the Management Plan, but that clause does not apply to the Pinnacle Specific Area and it appears likely that the reference should be to Clause S2.6 which sets out the standards in the Pinnacle Specific Area. Issue 7(c) of Clause S2.6 relates to sewerage infrastructure. The objective set out is:

To ensure that facilities provided for the treatment and disposal of sewage are sufficient to meet the needs of the development and do not result in the loss of water quality or cause environmental harm.

413. The acceptable solution in A7.7 is that the use and development does not require sewerage facilities. The proposal will require sewerage facilities, so the acceptable solution will not be met. The proposal must be assessed against the performance criteria in P7.7:

Sewerage facilities must be designed, perform and be managed to:

- (a) Deliver an appropriate level of protection for human health and the environment;
- (b) Minimise odour nuisance to acceptable levels;
- (c) Minimise noise nuisance to acceptable levels;
- (d) Not rely on the soils for absorption of any contaminated wastes; and
- (e) Not cause landslip or erosion on the development site or other lands.

Only the elements in (a), (b) and (c) of P7.7 are raised by the grounds.

414. Dr McKenzie gave evidence for the Appellant in respect to sewerage matters. The Eighth Joined Party also provided evidence, but Dr McKenzie was the only expert to do so.
415. Dr McKenzie reviewed the sewerage and infrastructure proposal and the engineering submissions forming part of the proposal. His evidence was that sewage created at the pinnacle centre will be delivered to a holding tank located in the basement level of the building via gravity drainage and pumping. The sewage will be transferred to transportation tanks that would be transported to the base terminal by the cable car. At the base terminal the tanks would be emptied to a gravity drainage system to a sewer pump station at the site and then delivered to the public reticulated sewer system. An odour risk assessment established a higher risk given the high residence time of sewage at the pinnacle centre. This will be addressed by vent stacks with carbon filter units connected to the storage tank/pump station outlet vent, which is a common and effective method used by a sewer utility providers. Both the storage tank and wet well will be fitted with an automatic well washer unit to reduce odour generation and septicity inside the storage tanks. Dr McKenzie considered that modelling demonstrated that air quality regulations would be satisfied. In the event of spillage of sewage, bunded wash-down facilities will be provided at both the pinnacle centre and the base terminal. Dr McKenzie recommended the addition of extraction fans in the vicinity of the transfer area.
416. In cross examination, Dr McKenzie agreed that the proposal could produce 20,000 litres of sewage per day, that the maximum rate of transport of the sewage would be 10,000 litres per hour and that, due to weight considerations, when sewerage was transported no patrons could be carried by the cable car transferring the sewage. This suggests that the proponent had underestimated the logistics of sewage transport, and that as a result there might be a greater generation of septicity within the holding tanks however,
417. Dr McKenzie considered that the proposal would deliver an appropriate level of protection for human health and the environment, with odour controls by way of carbon filters for vents from the holding tank at the pinnacle centre, bunded wash-down facilities to control and remove spillage, and contingencies for pump failure with truck access for sewage removal and the use of nearby public toilets. He considered that the proposal would minimise odour omissions with vent stacks and carbon filtration to a level deemed acceptable by the Environmental Protection Authority, that and noise omissions would be minimised by using enclosures and attenuators to noisy plant and equipment. He made recommendations in respect to issues concerning the base terminal which fell outside the area of operation in the pinnacle specific area.
418. Given Dr McKenzie's evidence, the sewerage facilities will, with appropriate conditions, satisfy the performance criteria. Grounds of refusal 27 and 28 are not made out.

GROUND 29 and 30 – TRAFFIC and PARKING

419. Ground 29 relates to traffic safety and efficiency and ground 30 sufficiency of parking respectively. They were advanced by the Fifth Party Joined.

