IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
VALUATION, COMPENSATION & PLANNING LIST

Not Restricted

S CI 2016 00878

SPIRE GROUP PTY LTD — Applicant

v

MONASH CITY COUNCIL — Respondent

JUDGE:	EMERTON J
WHERE HELD:	Melbourne
DATE OF HEARING:	19 August 2016
DATE OF JUDGMENT:	20 December 2016
CASE MAY BE CITED AS:	Spire Group Pty Ltd v Monash City Council
MEDIUM NEUTRAL CITATION:	[2016] VSC 801

PLANNING & ENVIRONMENT – Application for leave to appeal and appeal from the Victorian Civil and Administrative Tribunal under s 148(1)(a) of the *Planning and Environment Act 1987* (Vic) – Application for planning permit to develop former school site for residential purposes – Development Plan Overlay applicable – Requirement to submit landscaping plan as a component of the development plan – Whether landscaping plan must show the retention of trees identified in a reference document – Whether provision is authorised by the parent provision – Status of incorporated and reference documents – Leave to appeal granted – Appeal allowed – *Interpretation of Legislation Act 1984* (Vic) s 32 – *Planning and Environment Act 1997* (Vic) s 6(1)(j).

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr S Morris QC	Minter Ellison
For the Respondent	Mr C Wren QC	Maddocks

HER HONOUR:

Introduction

1 The applicant ('Spire') proposes to develop the site of the former Clayton West Primary School for residential purposes.

2 The land in question is at 10 Alvina Street, Oakleigh South, Victoria. It is zoned General Residential under the Monash Planning Scheme. A Development Plan Overlay applies to the land. The effect of the Development Plan Overlay is that, prior to the development of the land, a development plan must be prepared to the satisfaction of the responsible authority. Any permit for development must be generally in accordance with the development plan.

3 The subject land was sold as part of what was described as the 'DEECD Surplus Land Rezoning Project – Tranche 1'. This involved the sale of a number of former school sites and the rezoning of the land to residential. For this purpose, the Minister for Planning established a standing advisory committee to advise on the suitability of the proposed rezoning of the school sites. The advisory committee prepared a report dated 22 November 2013 recommending, among other things, that a development plan overlay apply to all former school sites.

4 The Development Plan Overlay is cl 43.04 of the Monash Planning Scheme. Clause 43.04-1 provides that a permit must not be granted to use or subdivide land, construct a building or carry out works until a development plan has been prepared to the satisfaction of the responsible authority. Any permit granted must be generally in accordance with the approved development plan and include conditions or requirements specified in the schedule to the Overlay.

5 Clause 43.04-3 provides for a development plan to consist of plans or other documents. A development plan providing for residential subdivision in, relevantly, a General Residential Zone, must meet the requirements of cl 56 as specified in the Zone. Clause 43.04-3 then provides:

> A development plan must describe:

- The land to which the plan applies.
- The proposed use and development of each part of the land.
- Any other requirements specified for the plan in the schedule to this overlay.

6 Schedule 5 to the Development Plan Overlay applies to the subject land and three other former school sites. Clause 3.0 of Schedule 5 sets out the requirements for a development plan including 'development plan components'. Clause 3.0 provides that a development plan must be prepared for the whole site and should, among other things, incorporate any significant native vegetation into the design of the development. As to 'components', cl 3.0 stipulates that the development plan must include certain 'information'. This information is specified in a number of bullet points and includes an existing conditions plan, concept plans for various things, a traffic management report and car parking plan, a risk assessment detailing the risk of landfill gas migration, noise attenuation measures and, relevantly –

- A landscaping plan which:
  - Shows the landscape concept for the site.
  - Incorporates any significant vegetation including trees rated as 'moderate' or 'high' in the 2013 Tree Logic assessment.

7 I shall refer to the bullet point referring to the 2013 Tree Logic assessment as the 'contentious bullet point'.

8 The '2013 Tree Logic assessment' referred to in the contentious bullet point is not defined or otherwise explained in the Monash Planning Scheme. However, the advisory committee referred to the '2013 Tree Logic assessment' in its report, recommending that the words that appear in the contentious bullet point be included in Schedule 5.

