

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *1335 Waterford Tamborine Rd Pty Ltd v Logan City Council*  
[2024] QPEC 14

PARTIES: **1335 WATERFORD TAMBORINE RD PTY LTD**  
**(ABN 48 627 332 405)**  
(Appellant)

v

**LOGAN CITY COUNCIL**  
(Respondent)

FILE NO/S: 340/21

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING  
COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 9 April 2024

DELIVERED AT: Brisbane

HEARING DATE: 27 November 2023 – 1 December 2023 with further written  
submissions received 4 and 6 December 2023

JUDGE: McDonnell DCJ

ORDER: **The appeal is dismissed. The Respondent's decision to  
refuse the application is confirmed**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where the  
Appellant appeals against the Respondent's decision to refuse  
a development application for a Service Station and two Food  
and Drink Outlets – whether weight should be given to a  
planning scheme amendment – whether the proposed  
development is an appropriate use of the site – whether the  
built form and appearance of the proposed development is  
appropriate – whether there is a need for the proposed  
development – whether the development application should  
be approved in the exercise of the planning discretion –  
whether the development application should be approved in  
part

CASES: *Abeleda & Anor v Brisbane City Council & Anor* [2020]  
QCA 257

*Ashvan Investments Unit Trust v Brisbane City Council &  
Ors* [2019] QPEC 16

*Brisbane City Council v YQ Property Pty Ltd* [2020] QCA

253

*Cut Price Stores Retailers v Caboolture Shire Council* (1984)  
QPLR 126

*Hua Shang Co Pty Ltd v Brisbane City Council and Ors*  
[1991] QPLR 99

*Isgrow v Gold Coast City Council & Anor* [2003] QPEC 2

*Iverach v Cardwell Shire Council & Anor* [2006] QPEC 114

*Murphy v Moreton Bay Regional Council & Anor; Australian  
National Homes Pty Ltd v Moreton Bay Regional Council &  
Anor* [2019] QPEC 46

*Navara Back Right Wheel Pty Ltd v Logan City Council &  
Ors; Wilhelm v Logan City Council & Ors* [2019] QPEC 67

*Southway Services No. 2 Pty Ltd v Brisbane City Council*  
[2022] QPEC 8

*Trinity Park Investments Pty Ltd v Cairns Regional Council  
& Ors; Dexus Funds Management Ltd v Fabcott Pty Ltd &  
Ors* [2021] QCA 95

*Watts & Hughes Properties Pty Ltd v Brisbane City Council*  
(1998) QPELR 273

*Wilhelm v Logan City Council & Or* [2020] QCA 273

*Wingate Properties Pty Ltd and Anor v BCC and Ors* [2001]  
QPEC 5

*Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022]  
QCA 168

LEGISLATION: *Planning Act 2016* (Qld) ss 45, 45(5), 45(5)(b), 45(7), 45(8),  
60(3)

*Planning and Environment Court Act 2016* (Qld) ss 43,  
45(1)(a), 46(2), 46(5), 47(1)

*Planning Regulation 2017* (Qld) s 31(1)(g)

COUNSEL: M Batty and N Batty for the Appellant

B Job KC and D Purcell for the Respondent

SOLICITORS: Mills Oakley for the Appellant

Minter Ellison Gold Coast for the Respondent

- [1] This is an appeal against the decision of the Respondent to refuse a development application for a Development Permit for a Material Change of Use (Service Station and Two Food and Drink Outlets) in respect of land located at 1335–1371 Waterford Tamborine Road, Logan Village, more particularly described as Lot 1 on RP168377 (the Site).

**What are the features of the Site and the surrounding area?**

- [2] The Site is located at the south-western corner of the intersection of Waterford Tamborine Road and Stockleigh Road. It is approximately 2.3km north of the main entry to the Yarrabilba master planned community and approximately 1km south of the central commercial area of Logan Village. Waterford Tamborine Road is a four-lane State-controlled road, with a centre concrete median strip. There is a 60m wide road reserve to the frontage of the Site.
- [3] The Site comprises a single lot with an area of approximately 20,090m<sup>2</sup> and is generally triangular in shape. It is presently improved with a single detached dwelling house and ancillary structures. The remainder of the Site is vegetated, as is evident from Figures 3 and 4 of the Visual Amenity Experts' Joint Report (VA JER).<sup>1</sup> It has a 263m frontage to Waterford Tamborine Road to the east. The Site slope falls generally from west to east, towards Waterford Tamborine Road, with elevations ranging from 27.0m to 29.0m AHD. Vehicular access from Waterford Tamborine Road is presently via a 4.5m crossover.
- [4] It adjoins a closed section of the Beaudesert Branch Railway to the rear (west) which is vegetated. The large rural residential lot to the south, containing a single dwelling and associated structures, is partially cleared of vegetation.<sup>2</sup>
- [5] Opposite the Site, on Waterford Tamborine Road, are three parcels of land. On the northern most parcel is a Shell service station and fast food outlet. That site is the subject of an appeal to the Planning and Environment Court against the Respondent's refusal of a development application for a Development Permit for a Material Change of Use for a Car Wash, two Food and Drink Outlets and Low Impact Industry. To the south of the service station is a residence and honey production use which is largely screened by established vegetation. To the south of that site is a residential lot with a dwelling set back over 200m, behind dense established vegetation.<sup>3</sup>
- [6] The Court had the benefit of evidence from Mr Curtis for the Appellant, and Dr McGowan for the Respondent, addressing the issues of the built form and appearance. For this purpose, the experts examined the nature of the uses of the land along Waterford Tamborine Road. North of the Site, across Stockleigh Road, is a parcel of land in the Low density residential zone which has been developed as a residential suburb. It is surrounded by an acoustic barrier approximately 1.8m high which extends along both Stockleigh Road and Waterford Tamborine Road. That development extends along the western side of Waterford Tamborine Road north for approximately one kilometre to Anzac Avenue. The Centre zone then extends to the north of Anzac Avenue along the western side of Waterford Tamborine Road.

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<sup>1</sup> Ex. 6, VA JER, pp 8 and 9.

<sup>2</sup> Ex. 6, VA JER, [10]–[12], p 10.

<sup>3</sup> Ex. 6, VA JER, [13]–[15], p 11.

- [7] A bamboo plantation extends for approximately 150m on the eastern side of Waterford Tamborine Road, north of the intersection with Stockleigh Road. It is adjoined to the north by several rural residential lots which are screened from the road by established trees in the road reserve. The Logan Village Park adjoins the residential lots to the north and appears as a dense area of bushland. North of the intersection of Anzac Avenue and Waterford Tamborine Road, the zoning on the eastern side of Waterford Tamborine Road, opposite the Centre zone, changes to the Low impact industry zone. Established trees screen the light industrial area from the road frontage.
- [8] To the south of the Site, the Rural residential zone extends along the western side of Waterford Tamborine Road for approximately 8km. The existing visual character is relatively consistent, comprised of large rural residential lots with dwellings set back from the road frontage within varying landscape surrounds.
- [9] South, on the eastern side of Waterford Tamborine Road, the Rural residential zone extends to Pioneer Drive. The frontages are generally dominated by vegetation with some behind high fencing. The land use reverts to a Community facilities zoning to include the Logan Village Cemetery which is screened by vegetation from the road frontage. The cemetery is adjoined by the emergency fire service sheds of the Logan Village Rural Fire Service which are visible along the frontage. The Logan Village Waste and Recycling Facility is located to the south of the fire service, set back and screened from the frontage. The Community facilities zoning continues for a further 660m south to the Yarrabilba Priority Development Area (Yarrabilba PDA) which extends for approximately 7.6km to the south. Smaller scale, higher density residential development exists closer to the centre of Logan Village to the north, and the Yarrabilba PDA to the south.<sup>4</sup>
- [10] I accept this accurately describes the locality and surrounds, as it is supported by the aerial photography and Figures 3 to 6 and 8 to 24 of the VA JER.<sup>5</sup>

### **What is the proposal?**

- [11] Since the Respondent's refusal, two minor changes have been made to the application.<sup>6</sup> The proposal now before the Court is for a Development Permit for a Material Change of Use (Service Station and One Food and Drink Outlet).
- [12] The gross floor area (GFA) of the proposed service station and combined convenience store is 220m<sup>2</sup>. The proposal includes truck stop facilities comprising dedicated bowzers and canopy, truck parking facilities, and large manoeuvring and parking area. Two truck bowzers with three truck refuelling positions, four retail bowzers providing 8 car refuelling positions and 37 car parks are proposed.<sup>7</sup> The proposed food and drink outlet has a GFA of 260m<sup>2</sup> and will include a drive through facility. The building site cover will be 13.5%. The proposal will operate 24 hours per day. Access to the proposal will be by way of two one-way vehicle crossovers (left-in, left-out) onto Waterford Tamborine Road. A pylon sign, subject to a separate approval, is proposed between the entry and exit.