Independence and expertise of the expert witnesses

420. The only expert traffic engineer called was Mr Midson for the Appellant. Mr Midson's evidence set out his experience and qualifications as an expert in traffic matters, and he has previously been accepted by the Tribunal as an expert in traffic and parking matters.
421. Mr David Day appeared as the advocate for the Fifth Jointed Party, and also gave evidence. Mr Day's evidence included factual matters and matters of opinion in respect to traffic. The Appellant did not object to admission of Mr Day's opinion evidence on the basis of expertise, or his role as an advocate for a party, but treated those issues as matters relevant to the weight of his evidence.
422. The specialised knowledge necessary to establish expertise may derive from training, study or experience. Mr Day described his expertise as including traffic modelling for road and rail networks, without expanding on that statement. Mr Day did not describe what specialised knowledge he held in respect to traffic modelling, or how it was obtained, or how it equipped him to express evidence of opinion in respect to traffic matters. Mr Day did not provide details of the nature or extent of his experience in traffic modelling. He did not assert that he had undertaken relevant courses of study or instruction in traffic-related subjects, or had membership of relevant professional bodies, or had engaged in employment in traffic-related disciplines, or had experience in assessing traffic modelling against planning standards, or had previously been accepted as an expert in court or tribunal proceedings.
423. In *B Rees v Hobart City Council and LXN Architecture and Consulting and Anor*⁵⁸ the Tribunal observed that there is a friction between the role of an expert witness, which is to provide opinion to assist the Tribunal in reaching the correct or preferable outcome, and the role of an advocate seeking to persuade the Tribunal as to the outcome of the appeal favourable to his or her party. The Tribunal referred to *Fagenblat v Feingold Partners Pty Ltd*⁵⁹ as authority for the proposition that lack of independence of an expert does not make the expert's evidence inadmissible but is a matter to be taken into account in giving weight to the evidence.⁶⁰
424. Although Mr Day's conduct as an advocate was entirely appropriate and his evidence was carefully and succinctly presented, given the absence of evidence of his expertise and his lack of independence, where his evidence conflicted with Mr Midson's in matters of expert opinion Mr Midson's evidence, where properly founded, has been preferred.

Traffic safety and efficiency

⁵⁸ [2021] TASRMPAT 30 at [12]

⁵⁹ [2001] VSC 454

⁶⁰ The decision of Pagone J in *Fagenblat v Feingold Partners Pty Ltd* was overturned on appeal, but the Court of Appeal confirmed that His Honour's ruling on this point was correct: *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33 at [3]-[30]

425. Ground 29 invokes Clause E5.5.1 P3 of the Scheme. That clause falls within the Traffic and Railway Assets Code in Part E5.0 of the Scheme.

426. The Code is invoked by triggers identified in Clause E5.2.1:

E5.2.1 This Code applies to use or development of land:

- (a) That will require a new vehicle crossing, junction or level crossing; or
- (b) That intensifies the use of an existing access; or
- (c) That involves a sensitive use, a building, works or subdivision within 50m metres of a Utilities Zone that is part of:
 - i. a rail network
 - ii. a category 1 – Trunk Road or category 2 Regional Freight Road, that is subject to a speed limit of more than 60km/h kilometres per hour.

427. Clause E5.5.1 A3 and P3 relate to increase in vehicle traffic at an existing access or junction and provide:

E5.5.1 Existing road accesses and junctions

A3	P3
<p>The annual average daily traffic (AADT) of vehicle movements, to and from a site, using an existing access or junction, in an area subject to a speed limit of 60km/h or less, must not increase by more than 20% or 40 vehicle movements per day, whichever is the greater.</p>	<p>Any increase in vehicle traffic at an existing access or junction in an area subject to a speed limit of 60km/h or less, must be safe and not unreasonably impact on the efficiency of the road, having regard to:</p> <ul style="list-style-type: none"> (a) the increase in traffic caused by the use; (b) the nature of the traffic generated by the use; (c) the nature and efficiency of the access or the junction; (d) the nature and category of the road; (e) the speed limit and traffic flow of the road; (f) any alternative access to a road; (g) the need for the use; (h) any traffic impact assessment; and (i) any written advice received from the road authority.

428. ‘Vehicle Crossing’ is not defined in the Scheme. Iterations of the Scheme from 22 February 2021 incorporate amendments resulting from Interim Planning Directive number 4 which introduced a definition of ‘vehicle crossing’ as meaning “a driveway for vehicular traffic to enter or leave a road carriageway from land adjoining a road”. That definition was included in the general definitions in

Clause 4.1.3 of the subsequent iterations of the Scheme, with no consequential amendment made to the Road and Railway Assets Code as a result of the insertion of the definition. There is no indication in the context or surrounding provisions of Clause E5.2.1(a) to indicate that vehicle crossing has any other meaning.

429. A 'junction' is defined by E5.3.1 as meaning "an intersection of two or more roads at common level, including intersections of on and off ramps and grade-separated roads".
430. 'Access' is defined in clause 4.1.3 as meaning "land over which a vehicle enters or leaves a road from land adjoining a road". It must be something different to a vehicle crossing.
431. Clause E5.5.1 deals with the effect on safety and efficiency of existing road accesses and junctions where the Code is invoked. Clause E5.6.2 contains similar provisions in respect to maintaining safety and efficiency of roads in respect to the creation of new accesses and junctions. The two clauses read together cover the field in respect to the effect on safety and efficiency of roads arising from new accesses and junctions and increased use of existing accesses and junctions.
432. The Road and Railway Assets Code will be triggered by the proposal because it will require a new vehicle crossing at the base station.

