

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Glen Machado & Ors v Council of the City of Gold Coast*
[2024] QPEC 22

PARTIES: **GLEN MACHADO & ORS**
(Appellants)

v

COUNCIL OF THE CITY OF GOLD COAST
(Respondent)

FILE NO/S: 1705, 1706, 1707, 1708 and 1709 of 2022

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING
COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 24 April 2024

DELIVERED AT: Brisbane

HEARING DATE: 15 - 17 April, 2024

JUDGE: Everson DCJ

ORDER: **Appeals Dismissed**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal
against refusal of Dual occupancy uses in the Low density
residential zone

PLANNING AND ENVIRONMENT – ASSESSMENT –
compliance with the planning scheme

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

Zappala Family Co Pty Ltd v Brisbane City Council [2014]
QCA, 147

Lalis v Bundaberg Regional Council [2018] QPELR 861

Sweeney Pastoral Company v Snowy River Shire Council
[1993] NSWLEC 189

LEGISLATION: *Planning Act 2016* (Qld)

Planning and Environment Court Act 2016 (Qld)

Planning Regulation 2017 (Qld)

COUNSEL: M J Batty and M Rodgers for the Appellants

K W Wylie for the Respondent

SOLICITORS: Sparke Helmore for the Appellants

HopgoodGanim for the Respondent

Introduction

- [1] These are five appeals against decisions of the respondent to refuse development applications seeking development permits for a material change of use for a Dual occupancy use at 7, 12, 13, 16 and 19 Boydaw Road, Ormeau. They were all heard together.

- [2] Each of the proposed developments relates to existing dwelling houses comprising two dwellings divided by an internal wall. The proposed developments comprise two dwelling configurations referred to as Type A and Type B. Type A comprises a one-bedroom dwelling and a four-bedroom dwelling and Type B comprises a two-bedroom dwelling and three-bedroom dwelling.¹ There are no material differences between each of the Type A proposed developments that are relevant to the issues in dispute. Likewise, there are no material differences between each of the Type B proposed developments which are relevant to the issues in dispute.²

- [3] The Type A proposed developments are located at 12 and 16 Boydaw Road. They each have a site area of 530m², a 12.5m frontage and a 1.8m high fence separating off approximately one third of the backyard of the property on the side of the smaller dwelling.³

- [4] The Type B proposed developments are located at 7, 13 and 19 Boydaw Road and each have a site area of 521m², a frontage of 12.5m and a 1.8m high fence dividing the backyard in half.⁴

- [5] All of the proposed developments have the appearance of a single dwelling house from the street. There is a single front door which provides access to the larger of the two residences in each instance. For all of the proposed developments access to the smaller residence is provided via a timber gate at the side of the dwelling house.

¹ Ex. 1A, para 15.

² Ibid, paras 16 and 17.

³ Ex. 5A.

⁴ Ex. 5B.

- [6] The Type A proposed developments have two garages at the front and access to the smaller residence is half-way along the southern boundary.⁵
- [7] The Type B proposed developments have a garage as part of the larger dwelling and a carport as part of the smaller dwelling and the entry to the smaller dwelling is at the rear of the carport.⁶
- [8] With all of the proposed developments, the two dwellings are separated by a firewall and each dwelling is completely self-contained with its own kitchen, bathroom and living facilities.⁷ As a consequence of a successful application for a minor change it is proposed to slightly alter the existing built form to provide better delineation of the gateway access from the street for each of the proposed developments, with a clearly delineated path and separated letterbox. The gate itself and the immediately adjacent part of the building are now intended to exhibit a slightly different architectural treatment.⁸ The widening of the driveway will now allow two vehicles to lawfully park side by side on the driveway.⁹ The driveway widening would be very minor in each instance,¹⁰ and this would effectively regularise what appears to already occur in any event.¹¹ The 1.8m fences which partition the backyards are shown on each of the plans. Given the size of the driveways and the need to provide vehicular and pedestrian access to two dwellings, in each instance only limited landscaping is proposed on the street frontage.
- [9] Each of the proposed developments was approved as a Dwelling house by a private certifier. Each was the subject of a Show Cause Notice from the respondent alleging the property was being used unlawfully as a Dual occupancy, resulting in the development applications the subject of these appeals being made in early 2022.¹²

The Street

- [10] Boydaw Road is on the southern edge of Ormeau, within an area that is the subject of emerging residential development. The road is comprised of predominantly single storey contemporary residential buildings which present to the street as

⁵ Ex. 5A.

⁶ Ex. 5B.

⁷ Ex. 5A and 5B.

⁸ Ibid.

⁹ Ex. 4A, para 71; Ex. 4B, para 71.

¹⁰ Ibid, Annexure E in each instance.

¹¹ Ex. 5A, Fig. 1.