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<sup>4</sup> Ex. 8, Town Planning Experts' Joint Report, [7]–[15], pp 7–10 ('TP JER').

<sup>5</sup> Ex. 6, VA JER, pp 8–10 and 12–21.

<sup>6</sup> Order of the Court dated 19 April 2022 (Court Document 27) and Order of the Court dated 17 July 2023 (Court Document 60).

<sup>7</sup> Ex. 35, Email from M Batty to Associate dated 6 December 2023.

- [13] A 2.8m high acoustic barrier is proposed along the southern perimeter of the hardstand. A 3.9m high acoustic barrier is proposed to the eastern and partial northern hardstand perimeters.<sup>8</sup>
- [14] The site area of the proposal is 8,351m<sup>2</sup> and will extend approximately 108.7m along the Waterford Tamborine Road frontage. Of this, 7360m<sup>2</sup> will be hardstand and 991m<sup>2</sup> will be landscaped. The landscaping is primarily distributed:
- (a) along the development area's frontage to Waterford Tamborine Road to a minimum width of 5m;
  - (b) in varying widths around the south, west and eastern edges of the hardstand adjoining the balance of the Site area;
  - (c) along the southern side of the exit driveway; and
  - (d) in an "island" separating the drive through vehicle path from the truck area at the western side of the development site, extending to the northern side of the service station and food and beverage building.<sup>9</sup>
- [15] The landscape drawings do not reveal the vegetation to be retained or the measures to be adopted to ensure its retention. The vegetated frontage is considered later in these reasons. The balance of the Site will remain in a vegetated state. The Appellant proposes a covenant to maintain the environmental integrity of the balance of the parcel and protect it from future development.<sup>10</sup>

### **What is the decision-making framework?**

- [16] The appeal is to be determined under the *Planning Act 2016* (Qld) (*Planning Act*) and the *Planning and Environment Court Act 2016* (Qld) (*PECA*), and proceeds by way of hearing anew.<sup>11</sup> The Court assesses the development application under s 45 of the *Planning Act* as if it were the assessment manager.<sup>12</sup> In deciding the appeal, the Court must confirm the decision appealed against, change the decision appealed against, or set it aside and either make a decision replacing it or return the matter to the Respondent with directions the Court considers appropriate.<sup>13</sup> The Appellant bears the onus in the appeal.<sup>14</sup>
- [17] As the development application was subject to impact assessment, the assessment:
- (a) must be carried out:
    - (i) against the relevant assessment benchmarks in a categorising instrument that was in effect when the development application was properly made, relevantly the Logan Planning Scheme 2015 (Version 6) (the Scheme);<sup>15</sup> and

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<sup>8</sup> Ex. 6, VA JER, Fig 27, p 24.

<sup>9</sup> Ex. 6, VA JER, [35], pp 26–27.

<sup>10</sup> Ex. 32, Written Submissions of the Appellant, Annexure A, Proposed Draft Conditions.

<sup>11</sup> *Planning and Environment Court Act 2016* (Qld), s 43 ('PECA').

<sup>12</sup> *PECA*, ss 46(2) and (5).

<sup>13</sup> *PECA*, s 47(1).

<sup>14</sup> *PECA*, s 45(1)(a).

<sup>15</sup> Ex. 2, CEO Certificate, Scheme Extracts, [1], p 1.

- (ii) having regard to any matters prescribed by the *Planning Regulation 2017* (Qld), including relevantly, the common material;<sup>16</sup> and
  - (b) may be carried out against, or having regard to, any relevant matter, other than a person's personal circumstances, financial or otherwise.<sup>17</sup>
- [18] The assessment and decision making process is to be approached consistently with the Court of Appeal decisions of *Brisbane City Council v YQ Property Pty Ltd*,<sup>18</sup> *Abeleda & Anor v Brisbane City Council & Anor*,<sup>19</sup> *Wilhelm v Logan City Council & Ors*,<sup>20</sup> and *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors*; *Dexus Funds Management Ltd v Fabcott Pty Ltd & Ors*.<sup>21</sup> Collectively, those cases confirm the approach articulated in *Ashvan Investments Unit Trust v Brisbane City Council & Ors*.<sup>22</sup> That approach is also consistent with that described in *Murphy v Moreton Bay Regional Council & Anor*; *Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor*.<sup>23</sup>
- [19] Section 60(3) of the *Planning Act* confers a broad discretion in deciding an impact assessable application. The decision-maker is to balance the factors to which consideration may be given. The factors in favour of approval and the factors in favour of refusal have to be balanced and the weight to be attributed to each factor is a matter for the decision-maker. Non-compliance with an assessment benchmark does not necessarily dictate refusal of a development application. The *Planning Act* does not alter the characterisation of a planning scheme as a reflection of the public interest. The extent to which a flexible approach to the exercise of discretion will prevail will turn on the facts and circumstances of each case, including the nature and extent of the non-compliance, if any, identified with an assessment benchmark.
- [20] Since the application was lodged, the Respondent has amended the Scheme. Version 9 of the Scheme commenced on 6 February 2023.<sup>24</sup> This amendment is relevant for the purposes of the determination of this appeal as both a relevant matter reflecting the Respondent's contemporary statement of planning intent pursuant to s 45(5)(b) of the *Planning Act*, and as a statutory instrument entitled to weight as considered appropriate by the Court pursuant to s 45(8) of the *Planning Act*. While weight may be afforded to the Scheme amendment, the *Planning Act* does not require that the application be assessed against it. The issue is the weight to be attributed to it.
- [21] The properly made submissions form part of the common material to which the Court must have regard in undertaking its assessment. One properly made submission was received by the Respondent.<sup>25</sup> The grounds relied upon by the submitter in opposing the proposal were:

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<sup>16</sup> *Planning Regulation 2017* (Qld), s 31(1)(g).

<sup>17</sup> *Planning Act 2016* (Qld), s 45(5) ('*Planning Act*').

<sup>18</sup> [2020] QCA 253.

<sup>19</sup> [2020] QCA 257.

<sup>20</sup> [2020] QCA 273.

<sup>21</sup> [2021] QCA 95.

<sup>22</sup> [2019] QPEC 16, [35]–[86].

<sup>23</sup> [2019] QPEC 46, [12]–[22].

<sup>24</sup> Ex. 2, CEO Certificate, Scheme Extracts, [4], p 1.

<sup>25</sup> Ex. 3, CEO Certificate, Development Applications, pp A4–A7.

- (a) that the proposal conflicted with the land use and development intent for the Site pursuant to the Scheme, in particular the purpose and Overall outcomes of the Rural residential zone code and the Overall outcomes of the Park living precinct; and
- (b) whilst it was acknowledged there is a need, there is sufficient suitably zoned and vacant land within the catchment to cater for the demand, and that any such need does not justify the proposal occurring in a location which is not located in an appropriate zone.

[22] The submission was made having regard to an earlier form of the development and without the benefit of the evidence before the Court. In the course of dealing with the issues in dispute, I have been conscious of the submitter's concerns and the reasonable expectations of the community as informed by the Scheme.

**What is the weight to be given to the Scheme amendment?**

[23] Version 9 of the Scheme relevantly amended s 3.5.8.1 of the Scheme by inclusion of the words "and centre activities" at the end of the heading. The heading now reads "Element – New and expanded centres **and centre activities**" (Emphasis added).