Does the standard in Ground 29 arise for assessment?

433. Notwithstanding that the Code will be triggered by the proposal, the Appellant says that application of two decisions of the Resource Management and Planning Appeal Tribunal (RMPAT) would mean that Clause E5.5.1 does not arise for consideration.
434. In *South Hobart Progress Association v Hobart City Council and Giameos*⁶¹ RMPAT determined that assessment against Clause E5.5.1 is only invoked where a development includes a new junction.
435. *Giameos* was applied by the Tribunal in *Paterson & Others v Hobart City Council and Tasmania Wild Experience Pty Ltd*.⁶² In that case RMPAT expressly dealt with, and rejected, a submission that Clause E5.5.1 applied where a proposal included a new vehicle crossing. It determined that, while a new vehicle crossing will trigger the Code, it will not do so in respect to consideration of the effect of increased traffic at a junction in terms of impact and efficiency.
436. For reasons of comity, and in the absence of comprehensive submissions that *Paterson & Others v Hobart City Council and Tasmania Wild Experience Pty Ltd* and *South Hobart Progress Association v Hobart City Council and Giameos* were not correctly decided, the Tribunal finds that Clause E5.5.1 A3 and P3 are not invoked by the proposal.

⁶¹ [2017] TASRMPAT 5

⁶² [2020] TASRMPAT 24 at [19] to [24]

437. Accordingly, ground of refusal 29 should be dismissed.

Assessment of Ground 29 if Clause E5.5.1 P3 applies to the proposal

438. If the Tribunal's application of *Giameos* and *Paterson* is wrong and the performance criterion is invoked, the ground of refusal is not made out, for the following reasons.

439. If Clause E5.5.1 A3 arises for assessment, it was common ground that the proposal would not meet it, and would require assessment against the performance criterion P3.

440. P3 directs the Tribunal to safety and impact on the efficiency of a road in connection with increase in vehicle traffic at an existing access or junction. It requires the Tribunal to have regard to certain listed matters. The requirement to have regard to those matters does not elevate them to individual mandatory requirements that the proposal must satisfy.⁶³ The Tribunal need only consider them in ascertaining whether the proposal complies with the performance criterion.

441. Clause E5.5.1 provides use standards that relate to existing road accesses and junctions. There is no existing access as defined relevant to the proposal. Traffic to the base station will use McRobies Road. That road exists within a well-established built-up area. The performance criteria will not require assessment against every junction within that area as many will be unaffected. Assessment would only be required in respect to junctions which are affected by an increase in vehicle traffic.

442. Mr Midson considered that the only relevant junction requiring assessment against the performance criteria would be the McRobies Road roundabout, as the proposal would intensify the use of an existing leg of that roundabout.

443. Mr Midson's analysis in respect to each of the paragraphs of P3(a) to (i) was:

- Estimated increased traffic generation in the order of up to 555 vehicle movements per day with a peak increase of up to 107 vehicles per hour. He considered that could be absorbed in the surrounding road network without any significant loss of efficiency and that the roundabout at McRobies Road provided an efficient traffic control device to cater for development traffic and existing refuse site traffic.
- The proposal would generate tourist traffic which would be consistent with traffic in the surround road network, noting other nearby tourist attractions such as the Female Factory and Cascade Brewery.
- The existing traffic flows at the roundabout are in the order of 130 vehicles per hour on a two-way flow, with all traffic currently travelling to and from the waste management facility.

⁶³ *S & S McElwaine and A Hamilton v West Tamar Council and Growth Developments Pty Ltd* [2021] TASCAT 4 at [28]

The introduction of up to 107 vehicle per hour on the access road of the roundabout would maintain a higher level of service for the intersection with relatively balanced flows on all three legs of the roundabout. The additional traffic flow generated by the proposal would be well within the capacity of the roundabout.

- McRobies Road is a minor collector road that plays an important role in access to the waste management site as well as other key destinations including the Female Factory, Childcare Centre, commercial sites and residential properties and the additional traffic generated by the proposal will not increase traffic flow beyond its existing capacity.
- The speed limit of McRobies Road is 50kph. The existing traffic volumes are estimated to be in the order of 1,300 per day near the junction. The speed and volume environment of McRobies Road is suitable for the increase in traffic generated by the proposed development.
- No alternative access was considered required.
- Mr Midson did not assess the need for the use.
- Mr Midson prepared a traffic impact assessment for the proposal which the requirements of P3 were met.
- Concerns raised by the Hobart City Council as the local road authority concerning the existing geometry of the roundabout have resulted in a revised layout of the approach leg from the base station to the roundabout.