9 Schedule 5 applies to four former school sites. Accordingly, whatever requirement is imposed by the contentious bullet point applies to all four school sites.

10 However, the 2013 Tree Logic assessment applicable to the subject land is only applicable to that land. It is dated 19 April 2013 and described as an 'Arboricultural

Assessment' of 10 Alvina Street, Oakleigh South, prepared for the Department of Education and Early Childhood Development by David Phillips. This particular 2013 Tree Logic assessment identified a population of 83 trees of 34 different species on the subject land, of which four were rated as 'high' and 28 as 'moderate' having regard to their potential for retention. The 2013 Tree Logic assessment recommended that these trees be considered for retention and protection over trees of low or no arboricultural value in any redevelopment of the site.

11 In January 2015, Spire submitted a development plan to the Monash City Council. Spire's development plan included a landscaping plan prepared by Tract Consultants which did not show as retained the 28 trees rated as 'moderate' in the 2013 Tree Logic assessment. The Council refused to approve Spire's development plan, stating that it had no power to approve the Tract landscaping plan because it did not show as retained all the trees rated as 'high' and 'moderate' in the 2013 Tree Logic assessment.

12 Spire sought review of the Council's decision in the Victorian Civil and Administrative Tribunal pursuant to s 149(1)(a) of the *Planning and Environment Act 1987* (Vic).

13 On 29 October 2015, the Tribunal ordered that there be a preliminary hearing to consider, among other things,[1] whether the landscaping plan prepared by Tract Consultants complied with cl 3.0 of Schedule 5 to the Development Plan Overlay.

14 At the preliminary hearing, Spire contended that the 2013 Tree Logic assessment did not form part of the Monash Planning Scheme and could not therefore impose any requirements on the development of the subject land. It argued in the alternative that even if the 2013 Tree Logic assessment formed part of the Planning Scheme, cl 3.0 of Schedule 5 could not be interpreted as requiring the landscaping plan to show as retained trees rated as 'moderate' or 'high' in the 2013 Tree Logic assessment.

15 On 10 February 2016, the Tribunal held that '[t]he landscape plan prepared by Tract

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1 The Tribunal was also asked to consider as a preliminary matter whether a Cultural Heritage Management Plan under the *Aboriginal Heritage Act 2006* (Vic) was required. The answer given to that question is not the subject of this application.

consultants (forming part of the proposed Development Plan which Spire seeks approval of) does not comply with the requirements of Schedule (sic) 3.0 of Schedule 5 of the Development Plan Overlay'.[2]

16 The Tribunal held that the Development Plan Overlay as a whole pointed to a mandatory requirement that the landscape plan show not merely the location but also the retention of the 28 trees rated as having a 'moderate' value.[3]

Proposed grounds of appeal

17 The questions of law identified in the proposed Notice of Appeal are as follows:

(a) Whether the Tribunal has jurisdiction to determine the validity of provisions of the Monash Planning Scheme;

(b) Whether the 2013 Tree Logic assessment is validly incorporated into the Monash Planning Scheme; and

(c) Assuming that the 2013 Tree Logic assessment is validly incorporated, whether cl 3.0 of Schedule 5 imposes a mandatory requirement that any proposed development plan include a landscape plan retaining any significant vegetation, including trees rated as 'moderate' or 'high' in the 2013 Tree Logic assessment.

18 The second and third questions of law were reformulated at the hearing to raise the following issues:

(1) What meaning, if any, can be ascribed to a provision of a planning scheme that refers to an extraneous document (the 2013 Tree Logic assessment) when the Monash Planning Scheme makes it clear that the document is not part of the Scheme? More specifically, can the 2013 Tree Logic assessment be relied upon to mandate the content of a development plan under the Development Plan

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2 *Spire Group Pty Ltd v Monash City* Council [2016] VCAT 152 (10 February 2016) 1.
3 *Spire Group Pty Ltd v Monash City* Council [2016] VCAT 152 (10 February 2016) ('*Reasons*') [51].