[24] The Explanatory Report which accompanied the "Major Planning Scheme Amendment 2021" provides the following explanation for the change:

"Section 3.5.8.1 of the Strategic Framework guides new and expanding centres by prescribing an 'out of centre' test for centre activities. These comprehensive criteria address community and economic need, scale, impact on centre hierarchy and separation distances. It has been identified through a Planning and Environment Court appeal, however, that the heading of this section, being '**Element – New and expanded centres**', **only applies to centre and not stand-alone centre activities**. The heading is therefore to be expanded to explicitly capture centre activities thereby enabling this portion of Strategic Framework to be applied not only to centres but also stand-alone centre uses (such as Service stations) as part of the application assessment process. This will enable, where impact assessable, the demonstration of community need and economic need to justify a proposed use." <sup>26</sup> (Emphasis added).

[25] The amendment has the effect of making community need, economic need and matters relevant to the centre hierarchy, amongst other things, relevant to the assessment of an impact assessable development application for stand-alone centre activities.

[26] The following table sets out the key events in relation to the adoption of the Scheme amendment and a timeline of the development application:

Date	Scheme amendment and development application status
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<sup>26</sup> Ex. 2, CEO Certificate, Scheme Extracts, p I351.

18 July 2019	Development application accepted as properly made. <sup>27</sup>
15 Jan 2021	Respondent refused the development application for reasons including that weight should be given to the draft amended Scheme. <sup>28</sup>
12 Feb 2021	Notice of appeal filed. <sup>29</sup>
16 Aug 2021	Respondent's Reasons for Refusal filed. This did not raise non-compliance with the proposed Scheme amendment. <sup>30</sup>
7 Feb 2022 to 4 Mar 2022	Public consultation for major planning scheme amendment open. <sup>31</sup>
12 May 2022	Respondent's Amended Reasons for Refusal filed. This did not raise non-compliance with the proposed Scheme amendment. <sup>32</sup>
30 Aug 2022	Scheme amendment approved by the Minister. <sup>33</sup>
29 Sept 2022	Respondent's Further Amended Reasons for Refusal filed. Inconsistency with the planning intent for the location of centre activities in Strategic framework s 3.5.8.1 as amended in the draft planning scheme amendment "Major Planning Scheme Amendment 2021" was raised as an issue by the Respondent. <sup>34</sup>
25 Jan 2023	Major Planning Scheme Amendment 2021 adopted.
6 Feb 2023	Major Planning Scheme Amendment 2021 commenced. <sup>35</sup>
23 Feb 2023	Respondent's Further Amended Reasons for Refusal filed. The changes did not relate to s 3.5.8.1 of the Strategic framework. <sup>36</sup>
22 June 2023	The Court granted leave to further amend the Respondent's Further Amended Reasons for Refusal. Inconsistency with the planning intent for the location of centre activities in Strategic framework s 3.5.8.1 as amended in the planning scheme amendment "Major Planning Scheme Amendment 2021" was raised as an issue by the Respondent. <sup>37</sup>

[27] The Respondent advanced four reasons in support of its submission that the Court ought place meaningful weight on the Scheme amendment:

- (a) the amendment does not represent a policy shift on the Respondent's part, but rather was an amendment to ensure the original intent of the Scheme is not avoided because of an inapt heading;
- (b) the amendment relates to an important aspect of the Scheme, being the retail hierarchy;
- (c) the amendment was approved by the Minister on 30 August 2022 and adopted by the Respondent on 6 February 2023; and

<sup>27</sup> Ex. 13, Tab 2, Confirmation Notice Letter from Respondent to Applicant, p 1.

<sup>28</sup> Ex. 3, CEO Certificate, Development Applications, p A8.

<sup>29</sup> Court Document 1, Notice of appeal.

<sup>30</sup> Court Document 6, Respondent's Reasons for Refusal.

<sup>31</sup> Ex. 33, Email from B Job KC to Associate dated 4 December 2023.

<sup>32</sup> Court Document 29, Respondent's Amended Reasons for Refusal.

<sup>33</sup> Ex. 8, TP JER, [53(c)], p 19.

<sup>34</sup> Court Document 37, Respondent's Further Amended Reasons for Refusal.

<sup>35</sup> Ex. 2, CEO Certificate, Scheme Extracts, [4], p 1.

<sup>36</sup> Court Document 41, Respondent's Further Amended Reasons for Refusal.

<sup>37</sup> Court Document 50, Order of the Court dated 22 June 2023, [1].



- (d) the amendment was not unfair as it was not targeted at the proposal, but rather it is Shire-wide and aimed at retail hierarchy.
- [28] I accept the amendment is not reflective of a policy shift by the Respondent. The amendment expressly contemplates the proposed development occurring on the Site provided certain criteria can be met. It is not the case that the proposed development might be said to cut across a planning strategy by affecting its implementation in a way which squarely affronts a strategy.
- [29] Further, I accept the importance of the maintenance of the retail hierarchy and the importance of the Scheme's provisions relevant to retail hierarchy. However, the evidence which I accept is that approval of this proposal will not have any effect on the centres hierarchy. Accordingly, I do not consider this a factor which supports giving weight to the amendment.
- [30] The amendment was not targeted at the proposal. However, a consideration of fairness is not limited to whether the amendment targeted the proposal. In this regard, I respectfully agree with McLauchlan QC DCJ in *Iverach v Cardwell Shire Council & Anor*<sup>38</sup> in which his Honour, in dealing with a temporary local planning instrument which came into effect almost a year after the appeal was commenced, observed that fairness is a relevant consideration in determining the 'appropriate' weight to be given to an amendment.
- [31] It is uncontroversial that public consultation in respect to the amendment commenced more than 2.5 years after the development application was properly made, and the amendment came into effect almost two years after the appeal was commenced. Nor is it controversial that the Respondent did not raise non-compliance with the draft Scheme amendment as a matter in issue in the appeal until 18 months after it was commenced. That the amended scheme has been in effect since 6 February 2023 is a relevant factor in determining the weight to be given to the amendment. However, that the Scheme remained the applicable scheme for the assessment of the application for almost two years after the appeal was commenced is a significant factor in determining the weight to be afforded the Scheme amendment. It is a matter which, in my view, goes to fairness, and tells against attributing weight to the amendment. This is particularly so as the appeal proceeds by way of hearing anew, but assessing the application against the statutory instruments in effect when the development application was properly made.<sup>39</sup>
- [32] For these reasons, in the exercise of my discretion, no weight should be attributed to the Scheme amendment.

### **What is the planning framework?**

- [33] Under the Scheme, the Site is included in the Park living precinct of the Rural residential zone.<sup>40</sup> The mapping reveals the Site is included in the Rural landscape and rural production area, outside the Urban footprint. The Strategic framework's Specific outcomes for the Regional landscape and rural production area are:

#### **"3.3.5.1 Specific outcomes**

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<sup>38</sup> [2006] QPEC 114, [49].

<sup>39</sup> *Planning Act*, s 45(7).

<sup>40</sup> Ex. 2, CEO Certificate, Property Report, p A4.

1. The Regional landscape and rural production area has non-urban character defined by:
  - (a) rural, rural residential, tourism, environmental and outdoor recreation uses;
  - (b) the predominance of natural landscape over buildings and structures;
  - (c) limited, dispersed buildings and structures that are integrated with the natural landscape.
2. The Regional landscape and rural production area accesses community infrastructure and services from the Urban footprint.
3. Rural communities are to access urban services such as retail commercial and community uses from the rural towns in the urban footprint such as Jimboomba and Logan Village and these services are not to be provided in the Regional landscape and rural production area.
4. The Regional landscape and rural production area has a minimum lot size of 100 hectares.<sup>41</sup>

[34] The purpose of the Rural residential zone is “to provide for residential uses and activities on large lots, including lots for which the local government has not provided infrastructure and services”.<sup>42</sup>

[35] The following provisions of the Rural residential zone code are in issue in the appeal:

- “2. The local government purpose of the Rural residential zone code is to:
  - ...
  - (b) provide for development in a semi-rural, landscaped or bushland setting;
  - ...
3. The purpose of the Rural residential zone code will be achieved through the following overall outcomes:
  - (a) the design of the built form:
    - ...
    - (ii) produces a built form that is compatible with the semi-rural, landscaped or bushland setting;
    - (iii) provides that the semi-rural, landscaped or bushland setting predominates over the built form;

<sup>41</sup> Ex. 2, CEO Certificate, Scheme Extracts, s 3.3.5.1, p B30.