444. Mr Midson's conclusion was that the proposal meets the requirements of P3.

445. Mr Day's major point of contention with Mr Midson's assessment was the catchment of intersections considered by him. His concerns included the safety of cyclists and pedestrians crossing McRobies Road at the intersection with Degraeves Street, the effect of traffic turning left from Apsley Street into Degraeves Street and the geometry of the intersection of Apsley Street and Cascade Road for turning traffic.

446. Mr Midson did not consider that a wider catchment of intersections was required, but for completeness he undertook an assessment of the intersections of Cascade Road and McRobies Road, McRobies Road and Degraeves Street, Degraeves Street and Apsley Street, and Apsley Street and Cascade Road and concluded that the performance criteria were met. His assessment essentially reflects his assessment of the McRobies Road roundabout, although the wider junctions will experience even less impact. All those junctions have one-way flows on one or more road approaches resulting in the intersections operating at a higher level of efficiency that would comfortably absorb the peak increase of 54 one-way vehicle movements per hour.

447. There is no defect in the matters underlying Mr Midson’s opinion or his reasoning such that his evidence in respect to compliance with the performance criteria should not be accepted. For the reasons noted above, his opinions on safety and efficiency should be preferred to any contrary opinion advanced by Mr Day.

448. The proposal would satisfy the performance criteria P3.

Parking sufficiency

449. Ground 30 raises compliance with Clause E6.6.1 of the Scheme. Clause E6.6.1 falls within the Parking and Access Code in Clause 6.0 of the Scheme. It relates to the number of car parking spaces required by a development.

450. Clause E6.6.1 provides:

E6.6.1 Number of Car Parking Spaces

Objective:	
To ensure that:	
<p>(a) there is enough car parking to meet the reasonable needs of all users of a use or development, taking into account the level of parking available on or outside of the land and the access afforded by other modes of transport.</p> <p>(b) a use or development does not detract from the amenity of users or the locality by:</p> <p>(i) preventing regular parking overflow;</p> <p>(ii) minimising the impact of car parking on heritage and local character.</p>	
Acceptable Solutions	Performance Criteria
<p>A1</p> <p>The number of on-site car parking spaces must be:</p> <p>(a) no less than and no greater than the number specified in Table E6.1;</p> <p>except if:</p> <p>(i) the site is subject to a parking plan for the area adopted by Council, in which case parking provision (spaces or cash-in-lieu) must be in accordance with that plan;</p>	<p>P1</p> <p>The number of on-site car parking spaces must be sufficient to meet the reasonable needs of users, having regard to all of the following:</p> <p>(a) car parking demand;</p> <p>(b) the availability of on street and public car parking in the locality;</p> <p>(c) the availability and frequency of public transport within a 400m walking distance of the site;</p>

<p>(ii) the site is subject to clauses E6.6.5, E6.6.6, E6.6.7, E6.6.8, E6.6.9 or E6.6.10 of this planning scheme.</p>	<ul style="list-style-type: none"> (d) the availability and likely use of other modes of transport; (e) the availability and suitability of alternative arrangements for car parking provision; (f) any reduction in car parking demand due to the sharing of car parking spaces by multiple uses, either because of variation of car parking demand over time or because of efficiencies gained from the consolidation of shared car parking spaces; (g) any car parking deficiency or surplus associated with the existing use of the land; (h) any credit which should be allowed for a car parking demand deemed to have been provided in association with a use which existed before the change of parking requirement, except in the case of substantial redevelopment of a site; (i) the appropriateness of a financial contribution in lieu of parking towards the cost of parking facilities or other transport facilities, where such facilities exist or are planned in the vicinity; (j) any verified prior payment of a financial contribution in lieu of parking for the land; (k) any relevant parking plan for the area adopted by Council; (l) the impact on the historic cultural heritage significance of the site if subject to the Local Heritage Code; (m) whether the provision of the parking would result in the loss, directly or indirectly, of one or more significant trees listed in the Significant Trees Code.
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451. The acceptable standard AI requires that a development provide a certain number of spaces determined according to a formula set out in Table E6.1. It was not disputed that compliance of the proposal with AI would require the proposal to provide 62 spaces.⁶⁴
452. The proposal would provide a total of 52 spaces at the base station along with parking for 7 mini buses and 3 coaches. Therefore, it does not meet the acceptable solution and requires assessment against the performance criteria PI.
453. Mr Midson's assessment of the proposal against the paragraphs in PI included:
- In respect to PI(a), he noted that the parking demand associated with the base station will reflect two cable cars with capacity for up to 40 people that take 15 minutes to ascend or descend, such that every 15 minutes there would be a maximum of 40 people boarding and disembarking from a cable car. A car occupancy survey undertaken by Mr Midson indicates an average occupancy of 3 people per vehicle travelling to the summit. Passengers will arrive by minibus and coach as well as car, but if all passengers arrived by car then a full cable car would result in the arrival of up to 13 cars. Mr Midson has assumed an average stay on the summit of 30 minutes resulting in a total journey duration of one hour including travel time. On this basis he estimated that there may be a parking accumulation equivalent to four cable cars of people at any one time. On a worst case scenario where all cable cars were at capacity and all passengers arrive by car this would equate to a parking accumulation of 53 cars. Mr Midson considered it reasonable to add an additional 20 people to account for early arrivals for the next cable car and slow departures giving a peak demand of 60 spaces. He noted that the parking provision of 52 spaces is less than that theoretical peak demand but considered that the use of bus and coach transport to the base station would reduce car parking demands. He also observed that not all cable cars would be at capacity throughout the day.
 - In respect to PI(b), the new access road to the base station would have sufficient width to permit occasional overflow parking at the base station.
 - In respect to PI(c), there are no public transport services that service the area. The proponents would actively encourage the use of bus transport to and from the base station.
 - In respect to PI(d), some pedestrian and cyclist customers may be generated, particularly with upgraded tracks in the area of the base station.