¹² Ex. 4A, para 41; Ex. 4B, para 41.

detached dwelling houses.¹³ All of the land the subject of the proposed developments is within the Suburban neighbourhood designation in the Strategic framework of the respondent's planning scheme ("the planning scheme").¹⁴ It is located in the Low density residential zone but not within any precincts or mapped areas within that zone and it is not within any mapped areas in the Residential density overlay map or the Minimum lot size overlay map.¹⁵ The development applications were subject to impact assessment.¹⁶

The statutory assessment framework

[11] Pursuant to the *Planning and Environment Court Act 2016* (Qld) ("PECA"), the appeal is by hearing anew,¹⁷ and the appellants must establish that the appeal ought to be upheld.¹⁸ Section 46 of the PECA addresses the nature of an appeal and relevantly provides:

- (2) The Planning Act, section 45 applies for the P&E Court's decision on the appeal as if—
 - (a) the P&E Court were the assessment manager for the development application; and
 - (b) the reference in subsection (7) of that section to when the assessment manager decides the application were a reference to when the P&E Court makes the decision.

[12] As the proposed developments were impact assessable, s 45 of the *Planning Act 2016* (Qld) ("PA") provides that the assessment must be carried out against the relevant assessment benchmarks in a categorising instrument for the development which, in the circumstances before me, are the relevant provisions of the planning scheme.¹⁹ It must also be carried out having regard to any matters prescribed by regulation. Accordingly, s 31(1)(g) of the *Planning Regulation 2017* (Qld) ("Planning Regulation") states that I must have regard to "the common material". This is defined to include any properly made submissions about the development application which have not been withdrawn.²⁰ A total of five properly made submissions were received during the public notification period. Four of these were

¹³ Ex. 1A, 5A and 5B.

¹⁴ Gold Coast City Plan, Version 8.

¹⁵ Ibid and Ex. 6, para 9.

¹⁶ Ibid, para 4.

¹⁷ *Planning and Environment Court Act 2016* (Qld) s 43.

¹⁸ Ibid s 45(1)(a).

¹⁹ *Planning Act 2016* (Qld) s 45(5)(a)(i).

²⁰ *Planning Regulation 2017* (Qld) Schedule 24.

in support of the proposed developments and one submission opposed it. It was submitted by Grummitt Town Planning on behalf of 7 residents of Boydaw Road. It opposed the proposed developments primarily on the grounds of traffic and parking impacts but also because of the built form and the overall appearance of the proposed developments. It was accompanied by a petition of several residents of Boydaw Road, each of whom opposed the proposed developments.²¹

[13] Additionally, s 31(1)(f) of the Planning Regulation states that I must have regard to “any development approval for, or any lawful use of, the premises or adjacent premises” in carrying out impact assessment. As will become evident this provision assumes particular significance in the determination of these appeals.

[14] Assessment may be carried out having regard to any other relevant matter, other than a person’s personal circumstances, financial or otherwise.²²

[15] Pursuant to s 60 of the PA, the court in determining an appeal about a development application is conferred a wide discretion. The section relevantly states:

- (3) To the extent the application involves development that requires impact assessment, and subject to section 62, the assessment manager, after carrying out the assessment, must decide—
 - (a) to approve all or part of the application; or
 - (b) to approve all or part of the application, but impose development conditions on the approval; or
 - (c) to refuse the application.

[16] In undertaking this task, the observations of Mullins JA in *Abeleda & Anor v Brisbane City Council & Anor*²³ are instructive:

- [42] ...The decision-maker under s 60(3) of the Act is still required to carry out the impact assessment against the assessment benchmarks in the relevant planning scheme and can take into account any other relevant matter under s 45(5)(b). The starting point must generally be that compliance with the planning scheme is accorded the weight that is appropriate in the particular circumstances by virtue of it being the reflection of the public interest (and the extent of any non-compliance is also weighted according to the circumstances), in order to be

²¹ Ex. 7.

²² *Planning Act 2016* (Qld) s 45(5)(b).

²³ [2020] QCA 257.

considered and balanced by the decision-maker with any other relevant factors.

[43] ...The decision-maker may be balancing a number of factors to which consideration is permitted under s 45(5) of the Act in making the decision under s 60(3) of the Act where the factors in favour of approval (or approval subject to development conditions) have to be balanced with the factors in favour of refusal of the application. The weight given to each of the factors is a matter for the decision-maker in the circumstances...²⁴

[17] The applicable principles for the construction of planning documents were considered by the Court of Appeal in *Zappala Family Co Pty Ltd v Brisbane City Council*, notably that the same principles which apply to statutory construction apply to the construction of planning documents,²⁵ and that such documents need to be read as a whole and in a way which is practical and as intended to achieve a balance between outcomes.²⁶

Relevant provisions of the Planning Regulation and the Planning Scheme

[18] It is uncontentious that Version 8 of the planning scheme was in effect at the time the development applications were properly made and should be applied in the determination of the appeals.²⁷ Notably s 1.2.1 of the planning scheme states that in the event a term has been assigned a meaning in the Planning Regulation, the meaning contained in it prevails over the meaning in the planning scheme.²⁸ This provision assumes significance in circumstances where the Planning Regulation contains definitions for “dwelling” and “secondary dwelling” whereas the planning scheme does not. Moreover, the Planning Regulation contains a definition of “dwelling house” which is materially different from that contained in the planning scheme which stipulates a residential use of premises involving “one dwelling for a single household”.²⁹

[19] The relevant definitions in the Planning Regulation are:

dwelling means all or part of a building that—

- (a) is used, or capable of being used, as a self-contained residence; and
- (b) contains—

²⁴ *Planning Act 2016* (Qld) s 45(5)(b).