<sup>42</sup> Ex. 2, CEO Certificate, Scheme Extracts, s 6.2.13.2, p D204.

...

- (e) in the Park living precinct:
  - (i) land use comprise Caretaker's accommodation, Dual occupancy (auxiliary unit), Dwelling house, Emergency services, Home-based business or Sales office;
  - (ii) development has a landscaped or bushland setting".<sup>43</sup>

[36] The following Performance outcomes and Acceptable outcomes are in issue:<sup>44</sup>

Performance outcomes	Acceptable outcomes
<b>For accepted development (subject to requirements) and assessable development</b>	
<b>Land use</b>	
<b>PO1</b> A use in the Rural residential zone is for uses identified in: ... (c) s 6.2.13.2(3)(e)(i) overall outcomes for the Park living precinct; ....	<b>AO1</b> A use in the Rural residential zone is for uses identified in: ... (c) s 6.2.13.2(3)(e)(i) overall outcomes for the Park living precinct; ....
<b>Park living precinct and Park residential precinct</b>	
<b>Design</b>	
<b>Built form</b>	
<b>PO24</b> The built form does not dominate the landscape or bushland setting.	<b>AO24</b> No acceptable outcome provided.

[37] Compliance with the codes is achieved by compliance with (1) the purpose and overall outcomes of the code, or (2) the performance outcomes or acceptable outcomes of the code.<sup>45</sup> The Scheme specifies a hierarchy of assessment benchmarks. Relevantly, where there is an inconsistency between the provisions within the Scheme, the Strategic framework prevails over all other components to the extent of the inconsistency for impact assessment.<sup>46</sup>

### What are the issues in dispute?

<sup>43</sup> Ex. 2, CEO Certificate, Scheme Extracts, s 6.2.13.2, p D204–D205.

<sup>44</sup> Ex. 2, CEO Certificate, Scheme Extracts, s 6.2.13.2, p D205, D212.

<sup>45</sup> Ex. 2, CEO Certificate, Scheme Extracts, s 5.3.3(4)(c), p C73.

<sup>46</sup> Ex. 2, CEO Certificate, Scheme Extracts, s 1.5, p B14.

[38] The parties agreed a list of issues.<sup>47</sup> The issues require consideration of the following:

- (a) Is the proposed development an appropriate use of the Site?
- (b) Is the built form and appearance of the proposed development appropriate?
- (c) Is there a planning, community and/or economic need for the proposed development?
- (d) Should the development application be approved in the exercise of the planning discretion?

[39] In the VA JER, the experts also considered the issue of visual amenity and landscaping, calling up the provisions in the Landscape code. While the Respondent did not concede compliance with the Landscape code, it accepted that it was not determinative and so appropriately did not press that issue in the proceedings.<sup>48</sup> This allowed the Court to focus on the determinative issues.

**Is the proposed development an appropriate use of the Site?**

[40] The Scheme provisions relevant to the consideration of this issue are:

- (a) Strategic framework – s 3.3.5.1; and
- (b) Rural residential zone code – OO3(e)(i), PO1 and AO1.

[41] Service Station and Food and Drink Outlet are not uses identified in OO3(e)(i), PO1 and AO1. However, that is not the end of the matter. These provisions were considered by Williamson KC DCJ in *Navara Back Right Wheel Pty Ltd v Logan City Council & Ors; Wilhelm v Logan City Council & Ors (Navara)*.<sup>49</sup> His Honour considered the planning consequences where a proposed use falls outside the list of uses in OO3(e)(i). I respectfully observe, adopt and rely upon his Honour's reasons at [166] to [174]. The planning consequences are to be assessed having regard to:

- (a) the extent to which the zone code anticipates non-residential uses; and
- (b) an assessment of the development against specific controls for the zone, particularly in relation to built form and appearance.

[42] As his Honour observed in *Navara*, the provisions do not expressly discourage uses. The uses envisaged in the Rural residential zone are not limited to those identified in OO3(e)(i), PO1 and AO1. The zone code envisages that non-residential uses may occur in the Park living precinct of the zone. It is then necessary to examine the impacts from non-residential development that ought be expected in the zone having regard to the controls found in, amongst other things, the zone code. For the present purposes, those controls are Purpose 2(b), OO3(a)(ii)–(iii) and OO3(e)(ii).

[43] These provisions are considered in [60] to [81] below. For the reasons below, compliance has not been established with these provisions. Non-compliance with these provisions suggests that the use is not anticipated. This gains support from the

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<sup>47</sup> Ex. 1, Agreed List of Issues.

<sup>48</sup> T1-14, ll 16–20.

<sup>49</sup> [2019] QPEC 67, [166]–[174] (*'Navara'*).

Specific outcomes in ss 3.3.5.1(2) and (3) of the Strategic framework as discussed below.

- [44] A matter which distinguishes *Navara* from the present case is that the land in *Navara* was contained in the Urban footprint and so the Court was not required to consider the effect of the Specific outcome in s 3.3.5.1 of the Strategic framework. That is not the case here. The Site is not in the Urban footprint. Accordingly, the Regional landscape and rural production area provisions of the Scheme apply.
- [45] The Strategic framework sets the policy direction for the Scheme. The Settlement pattern Strategic outcomes provide that the Regional landscape and rural production area is an expansive non-urban area with a non-urban character.<sup>50</sup> The Specific outcomes in s 3.3.5.1(1)(a), (2) and (3) of the Strategic framework are relevant.
- [46] The Appellant submitted that s 3.3.5.1(3) does not apply because the Site is not a “rural community” as the Site is zoned Rural residential, not Rural. I do not accept this. This approach ignores the second part of the provision that urban services such as retail, commercial and community uses “are not to be provided in the Regional landscape and rural production area.” The purpose of the provision is to provide guidance as to the types of urban services not to be provided in the Regional landscape and rural production area.
- [47] The Appellant submitted that as the proposed development is not “community infrastructure and services”, s 3.3.5.1(2) does not apply. Neither “community infrastructure and services” nor “services” are defined in the Scheme. “Community infrastructure” is a defined term. The proposed uses do not fall within the proposed definition of ‘Community infrastructure’.<sup>51</sup> As “services” is not a defined term, it must be given its ordinary meaning. The Macquarie Dictionary defines “service” as “[t]he supplying or supplier of any articles, commodities, activities, etc., required or demanded”.<sup>52</sup>
- [48] I am satisfied that fuel, convenience items, food and drink are articles or commodities, and so the sale of these items are services for the purposes of the provision.
- [49] In the alternative, the Appellant submitted that having regard to the scale of the proposed development, it would not have a meaningful impact on the extent to which residents’ access “community infrastructure and services” or “urban services” from the Urban footprint. In any event, it said the community will access such infrastructure and services from outside the Urban footprint due to the prior approvals of the Shell and Procon developments. However, each proposal must be considered on its merits.
- [50] For these reasons, I am satisfied that the Specific outcomes in ss 3.3.5.1(2) and (3) apply.
- [51] The proposed development is not of a type of use listed in s 3.3.5.1(1)(a). Mr Perkins’ evidence was that the components of the proposed use are commercial

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<sup>50</sup> Ex. 2, CEO Certificate, Scheme Extracts, s 3.3.1(4), p B28.

<sup>51</sup> Ex. 2, Scheme Extracts, Administrative Definitions, pp F272–F273.

<sup>52</sup> Macquarie Dictionary, Eight Edition.

activities, retail activities and centre activities groups.<sup>53</sup> Mr Curtis accepted that the proposal will not have a non-urban character. The uses will not have a non-urban character as they are commercial and retail uses.