Overlay?

(2) Assuming that the 2013 Tree Logic assessment can be given effect as if it were incorporated into the Scheme, does it mandate the content of the development plan under the Development Plan Overlay?

Analysis

19 The reformulation of the questions of law recognises that the Court must now construe the Planning Scheme provisions. The proposed appeal turns on the proper construction of the Development Plan Overlay and Schedule applicable to the subject land. The question of the Tribunal's jurisdiction to determine that a planning scheme provision is invalid falls away. Furthermore, it is uncontroversial that the 2013 Tree Logic assessment is not an incorporated document in the Monash Planning Scheme. The Tribunal did not base its decision on the 2013 Tree Logic assessment being an incorporated document.

20 Spire submits that the Tribunal should have interpreted Schedule 5 without giving any effect to the 2013 Tree Logic assessment in order to adopt an interpretation that was within legislative power. It submits that the contentious bullet point must be read down by deleting the final words, 'including trees rated as "moderate" or "high" in the 2013 Tree Logic assessment'. The landscaping plan that is a component of the development plan must simply show 'the landscape concept for the site' and 'incorporate any significant vegetation'.

21 Spire's complaint is that the Tribunal's holding that the development plan must show as retained all trees rated as 'moderate' or 'high' in the 2013 Tree Logic assessment means that a document that is not part of the Monash Planning Scheme dictates in a highly prescriptive way how the subject land can be developed. Spire submits further that even if the 2013 Tree Logic assessment formed part of the Monash Planning Scheme, Schedule 5 must be interpreted so as not to go beyond what is provided for in the Development Plan Overlay. On the proper construction of cl 43.04 and Schedule 5, the landscaping plan is 'information' that the development plan must 'describe',

and the 2013 Tree Logic assessment cannot dictate the content of the development plan.

22 Both of these grounds are based on the proposition that, on the Tribunal's construction of the contentious bullet point, the 2013 Tree Logic assessment impermissibly 'dictates' or 'mandates' the content of the development plan.

23 I have had regard to the 2013 Tree Logic assessment applicable to the subject land and, in particular, to Appendix 2, which is an aerial photograph of the subject land showing numbered trees and their locations. I have identified the location of each of the 32 trees rated as 'moderate' and 'high'. The trees in question are scattered across the subject land. The mandatory retention of all of these trees would preclude the form of medium density residential development that is proposed. In that sense, if the Tribunal's construction is correct, the 2013 Tree Logic assessment will dictate how the subject land can be developed. A requirement to retain all 32 trees rated as 'moderate' or 'high' in the 2013 Tree Logic assessment is a significant impediment to the development of the subject land.

24 It is also a requirement that is not in keeping with stated purpose of the 2013 Tree Logic assessment itself, and which is anomalous having regard to the other vegetation protection controls in the Monash Planning Scheme.

25 The 2013 Tree Logic assessment relevant to the subject site describes itself as a 'pre-development arboricultural inspection report' to provide 'planners and designers with information on the measures required to protect trees suitable to be retained.' It states further that:

> In the absence of formal design plans, it is not appropriate to speculate on which trees are most appropriate for retention beyond the general guide provided by the arboricultural ratings attributed to each tree feature.

26 It goes on to recommend that the trees of high or moderate arboricultural value 'be considered' for retention or protection over trees of low or no arboricultural value. It follows that individual trees rated as 'moderate' or 'high' are not necessarily marked for retention by the 2013 Tree Logic assessment itself.

27 Moreover, the trees rated as 'moderate' or 'high' in the 2013 Tree Logic assessment are not necessarily significant native vegetation that 'should' be retained in the development plan in accordance with the first part of cl 3.0 in Schedule 5.