⁶⁴ Per Table E6.1: 32 spaces for the restaurant based on 1 space for each 3 seats and 30 spaces for the transport depot based on 3.5 spaces per 100 metres square floor area.

- In respect to PI(e), no alternative parking arrangements would be necessary, given the provision of parking and the anticipated demand.
- In respect to PI(f), parking demands associated with the café would be met by the cableway parking provision given that access to the café would be via the cableway.

Mr Midson considered that PI(g), (h), (i), (j), (k), (l) and (m) do not apply in the circumstances. He suggested in cross-examination that overflow parking would be available on the access road, but there was no evidence that parking bays had been included in the road plans and no evidence in respect to the safety and efficiency of relying on parking on the access road.

454. The Fifth Joined Party disputed Mr Midson's conclusions, particularly in respect to his estimate of 3 people per car, preferring a lower occupancy of 2.2 people per car based on a survey undertaken by Mr Day. That would increase the number of cars for a full cable car load of 40 persons by five cars, if every person arrived by car. On Mr Midson's worst case scenario this might see a further 20 cars at peak periods. The Fifth Joined Party's analysis focussed on parking demand in connection with cars and did not take into account customers arriving by minibus or coach. Mr Midson's estimate of the likely period of stay was also challenged.
455. Car occupancy and length of stay are both matters of conjecture. The surveys were not undertaken over extended periods or at different times of year or seasons. They measure cars on the Pinnacle Road, some of which might not travel to the summit. They are at best a guide to demand and ought not to be applied as a formula.
456. The Fifth Joined Party pointed out that the base station parking area could be used as a hub for bushwalkers and mountain bike riders, so reducing the parking available for passengers on the cableway. Insofar as the unauthorised conduct of third parties might be taken into account in assessing the proposal against the standard, and the Tribunal makes no finding in that regard, the use of its parking area by non-patrons is a matter that the proponent would have an incentive to police, and could be addressed by conditions, such as a parking management plan.
457. As noted above, having regard to the matters listed in PI does not mean applying them as individual standards. The matter to be determined is whether the number of on-site car parking spaces must be sufficient to meet the reasonable needs of users of the cableway.
458. On balance, taking into account the provision for access to the base station by mini bus and coach, the lack of other demands on parking in the locality of the base station given its relative isolation and the likelihood that the cableway will not constantly operate at capacity, the Tribunal accepts Mr Midson's assessment of the performance criteria and finds that the number of onsite car parking spaces will be sufficient to meet the reasonable needs of users of the cableway.
459. Ground of refusal 30 is not made out.

DETERMINATION and ORDERS

460. The enlarged grounds of refusal 3, 4, 8, 9, 10, 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 24, 25, and 26 are made out. The appeal should be dismissed.
461. Accordingly, the decision of the Council to refuse a permit for the proposal should be affirmed, and consequently the orders of the Tribunal are:
1. The decision of the Hobart City Council made 27 July 2021 to refuse a permit for application PLN-19-345 is affirmed.
 2. Any application for an order for costs in this appeal is to be made in writing with supporting submissions within the next 21 days. In the absence of any such application supported by submissions being so filed the order of the Tribunal is that each party bear its own costs.