- [52] The Specific outcomes for the Regional landscape and rural production area contain an exclusion, specifically that urban services such as retail, commercial and community uses are “not to be provided in the Regional landscape and rural production area.”<sup>54</sup> This strong language demonstrates a clear and deliberate policy intention.
- [53] While the uses envisaged in the Rural residential zone are not limited to those identified, where the land is outside the Urban footprint, and in the Regional landscape and rural production area, the intention of the Specific outcomes is that urban services, relevantly retail and commercial uses, are not to be provided. For these reasons, I am satisfied that the proposal is not consistent with the use provisions of the Specific outcomes for the Regional landscape and rural production area.
- [54] The Appellant submitted that the proposed use is consistent with land use expectations having regard to existing uses already found in the locality on sites located in the Park living precinct of the Rural residential zone, and outside of the Urban footprint, including the Shell and Procon Service Stations. It urged that the approval of these uses indicate a flexible approach to a consideration of land use issues and support a conclusion that any land use non-compliance does not warrant refusal of the proposed development.
- [55] To the extent the Procon proposal did not meet the benchmarks, the Respondent was satisfied that there was a community and economic need for the proposal.<sup>55</sup> The Procon Service Station is located at the major intersection of Waterford Tamborine Road and Camp Cable Road (both State-controlled roads), at the entrance to the Yarrabilba PDA. In that location, the experts accepted that it would serve the needs of the Yarrabilba residents, and the public travelling in either direction on Waterford Tamborine Road or travelling to and from the west. The development area of the subject proposal is approximately a third larger than the development area of the Procon proposal. The Procon site has limited neighbours which influences the character of the location and the suitability of the development in that location.
- [56] The Respondent determined that the Shell proposal conflicted with provisions of the Scheme, but found there were sufficient grounds to approve the development application, in particular, there was an identified and demonstrable need, despite the conflict.<sup>56</sup> The Shell Service Station, located at an intersection enabling ease of access for travellers north and south along Waterford Tamborine Road, would also readily serve Yarrabilba residents and the travelling public regardless of their direction of travel. The hardstand area of the current proposal is 2.5 to 3 times the size of the hardstand area at the Shell Service Station.
- [57] While the Appellant’s submission has some initial attraction, to the extent those proposals did not comply with the relevant scheme provisions, there was a

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<sup>53</sup> Ex. 18, Separate Report of Mr Perkins, [10(a)], p 5.

<sup>54</sup> Ex. 2, CEO Certificate, Scheme Extracts, 3.3.5.1(3), p B30.

<sup>55</sup> Ex. 3, CEO Certificate, Development Applications, pp A12–A15.

<sup>56</sup> Ex. 26, Decision Notice, [13]–[14], pp 2–3.

demonstrated need for each proposal which, in the Respondent's determination, supported approval. This reduces the merit of this submission. Ultimately, of course, each application must be considered on its merits.

- [58] To the extent OO3(e)(i), PO1 and AO1 admit of the prospect that non-residential uses may occur in the Park living precinct of the zone, this is discordant with the specific controls for the zone and the planning policy, and ss 3.3.5.1(1)(a), (2) and (3) of the Strategic framework, that urban services such as those proposed are not to be provided in the Regional landscape and rural production area. For these reasons, I am satisfied that the proposed uses are not reasonably expected on land in the Park living precinct which is also subject to the Regional landscape and rural production area.
- [59] For these reasons, I am not satisfied that the use benchmarks in issue are met. This is a factor which weighs against approval.

**Is the built form and appearance of the proposed development appropriate?**

- [60] The Scheme provisions relevant to the consideration of this issue are:
- (a) Strategic framework – s 3.3.5.1; and
  - (b) Rural residential zone code – Purpose 2(b), OO3(a)(ii)–(iii), OO3(e)(ii), PO24 and AO24.
- [61] The vertical built form is located centrally within the hardstand and is comprised of:
- (a) a single-storey combined service station/food and drink building with a length of 47m, a width of 12m and a roof height of 5.5m. A 10m high projecting pylon is an integrated element of the building. The building will be set back approximately 44.5m from the Waterford Tamborine Road frontage. The building is treated with a range of materials and colours including bright red painted walls to the service station, including the projecting pylon;
  - (b) a canopy extending over the car refuelling area located between the service station and food/drink building and the road frontage with a height of 7m. The canopy, 31.5m long and 9.7m wide, will be set back approximately 18.6m from the road frontage. The area beneath the canopy is open on all 4 sides. The canopy fascia will be treated with blue and red livery; and
  - (c) a canopy extending over the truck fuelling area located between the service station and food/drink building and the southern edge of the hardstand. The canopy is 16.8m long by 12m wide, has a height of 8m and will be set back approximately 43.8m from the road frontage. The area beneath the canopy is open on the northern, eastern and western sides. The southern side will include a visual screen extending down from the underside of the canopy. The canopy fascia will be treated with blue and red livery.<sup>57</sup>
- [62] I accept that the acoustic barriers can be painted a recessive colour (and a condition imposed to achieve this), and that vegetation can be grown up the barriers to better screen them, which will contribute to the vegetated setting of the proposal. The Appellant proposed a condition requiring this planting. In addition, if approved, to

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<sup>57</sup> Ex. 6, VA JER, [31], p 25.

ensure that this vegetation continues to be effective, conditions requiring the maintenance of this vegetation can be imposed.

- [63] The 991m<sup>2</sup> of vegetation to be incorporated in the development area is largely proposed around the perimeter of the development footprint, with some around the back of the shop area.
- [64] The experts agreed that the Site has a bushland setting.<sup>58</sup> Mr Curtis accepted in cross-examination that the vegetated setting generally continues, intermittently but generally so, on both sides of the road as one travels south from the intersection.<sup>59</sup> Dr McGowan focussed on the prevailing character of the area, and maintained the area has a bushland setting,<sup>60</sup> to which the Site contributes.<sup>61</sup> I accept the evidence of Dr McGowan which is supported by Figures 43 to 48 of the VA JER.
- [65] The proposed built form sits back from the intersection of Waterford Tamborine Road and Stockleigh Road approximately 120m.<sup>62</sup> Between the driveway on the parcel of land to the south and the development footprint is a distance of approximately 100m.<sup>63</sup> That these areas and the Site are presently significantly vegetated is evident from Figures 3 to 5 of the VA JER.
- [66] Mr Curtis opined that the intersection was dominated by the Shell service station and the acoustic barrier and rooftops associated with the residential development. For these reasons, he considered the Site's proximity to the intersection adversely impacted its character.<sup>64</sup> This fails to have regard to the context of the development on the Site and that the development area is approximately 120m from the intersection. The significant vegetated area between the development area and the intersection creates visual separation from the intersection, reducing the influence of the intersection and the residential development north of the Site on the character of the area.
- [67] Ms Rayment accepted that the proposal is akin to a subdivision, fragmenting the Site into two parts, the development footprint and the balance,<sup>65</sup> which in my view, impacts adversely on the proposal's ability to present as limited, dispersed buildings and structures that are integrated with the natural landscape.
- [68] Within the development area, Mr Curtis sought to draw a distinction between the impervious area and the built form. In support of this, he opined that the effect of the impervious area on matters of visual amenity was likely to be limited as it does not project out of the ground and so is unlikely to be visible. Thus, he said, the majority of the Site is not developed.<sup>66</sup> I do not agree. The effect of the impervious area on the visual amenity is that it limits the amount of vegetation that can be incorporated into the design within the area of the hardstand, which means that the development area presents as a built form with limited internal vegetative screening. The large scale of the hardstand is driven by the truck stop facilities and the

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<sup>58</sup> Ex. 6, VA JER, [78], p 40 (Dr McGowan); T2-74 ll 1–6 (Mr Curtis); Ex. 8, TP JER, [129(e)], p 44.

<sup>59</sup> T2-73 l 30 – T2-74 l 31.

<sup>60</sup> T3-9, ll 1–18.

<sup>61</sup> Ex. 6, VA JER, [78], p 40.

<sup>62</sup> T2-79, l 8.

<sup>63</sup> T1-78, ll 41–42.

<sup>64</sup> Ex. 6, VA JER, [53], p 37.

<sup>65</sup> T3-37 ll 29–33.