28 Absent the contentious bullet point, most of the trees in question enjoy no protection under the Monash Planning Scheme. The General Residential Zone has no tree controls. Aside from three trees that are Victorian native trees,[4] Spire could have lawfully removed the trees before applying for a development plan. It could still do so at any time. If a Vegetation Protection Overlay had been the control used to protect the trees, Spire could have sought a permit to remove them, a possibility that has been foreclosed in the contentious bullet point.

29 In these circumstances, on the Tribunal's construction of the contentious bullet point, the importance attributed to the 2013 Tree Logic assessment is disproportionate to the significance of the trees as reflected in the vegetation protection controls elsewhere in the Monash Planning Scheme. There is a disconnect between the contentious bullet point (as construed by the Tribunal) and the vegetation protection measures contained in the other Planning Scheme controls.

30 It is uncontroversial that the 2013 Tree Logic assessment is not an incorporated document in the Monash Planning Scheme. The sole mechanism for incorporation is to list the document in the table under cl 81.01 of the Monash Planning Scheme via an amendment to the Scheme. The 2013 Tree Logic assessment has not been listed under cl 81.01 and is therefore not an incorporated document.

31 Both Spire and the Council submit that the 2013 Tree Logic report should be regarded as a 'reference document'. As such, it does not form part of the Planning Scheme. Moreover, as is explained in Planning Practice Note 13,[5] reference documents 'have

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4 The Victorian native trees are subject to the state-wide control on removing Indigenous vegetation in cl 52.17 of the Scheme. That control does not normally apply to urban land in Melbourne. However, it does where the land is over 0.4 hectares.

5 Department of Environment, Land, Water and Planning, *Planning Practice Note No 13, Incorporated and Reference Documents*, June 2015. Among other things, the Practice Note states:

> Planning schemes should be transparent and complete in terms of policies and provisions that are relied upon to make decisions about planning matters.

only a limited role in decision-making as they are not part of the planning scheme. They do not have the status of incorporated documents or carry the same weight.'

32 Spire submits that as the 2013 Tree Logic assessment is not part of the Monash Planning Scheme and carries limited weight, it cannot dictate how the subject land is developed. It does not and cannot create a mandatory requirement to retain the trees in question in any development plan.

33 The Council submits that while afforded less weight than incorporated documents, reference documents nonetheless have status in the Planning Scheme. There have been a number of cases in which the Tribunal has considered the status of reference documents and held them to be of importance for the use and development of the land.

34 In *Queensberry Hotel Pty Ltd v Minister for Planning and Community Development*,[6] the Tribunal considered the status of a masterplan that was not incorporated into the planning scheme, notwithstanding that the schedule to the Comprehensive Development Zone of the Melbourne Planning Scheme required the use and development of land to be undertaken in accordance with the masterplan. The Tribunal said:[7]

> Schedule 2 and the incorporated CDP contemplate, and specifically refer to, another planning document entitled Carlton CUB Brewery Masterplan October 2007 (the masterplan). The masterplan is a reference document referred to in the planning scheme, but it is not, of itself, an incorporated document. Nevertheless, it is clearly of importance in relation to the future use and development of the CUB site and the review site in relation to the present case.
>
> It is possible that this masterplan might be altered or abandoned, but the same could be said of the CDP or, indeed, Schedule 2. It is just that the CDP or Schedule 2 would probably require an amendment to the planning scheme if they were to be amended or revoked. In so far as these documents refer to the masterplan, they must mean the masterplan in its current form. It appears that an alteration to the masterplan would call for recognition in the CDP and

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> ...
> One of the benefits of incorporating documents into the planning scheme is that the document carries the same weight as other parts of the scheme.

6 [2013] VCAT 444 (21 March 2013).

7 Ibid [32]-[33].

> Schedule 2. On that basis an amendment to the masterplan may call up the need for amendment to the planning scheme.

35 As to the interaction between the various documents, the Tribunal said:[8]

> Schedule 2 is in the planning scheme. The CDP is an incorporated document in the planning scheme and is therefore part of the planning scheme. The masterplan is a reference document and not formally an incorporated document. However its status is more than merely something that can be referenced to a background. It is de facto expressly incorporated in the CDP and, indeed, in the second schedule in the scheme.
>
> All this conveys an unmistakable message. Schedule 2 and the CDP are parts of the planning scheme. They are firmly locked to each other and to the masterplan. There is an advanced and complex degree of strategic planning found in these interlocked documents.