<sup>66</sup> T2-97 l 35.



circulation areas. The design of the proposal has the effect of placing a large area of development comprising of buildings, structures and hardstand, in a surrounding bushland setting, but the buildings and structures do not have the appearance of being integrated with the natural landscape. The design of the proposal, with extensive hardstand surrounded on almost 3 sides by the acoustic barrier, albeit painted and vegetated, and with limited vegetation situated within the development area, does not allow the proposal to present as limited, dispersed buildings and structures integrated with the natural landscape. Thus, while the purpose of the zone code might be achieved, the overall outcomes are not.

- [69] That the Site is elevated adds to its visibility. Mr Curtis opined that while the proposed development would be clearly visible from Waterford Tamborine Road, it would be perceived to be in a semi-rural, landscaped or bushland setting because of the retention of the vegetation on the balance of the Site.<sup>67</sup> In forming his opinions, Mr Curtis relied upon the retained vegetation on the Site frontage to provide partial screening. In my view, this reliance is misplaced.
- [70] The extent of the vegetation to be retained and planted on the front portion of the Site to be developed is unclear. The Landscape Concept Plan notes with respect to the frontage of the development:

“RETENTION OF EXISTING VEGETATION

Retention of all existing native vegetation to the frontage as shown, and to include trees, shrubs and groundcovers **where possible**. Supplementary planting of native shrubs and ground covers **where possible** and to gaps” (Emphasis added).

And

“PROPOSED GARDEN EDGE

To future detail”.<sup>68</sup>

- [71] For the purposes of one of the minor changes to the application, a tree survey was undertaken. This survey does no more than identify a number of trees that may potentially be retained.<sup>69</sup> Adding to this uncertainty is the notation on the Landscape Concept Plan that such existing native vegetation will be retained “where possible”. There is insufficient evidence regarding the extent to which vegetation will be retained or planted, which is required to establish the extent of screening proposed. The assessment proceeds on the basis that there is uncertainty as to the extent of vegetation proposed on the frontage of the Site.
- [72] “Predominance” is not defined in the Scheme. Adopting its ordinary meaning, it is defined as “the quality of being predominant; prevalence over others”.<sup>70</sup> Relevantly, “predominant” is defined as “prevailing”.<sup>71</sup> Even if the proposal is visible for only a limited stretch of Waterford Tamborine Road, I accept Dr McGowan’s evidence that when it is visible, it will present as a conspicuous

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<sup>67</sup> Ex. 6, VA JER, [55], p 37; T2-102 l 48.

<sup>68</sup> Ex. 12, Book of Plans, Landscape Concept Plan, p 13.

<sup>69</sup> T2-72 ll 18–19.

<sup>70</sup> Macquarie Dictionary, Eight Edition.

<sup>71</sup> Macquarie Dictionary, Eight Edition.

development, characterised by expansive hardstand, prominent signage and tall acoustic barriers. This is because of the nature of the development, in particular the scale of the buildings and structures which include elevated canopies with façade signage, the extent of the hardstand comprising separated car and truck forecourts, car and truck parking and circulation spaces, and the paucity of vegetation within the developed area. The built form will dominate the bushland setting. Those same features of the development, in combination with the nature and scale of the use extending over 8,351m<sup>2</sup>, in my view, cause the proposal to be urban in appearance.

- [73] OO3(a)(ii) requires that the built form be compatible with the bushland setting. In the absence of a definition in the Scheme, “compatible” must be given its ordinary meaning. The Macquarie Dictionary defines “compatible” as “capable of existing together in harmony”. “Harmony” is defined as “a consistent, orderly or pleasing arrangement of parts; congruity”.<sup>72</sup>
- [74] The urban appearance of the use will not, in my view, be compatible with the bushland setting. A non-urban character defined by a predominance of natural landscape over buildings and structures is not achieved. This is due to the conspicuous and urban appearance of the proposal. It is not harmonious with the bushland setting.
- [75] The service station component is intended to operate 24 hours a day requiring illumination at night. Mr Curtis accepted that the vegetated background would not facilitate a bushland setting at night.<sup>73</sup> This further reinforces that the appearance of the proposal is not compatible with the setting.
- [76] For these reasons, I am not satisfied that the proposal will comply with the benchmarks relevant to built form and appearance. Whether this uncertainty can be addressed by the imposition of conditions, such that the Court can be satisfied that the proposal meets the benchmarks, is addressed below.
- [77] The Appellant submitted that any issue with respect to built form and appearance is capable of resolution through the imposition of conditions. Dr McGowan accepted that it was possible to draft conditions that would make the development visually acceptable which, setting aside economic imperatives, are achievable. Such conditions would need to address the provisions regarding the bushland setting and the predominance of the landscape over built form.<sup>74</sup>
- [78] The Appellant proposed conditions requiring a covenant and a Covenant Area management plan with respect to the balance of the Site, protecting it from future development.<sup>75</sup> The retention of the bushland to the north, south and west of the development area will contribute to the proposal’s bushland setting. This covenant will protect the integrity of the balance of the Site. However, in my view, this will not address the lack of compatibility of the built form with the bushland or landscaped setting, ensure that the built form does not dominate the bushland or landscaped setting, nor integrate the built form with the natural landscape.

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<sup>72</sup> Macquarie Dictionary, Eight Edition.

<sup>73</sup> T2-99 I 47.

<sup>74</sup> T3-14 I 45 – T3-15 I 47.

<sup>75</sup> Ex. 32, Written Submissions of the Appellant, Annexure A, Proposed Draft Conditions.

- [79] The Appellant also proposed a draft condition requiring a Rehabilitation and vegetation retention plan to address the built form, landscaping and visual amenity issues.<sup>76</sup> The draft condition requires the preparation of a plan identifying vegetation capable of retention. There are circumstances in which matters of built form, landscaping and amenity may be dealt with by the imposition of conditions. The present difficulty is that there is insufficient evidence of the proposed landscaping, including the retained and proposed vegetation and the extent of vegetation required to resolve the non-compliances (particularly as Mr Curtis does not accept there to be non-compliance).
- [80] As this Court has previously recognised, with any development, there is a degree of uncertainty about the final product that will be delivered.<sup>77</sup> Whether the degree of uncertainty tells against approval is a question of fact and degree that turns on the circumstances of the case. The evidence does not reveal the extent of the native vegetation proposed to be retained nor what additional planting, including species identification, is proposed. The extent of the landscaping to be provided at the frontage to the Site is unclear. There is uncertainty about the extent of the landscaping required to achieve the benchmarks. The proposal is for a large non-residential built form. The landscaping proposed is crucial to demonstrating compliance with the Scheme. It has long been accepted that it is not the function of the Court to redesign a proposal. The role of the Court is to decide the application before it.<sup>78</sup> It is not sufficient for the Appellant to say that compliance can be achieved. There must be evidence to support that contention. On the evidence, it is not possible to identify what is required to achieve compliance so that the Court can be satisfied that conditions can be imposed to meet the benchmarks. Absent evidence of the landscaping that would enable compliance with the benchmarks, I cannot be satisfied that conditions can be imposed to achieve compliance with the benchmarks.
- [81] That the proposal does not comply with the benchmarks relevant to built form and appearance weighs against approval.

**Is there a planning, community and/or economic need for the proposed development?**

- [82] The Appellant relies upon need as a matter that favours approval of the development application. In issue is whether there is a planning, community and economic need for the proposed development.
- [83] Before turning to the evidence, it is helpful to identify the well-established principles which inform and guide an assessment of need. They are conveniently summarised in *Isgrow v Gold Coast City Council & Anor*.<sup>79</sup>
- (a) a use is needed if it would, on balance, improve the services and facilities available in a locality;
  - (b) need, in planning terms, does not mean pressing or critical need, or even a wide-spread desire;

<sup>76</sup> Ex. 32, Written Submissions of the Appellant, Annexure A, Proposed Draft Conditions.

<sup>77</sup> *Southway Services No. 2 Pty Ltd v Brisbane City Council* [2022] QPEC 8, [246]–[248].

<sup>78</sup> *Wingate Properties Pty Ltd and Anor v BCC and Ors* [2001] QPEC 5, [21].

<sup>79</sup> [2003] QPEC 2, [20]–[26].

- (c) the question of need is decided from the perspective of the community and not that of an applicant, commercial competitor or those who make adverse submissions;
- (d) providing competition and choice can be a matter which provides for a need;
- (e) any possible adverse effect on an existing business will only be relevant to the extent there is a risk of a reduction in the level of services enjoyed by the community by depressing one provider, and not replacing it with another; and
- (f) need is a relative concept to be given greater or lesser weight depending on all of the circumstances.

[84] In that decision, his Honour Judge Wilson SC (as his Honour then was) stated:

“Need, in planning terms, is widely interpreted as indicating a facility which improve the ease, comfort, convenience and efficient lifestyle of the community...of course, a need cannot be contrived one. It has been said that the basic assumption is that there is a latent unsatisfied demand which is either not being met at all or not being adequately met. Need, in the town planning sense, does not mean a pressing need or a critical need or event a widespread desire that relates to the well being of the community.”<sup>80</sup> (Footnotes omitted).

[85] Planning need is also not limited to the need for the proposed development on the particular site in question and no other site, but the existence of other sites for which the proposed development is permitted under the applicable code may be a relevant matter, depending on all the circumstances of the case.<sup>81</sup>

[86] It must be remembered that these are general statements of principle that inform and guide an assessment of need. They are not a checklist that must be established in every case. Rather, the assessment of need in this context is a flexible process. This has long been recognised and was recently confirmed by the Court of Appeal in *Yorkeys Knob BP Pty Ltd v Cairns Regional Council*.<sup>82</sup>

[87] The Court had the benefit of evidence from Mr Duane for the Appellant and Mr Leyshon for the Respondent to assist to address the issue of need. They agreed that for the agreed trade area:

- (a) some 5 to 6 service stations are supportable now;<sup>83</sup>
- (b) by 2026, 6 to 7 service stations will be supportable.<sup>84</sup>

[88] I accept this assessment. In forming their opinions, the experts agreed that the main trade area population is very rapidly growing.<sup>85</sup> This growth is driven in large part by the rapid population settlement in Yarrabilba such that Mr Leyshon and Mr

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<sup>80</sup> *Isgrow v Gold Coast City Council & Anor* [2003] QPEC 2, [20], citing *Watts & Hughes Properties Pty Ltd v Brisbane City Council* (1998) QPELR 273, 275 and *Cut Price Stores Retailers v Caboolture Shire Council* (1984) QPLR 126, 131.

<sup>81</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257, [51].

<sup>82</sup> [2022] QCA 168, [30].

<sup>83</sup> Ex. 4, Need JER, [111(i)], p 36.

<sup>84</sup> Ex. 4, Need JER, [115], p 36; Ex. 5, Separate Report of Mr Duane, [4.1(i)], p 8; T2-6 ll 28–29.

<sup>85</sup> Ex. 4, Need JER, [46], p 16.

Duane agreed that the “overwhelming majority of demand for additional retail and commercial facilities, including services stations, will derive from population growth in Yarrabilba”.<sup>86</sup> Further, they accepted that population growth is relatively proximate to the Site.<sup>87</sup> The experts also had regard to other matters relevant to the catchment, including high levels of car ownership, that the catchment is characterised by young families likely to be price sensitive, as well as volumes of fuel and commercial vehicle uplifts applicable to the trade area. To account for the uncertainty of the extent to which there would be declining fuel consumption in the future, they adopted a prediction between declining fuel consumption of 0.25% per annum and a constant fuel consumption.

- [89] Mr Duane accepted that there are a number of available options for fast food which were all modern facilities and that these options will increase over time.<sup>88</sup> He opined that the Site would support the proposed food and drink outlet. There is no evidence of tenant interest in this component. I accept that if the proposed service station is approved, it would be reasonable to also approve the proposed convenience store element, as consumers now expect such facilities to form part of the service station offer and the proposed fast food outlets.<sup>89</sup> The experts agreed that key trends reflecting the importance of convenience and petrol stores opening for extended hours, or 24-hours, is particularly the case in suburban contexts. I proceed on the basis that if the service station component is approved, then the food and drink and convenience components should follow.
- [90] The experts agreed that in Australia the network of service stations is characterised by them being located on heavily trafficked roads serving passing traffic, within village/urban community/centre serving local residents and businesses, and associated with supermarkets. Mr Duane opined that the inclusion of a truck stop in this facility would reinforce its location on a heavily trafficked road, because trucks do not travel into centres in the same way they travel along the major roads.<sup>90</sup> The experts accepted that the provision of a truck stop in either a service station at Logan Village or Yarrabilba would be highly unlikely.<sup>91</sup>
- [91] Relevant to the issue of the need for a truck stop were the competing traffic counts. The Council’s traffic counts utilised video traffic surveys and broke the heavy vehicle category into subcategories relevant to service station accessibility. The Appellant’s traffic counts were undertaken using a ‘tube’ count methodology and revealed a greater number of heavy vehicles travelling on the road than the Council’s count. I accept that Council’s survey provides more accurate data than the Appellant’s which was not verified by video, but rather took a ‘best fit’ approach. Mr Duane accepted that the term ‘heavy vehicle’ encompassed a broad range of vehicles from the size of a large ‘pick up’, and that the vast majority of the heavy vehicle category can be accommodated in a modern service station and do not require truck stop facilities.<sup>92</sup> All but one of the 5 existing service stations have high flow diesel bowzers. Even accepting the Appellant’s traffic counts, Mr Duane’s evidence was that there will be less than one larger heavy vehicle per day

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<sup>86</sup> Ex. 4, Need JER, [48], p 17.

<sup>87</sup> Ex. 4, Need JER, [48], p 17.

<sup>88</sup> T2-16 ll 43–49 – T2-17, ll 1–33.

<sup>89</sup> Ex. 4, Need JER, [176], [180], p 50.

<sup>90</sup> T2-7 l 140

<sup>91</sup> T3-43 ll 47–49 – T3-44 ll 1–2; T3-61 ll 28–33.

<sup>92</sup> T2-23 l 22.

that cannot be accommodated by a modern standard facility.<sup>93</sup> This does not, in my view, support a need for additional truck stop facilities. At the time of preparation of the Need JER, the proposal at 1601 Waterford Tamborine Road was the subject of legal challenge. It is now under construction and includes truck refuelling facilities. It can meet any need for truck refuelling facilities in the southern part of the Waterford Tamborine corridor, further reducing the need for additional truck stop facilities.

- [92] The absence of any relevant need for the truck stop component is relevant to the outcome of this case. The truck stop facility is an element of the service station component of the use, rather than a separate use. The truck stop facility is a factor which causes the proposal to be as large as it is, with significant areas of hardstand, which in turn affects its ability to meet the built form and appearance benchmarks. It is integral component of the approval sought. It is relied upon by the Appellant to assert that there is a “locational need.”
- [93] Mr Duane opined that “There is a gap in the market for a high profile located service station along Waterford Tamborine Road, near Stockleigh Road”,<sup>94</sup> and relied upon this proposal being “highly recognisable and visible for traffic along this road”<sup>95</sup> in forming his opinions. The need analysis was undertaken on this basis.
- [94] The location of the facility on a major transport route may assist in supporting a need for the proposal. However, if the proposal is not high profile and visible, this may impact on the ability of the proposal to improve community well-being. Further, the proposal is accessible only to northbound traffic. If the proposal is screened by vegetation, it may not be high profile and may not address the gap in the market for a “high profile located service station along Waterford Tamborine Road, near Stockley Road”.
- [95] There are five existing service stations in the trade area, branded Ampol, Shell, 7-Eleven and BP. The Shell and 7-Eleven service stations are approved to operate 24 hours per day. Once the approved 1601 Waterford Tamborine Road service station is operating, two service stations will be located on Waterford Tamborine Road. Current demand will be met, and trade area motorists will be adequately served. They will not experience difficulty or inconvenience in obtaining fuel or convenience items. The evidence does not suggest that these facilities do not provide adequate choice and competition. The agreed need for service stations by 2026 falls within a range. That there are sufficient service stations to meet the bottom of that range suggests that there is no material demand for additional service stations in the trade area within that timeframe.
- [96] The evidence before the Court is that there is an operator interested in the Site. The offer to lease has not been accepted.<sup>96</sup> Until August 2023, the operator was intended to be Shell.<sup>97</sup> During the hearing, evidence was adduced that the operator would be Liberty, an independent supplier. While the offer to lease was conditional upon development approval being obtained by 31 May 2023, the proposed operator remains interested. The proposed operator is prepared to proceed on Version C, the

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<sup>93</sup> T2-32, ll 46-48.