36 In *Cherry Tree Windfarm Pty Ltd v Mitchell SC*,[9] the Tribunal was asked to consider what weight to give to the 'Policy and Planning Guidelines for the development of Wind Energy Facilities in Victoria, July 2012'. The question arose because the status of that document had been changed from an incorporated document to a reference document. The Tribunal said:[10]

> This question is not so much answered as sidestepped by the specific inclusion of the Guidelines as a decision guideline in clause 52.32-5. In our view this elevates the status of the Guidelines beyond that it would have as either an incorporated document or a reference document that is not specifically identified as a decision guideline.

37 In this case, the 2013 Tree Logic assessment is not 'de facto expressly incorporated' in the Monash Planning Scheme or 'elevated' by inclusion in the decision guidelines for the Development Plan Overlay. It appears in a single instance at the end of a schedule describing the components of a development plan.

38 The Council also pointed a number of other bullet points under 'components' in cl 3.0 that make reference to external documents. The third last bullet point refers to 'EPA Publication 788.1' in relation to landfill management; the fourth last bullet point refers to the Site Development Management Plan developed by Prensa in its report dated August 2013. So far as I can tell, neither of these is an incorporated document in that

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8 Ibid [46]-[47].
9 [2013] VCAT 521 (4 April 2014).
10 Ibid 52.

neither appears in the Table to cl 81.01 or in the table in the Schedule to cl 81.01. However, neither document appears capable of dictating the content of the development plan: the third last bullet point requires a risk assessment in regard to landfill gas to be carried out having regard to the EPA guidelines; the fourth last bullet point requires the information to include plans to implement another plan, being the Prensa site development plan.

39 In any event, the fact that unincorporated documents are regularly referred to in planning schemes does not remove the need for clarity about what is in the planning scheme and what is required by it. The provision made for the incorporation of documents by the planning scheme and in the legislative framework within which it operates serves this end. That provision should not be by-passed simply for the sake of convenience. It carries important legal consequences.

40 The Tribunal saw 'nothing fatal' in the fact that cl 3.0 referred to the 2013 Tree Logic assessment in circumstances where that document was not expressly made part of the Monash Planning Scheme.[11] It observed that there was 'some degree of flexibility' in planning scheme cross-referencing to other documents and as to how such documents would operate, and that their contents varied over time without the need to formally vary the planning scheme.[12] The practical application of the reference to the 2013 Tree Logic assessment was 'straightforward' and the contentious bullet point did no more nor less than to require the 32 relevant trees listed in the 2013 Tree Logic assessment to be incorporated in the landscaping plan put forward for approval as part of the proposed development plan.[13]

41 The Tribunal described Spire's submissions on the status of the 2013 Tree Logic assessment 'excessively rigid and legalistic'. It said that an interested person could readily get a copy of the 2013 Tree Logic assessment from the Council or Tract Consultants, 'who are reputable consultants well known in the planning industry'.[14]

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11 Reasons [27].
12 Reasons [29].
13 Reasons [33].
14 Reasons [30].

42 In my view, this is no answer to the concerns about the lack of certainty and transparency arising from the Tribunal's construction of the contentious bullet point. If, as the Tribunal held, the 2013 Tree Logic assessment effectively governs the development of the subject land, the status and whereabouts of the 2013 Tree Logic assessment ought to be abundantly clear. It should be publicly available so that members of the public, not just members of the planning industry, can inspect it.

43 Section 32(3) of the *Interpretation of Legislation Act 1984* (Vic) imposes special requirements of this kind for external documents that are incorporated in, or adopted or applied by subordinate instruments such as a planning scheme. Pursuant to s 32(3)(a), a document applied, adopted or incorporated in a subordinate instrument must be lodged with the Clerk of the Parliament and notice of it must be published in the Government Gazette. The notice must be laid before both Houses of Parliament. Pursuant to s 32(3)(b), the document must then be kept available for inspection by members of the public in a designated place.

44 Needless to say, the 2013 Tree Logic assessment has not been treated in this way. Importantly, it is not available for inspection by members of the public in accordance with s 32(3)(b) of the Interpretation of Legislation Act. While s 32(5) provides that a failure to comply with these requirements does not affect the validity, operation or effect of the subordinate instrument, it must influence the Court's approach to the importance given to the 2013 Tree Logic assessment and the tree ratings contained therein.

45 Spire contends that if meaning is given to the contentious words, 'including trees rated as "moderate" or "high" in the 2013 Tree Logic assessment' in circumstances where the 2013 Tree Logic assessments are not incorporated documents, the contentious bullet point is both void for uncertainty and contrary to the clear intent of the Planning Scheme. The intent of the Planning Scheme is that documents forming part of the planning controls be incorporated in, or adopted or applied by the Planning Scheme.

46 I agree that if the contentious bullet point requires the retention of all trees rated

'moderate' or 'high' in the 2013 Tree Logic assessment, it is contrary to intent of the arrangements in the Interpretation of Legislation Act, the Planning and Environment Act and the Planning Scheme for the incorporation of external documents. The contentious bullet point must be 'read down' in the manner contended for by Spire. A document that forms no part of the Planning Scheme cannot dictate how land may be used or developed.

47 However, I am not persuaded that giving meaning to the contentious words requires the retention of all trees rated 'moderate' or 'high' in the 2013 Tree Logic assessment. If it is possible to construe the contentious bullet point consistently with the Planning Scheme and the legislative framework within which it operates without reading it down so as to remove the contentious words, that is the construction that should be preferred.[15]

48 Spire made extensive submissions on the construction of the Development Plan Overlay and Schedule. It submits that the language and structure of cl 43.04 and Schedule 5 show that the contentious bullet point does not require the retention of the trees in the development plan. As the contentious bullet point is in a schedule to the Development Plan Overlay, it cannot exceed the scope of its parent provision in the Development Plan Overlay; it is confined to 'information' that the development plan must 'describe'. According to Spire, it would violate the Monash Planning Scheme to allow the contentious bullet point to dictate the content of the development plan for which the parent provision provides.

49 Spire therefore submits that, as a matter of construction, there is no barrier to the approval of a development plan in which not all the trees identified as being of either high or moderate value in the 2013 Tree Logic assessment are retained. That is not to say that the 2013 Tree Logic assessment is irrelevant. It would still be relevant to consider the 2013 Tree Logic assessment in determining whether the any development

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15 A court construing a provision must strive to give meaning to all the words in a provision: *Maroondah City Council v Fletcher and Another* (2009) 169 LGERA 407, Warren CJ and Osborn AJA citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71].

plan should be approved as a matter of discretion.

50 I agree that Schedule 5 is subservient to cl 43.04 and that it can only make provision for what the parent clause (cl 43.04) specifies that a schedule may provide for.

51 Clause 43.04-3 requires the development plan to 'describe' three things. It must describe the land and the proposed use and development of the land. The third thing that it must describe is '[a]ny other requirements specified for the plan in a schedule to this overlay'. There is, of course, a schedule to the Overlay that sets out a number of requirements, including development plan components.

52 The conjunction of the word 'describe' with 'requirements' is not a natural one. The verb 'to describe' sits more easily with 'the land' and 'the proposed use and development' of the land. Requirements are more commonly 'satisfied' or 'met'. Thus, for example, pursuant to cl 43.04-3 a development plan 'must meet' the requirements of cl 56. However, the 'requirements' in Schedule 5 are not all mandatory requirements. Clause 3.0, under the heading 'Requirements for development plan', lists a number of things that a development plan should 'provide', 'incorporate', 'create', 'apply' and 'respect'. The things that should be done in these ways include the provision of 'a range of dwelling types', the incorporation of 'sustainable design features' and 'any significant native vegetation', the creation of 'a composition of varied building forms and heights' and 'opportunities for improved local permeability' and the application of 'appropriate buffer features'.