<sup>94</sup> Ex. 4, Need JER, [143(iii)], p 46.

<sup>95</sup> Ex. 4, Need JER, [144], p 46.

<sup>96</sup> Ex. 10, Affidavit of Harbir Khurana sworn 15 August 2023.

<sup>97</sup> Ex. 10, Affidavit of Harbir Khurana sworn 15 August 2023, [3]–[5].

plan between the first and second change, which is a different proposal to that presently before the Court. There is no evidence that the operator is prepared to proceed on the basis of the proposal as amended. The evidence was that an independent retailer, such as Liberty, is price competitive, which would offer the community the benefits of competition and choice. Of course, the Court cannot require that the service station be operated by an independent operator. When those factors are considered in conjunction with the fact that an independent operator already exists in the market, being the 7-Eleven in Logan Village, I am not persuaded that the possibility of an additional independent operator in the market is a matter deserving of significant weight.

- [97] An additional service station will no doubt add to choice and competition, as would any additional facility, but there are sufficient service stations to meet the lower end of the agreed demand in 2026. The Site is not convenient to south bound traffic. Realistically, it is only accessible for northbound traffic.<sup>98</sup> This reduces its accessibility all users of the road. Thus, I am not persuaded that an additional facility will noticeably improve the well-being of the community. Mr Duane acknowledged that a range of centres will be developed in Yarrabilba over time which can incorporate service stations.<sup>99</sup> While those service stations might not enjoy the same benefits of passing traffic as does the Site, they will be proximate to the growing population of Yarrabilba and will, of course, be located within the agreed trade area. Ms Rayment confirmed that any need is capable of being met by the planning instruments. On the evidence, there is no latent unsatisfied demand not being adequately met by the planning instruments.<sup>100</sup>
- [98] The Appellant urged that lead in time for applications for service stations must be factored in to ensure that future needs are met. As I have found there is not a material demand for an additional service station by 2026, I place limited weight on this submission. In any event, the existing Ampol service station and fast food outlet in Yarrabilba received development approval within two months of application.<sup>101</sup> The Shell and 7-Eleven were completed within five months and nine months of obtaining building approval, respectively. Having regard to the process of those approvals and the construction of the facilities, I am satisfied there is adequate time for delivery of additional service station to meet any future demand arising from population growth in the trade area.
- [99] It follows that there is no planning need for the proposal. To the extent that there is any need for an additional service station in the trade area by 2026, I am not persuaded that it warrants departure from a clearly expressed planning strategy. In these circumstances, I am not persuaded that need is a matter which weighs in favour of approval.

**Should the development application be approved in the exercise of the planning discretion?**

- [100] For the reasons I have given above, I am not satisfied the proposal meets all the assessment benchmarks. In particular, the proposed development is not an appropriate use of the Site and the built form and appearance of the proposal are not

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<sup>98</sup> T2-13 l 40.

<sup>99</sup> Ex. 4, Need JER, [166], p 48.

<sup>100</sup> T3-46 ll 4–37.

<sup>101</sup> Ex. 30.

appropriate. To the extent that conditions can be imposed to remedy non-compliance with the benchmarks, these are addressed in the reasons. I am not satisfied that the application can be conditioned to comply.

[101] The Appellant contended that in the event that the Court finds non-compliances with the Scheme, there are relevant matters which support approval. A balancing exercise needs to be undertaken in the exercise of discretion. It is invariably a complicated and multifaceted exercise.<sup>102</sup> The discretion is to be exercised based on the assessment carried out under s 45 of the *Planning Act*. It is not to be undertaken capriciously. The decision must withstand scrutiny against the background of the planning scheme and proper planning practice.<sup>103</sup> It should recognise that the provisions of a planning scheme are seen to embody the public interest and, as such, there is a public interest in compliance with them. However, not every non-compliance is contrary to public interest or will warrant refusal. The extent to which a flexible approach will prevail in the face of any given noncompliance with a planning scheme (or other assessment benchmark) will turn on the facts and circumstances of each case, which includes a consideration of the “relevant matters”.

[102] Relevant matters raised by the Appellant as supporting approval of the development application were that the proposal:

- (a) would provide increased convenience, choice and competition;
- (b) complies, or can be conditioned to comply, with the planning scheme;
- (c) would not jeopardise the economic viability of existing or planned centres;
- (d) involving the co-location of the food and drink outlet with the service station is an appropriate combination of uses to serve the convenience and need of local residents and passing motorists;
- (e) will create additional employment opportunities;
- (f) cannot be accommodated on other suitably located, convenient, available or unconstrained land in the locality;
- (g) is of an appropriate scale to support both existing and future development;
- (h) is well planned and integrated with surrounding land uses;
- (i) does not impinge on the existing or intended use of the surrounding area;
- (j) does not prejudice future urban development;
- (k) is conveniently accessible to local residents and passing motorists;
- (l) provides a safe and efficient environment for pedestrians and motorists;
- (m) provides an adequate buffer between adjoining land uses;
- (n) will not result in adverse amenity impacts; and
- (o) does not adversely affect character or environmental value of the land.

<sup>102</sup> *Ashvan Investments Unit Trust v Brisbane City Council and Ors* [2019] QPEC 16, [60].

<sup>103</sup> *Ashvan Investments Unit Trust v Brisbane City Council and Ors* [2019] QPEC 16, [63], citing *Hua Shang Co Pty Ltd v Brisbane City Council and Ors* [1991] QPLR 99.



- [103] I have dealt with many of the relevant matters throughout the course of the reasons above. The remainder are dealt with below.
- [104] The evidence as to the generation of employment during construction was limited. Mr Perkins and Ms Rayment agreed that the proposed development would generate employment and add to consumer choice and competition. I accept that a service station, however branded, is likely to increase consumer choice and competition and will generate employment.
- [105] The experts agreed that the proposed food and drink outlet component of the development would not impact on the viability of other facilities in or beyond the trade area.<sup>104</sup> I accept that approval of the proposal will not impact on the continued vitality and functioning of nearby centres,<sup>105</sup> and will not impact on the continued operation of the other service stations in the area. Approval of the proposed development will not have any effect on the centre hierarchy.
- [106] The Scheme has a clearly articulated planning strategy. Retail and commercial uses are not to be provided in the Regional landscape and rural production area. In the face of non-compliance with the Scheme and the findings about need, these additional factors do not persuade me that the application ought be approved. In the exercise of my discretion, the application is refused.

**Should consideration be given to approving the development application in part?**

- [107] During oral addresses, Mr Batty submitted that in the event the Court is not persuaded by the Appellant's submissions as to the need for the various components of the proposal, that instead of making final orders, the Appellant be given the opportunity to consider the Court's reasons to allow it to give consideration to a partial approval. He acknowledged that was not the manner in which the case had been presented and that such a course would be "messy". It is not for the Court to design or redesign the proposal. This is not a staged development. The case presented was for an integrated development. There is no evidence before the Court about an alternative design. The impacts of any redesigned proposal have not been assessed, and whether any such redesigned proposal complies, or can be conditioned to comply, with the benchmarks has not been determined. A further concern is that a changed proposal, with some of the elements considered by the need experts in their analysis removed, may have impacts not considered by them. For these reasons, I am not persuaded this is a course of action which should be adopted in the present circumstances.

**Conclusion**

- [108] The Appellant has not discharged the onus. The appeal is dismissed. The decision of the Respondent to refuse the application is confirmed.

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<sup>104</sup> Ex. 4, Need JER, [137], p 40.

<sup>105</sup> Ex. 5, Separate Report of Mr Duane, [4.1(vii)], p 8.