53 It is clear from the language that has been used that the 'requirements' in the first part of cl. 3.0 are not mandatory. The word 'should' does not mean 'must'. The requirements in cl 3.0 relate to the content of the development plan but they do not mandate what that content must be. This is consistent with the use of the word 'describe' in in the parent provision, cl 43.04-3. The word 'describe' ordinarily means 'address'. In some circumstances, it might mean more, such as 'set forth'. Here, 'describe' must be understood to mean 'address'.

54 The use of the word 'information' in the second part cl 3.0 of Schedule 5 –

development plan components – is also significant. The development plan must contain information, principally in the form of plans: plans showing existing conditions; concept plans for future buildings, traffic and car parking; an implementation plan for an identified development management plan; and the landscaping plan. These plans must address certain matters. However, their content is not prescribed.

55 In my view, if the landscaping plan is required to show as retained all the trees rated 'moderate' or 'high' in the 2013 Tree Logic assessment, the landscaping plan will cease to be 'information' as a component of the development plan; rather, it will become the motor that drives the content of the development plan as a whole. The other elements of the development plan will have to be built around the landscaping plan and, more precisely, all of the trees rated as 'moderate' or 'high' in the 2013 Tree Logic assessment. This could preclude or compromise the inclusion of some of the development plan requirements in the first part of cl 3.0 such as the graduation of taller buildings, the creation of a composition of varied building forms and heights across the site and so on. It could also preclude or compromise the incorporation of significant native vegetation, which - paradoxically - would become a lower order requirement.

56 The contentious bullet point cannot bear the meaning given to it by the Tribunal. However, it is unnecessary to construe the contentious bullet point by removing the reference to the 2013 Tree Logic assessment altogether. In my view, all of the words in the contentious bullet point can be given meaning without the 2013 Tree Logic assessment impermissibly dictating the form of development of the subject land.

57 The contentious bullet point does not refer to <u>all</u> of the trees that are rated 'moderate' or 'high' in the 2013 Tree Logic assessment. The landscaping plan must incorporate, in the sense of show as retained, 'any significant vegetation'. This may include trees rated as 'moderate' or 'high' in the 2013 Tree Logic assessment. Which of these trees, if any, is 'significant vegetation' will be a question of fact. So construed, the contentious bullet point does not define the trees in question as 'significant vegetation'

and does not require their retention in the landscaping plan as a matter of course.

58 Such a construction is consistent with the status of the 2013 Tree Logic assessment as a reference document that cannot dictate the content of the development plan. It is also consistent with the language of the Development Plan Overlay and the Schedule[16] and it gives a meaning to all of the words in the contentious bullet point.[17]

59 If I am wrong in my conclusion that the contentious bullet point should be interpreted in this way, it must be construed as contended for by Spire, that is, without reference to the 2013 Tree Logic assessment.

60 In either case, the Development Plan Overlay and Schedule does not require the retention in the development plan of all trees rated as 'moderate' or 'high' in the 2013 Tree Logic assessment.

Conclusion

61 Leave to appeal is granted and the appeal is deemed to have been instituted and heard *instanter*.

62 The appeal is allowed.

63 The Order made by the Tribunal will be set aside insofar as it includes the finding that '[t]he landscape plan prepared by Tract consultants (forming part of the proposed Development Plan which the Applicant seeks approval of) does not comply with the requirements of Schedule 3.0 of Schedule 5 of the Development Plan Overlay'.

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16 A provision should be construed so that it is consistent with the language and purpose of all the provisions in the Planning Scheme: *Maroondah City Council v Fletcher and Another* (2009) 169 LGERA 407 [36] citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69].

17 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [71].

CERTIFICATE

I certify that this and the 15 preceding pages are a true copy of the reasons for Judgment of Emerton J of the Supreme Court of Victoria delivered on 20 December 2016.

DATED this 20th day of December 2016.

.....
Associate