²⁵ [2014] QCA, 147 at [52].

²⁶ *Ibid* at [56].

²⁷ Ex. 1A, 1B and Ex. 2.

²⁸ Ex. 2, s 1.2.1, p 7.

²⁹ *Ibid*, Table SC1.1.1.

- (i) food preparation facilities; and
- (ii) a bath or shower; and
- (iii) a toilet; and
- (iv) a wash basin; and
- (v) facilities for washing clothes.

dwelling house means a residential use of premises involving—

- (a) 1 dwelling and any domestic outbuildings associated with the dwelling; or
- (b) 2 dwellings, 1 of which is a secondary dwelling, and any domestic outbuildings associated with either dwelling.

secondary dwelling means a dwelling on a lot that is used in conjunction with, but subordinate to, another dwelling on the lot, whether or not the dwelling is—

- (a) attached to the other dwelling; or
- (b) occupied by individuals who are related to, or associated with, the household of the other dwelling.³⁰

[20] The Strategic framework in the planning scheme prevails over all other components the extent of inconsistency for impact assessment.³¹ In the Strategic framework, s 3.3.1 contains the following relevant strategic outcomes:

- (3) Housing is provided in a form, height and scale consistent with the function, amenity and desired future character of local areas and centres, and promotes a sense of community cohesion and wellbeing. Housing is attractive and well-designed.
- (4) Affordable housing or entry level priced housing meets the needs of low to moderate income households, ...These forms of housing are located close to facilities, services...and essential infrastructure.
- ...
- (11) Suburban neighbourhood areas are maintained as low-intensity, low-rise residential environments that retain and enhance local character and amenity.³²

[21] Thereafter the following specific outcomes in s 3.3.3.1 are relevant:

- (4) Suburban neighbourhoods provide opportunities for smaller and more affordable housing options. Low intensity, low-rise, dual occupancy and multiple dwellings and new lots, which are smaller than traditional lots (but not small lots), occur in

³⁰ *Planning Regulation 2017* (Qld) Schedule 24.

³¹ Ex. 2, s 1.4.

³² Ibid, s 3.3.1.

suburban neighbourhoods in low concentrations where they achieve a dispersed or gentle-scattering effect and are limited to the following:

- (a) lots with dual frontage; or
- (b) lots identified:
 - (i) as having a residential density designation of RD1 or greater of the **Residential density overlay map**; or
 - (ii) on the **Minimum lot size overlay map**.³³

[22] Relevantly, s 5.3.3 provides that Code assessable development that complies with:

- (i) the purpose and overall outcomes of the code complies with the code;
- (ii) the performance or acceptable outcomes complies with the purpose and overall outcomes of the code.³⁴

[23] The Low density residential zone code (“LDRZC”) relevantly provides:

6.2.1.2 Purpose

- (1) The purpose of the **Low density residential zone code** is to provide for Dwelling houses, supported by community uses and small-scale services and facilities that cater for local residents.
- (2) The purpose of the code will be achieved through the following overall outcomes:
 - (a) Land uses –
 - (i) consist of a range of low intensity, low rise, predominantly detached housing that retains and enhances local character and amenity by maintaining existing scale, building height and
 - ...
 - (iii) such as Dual occupancies and Multiple dwellings, occur in low concentrations where they achieve a dispersed or gentle-scattering effect. They are found on:
 - (A) lots with dual frontage; or
 - (B) lots identified on the **Residential density overlay map** and have a designated residential density of RD1 or greater.
 - ...
 - (vii) do not detract from the residential amenity of the area.

³³ Ex 2, s 3.3.3.1.

³⁴ Ibid s 5.3.3.

(b) Character consists of –

- (i) low intensity, locally serviced suburban neighbourhoods that offer a high level of amenity and a sense of openness, with buildings that present well to the street and are set amongst generous landscaping;

...³⁵

[24] Thereafter, PO1 of the LDRZC provides that setbacks assist in the protection of adjacent amenity, allow for access around the building, contribute to streetscape character and allow for onsite car parking.³⁶ PO5 states that the development is to be low intensity to complement the existing residential development of the neighbourhood and protect its Dwelling house character.³⁷

[25] Finally, the following provisions of the Dual occupancy code (“DOC”) are relevant.

9.3.6.2 Purpose

- (1) The purpose of the Dual occupancy code is to ensure Dual occupancies are appropriately located, achieve a high level of comfort and amenity for occupants, maintain the amenity of neighbouring premises and do not dominate the streetscape.
- (2) The purpose of the code will be achieved through the following overall outcomes:

...

- (c) Dual occupancies overlook streets, open spaces and rear lanes to promote casual surveillance.
- (d) Dual occupancies have sufficient private open space to meet the needs of the residents.

...

- (f) Dual occupancies are designed to provide visual interest to the streetscape and contribute positively to the local character and city image.³⁸

[26] Thereafter PO1 requires the provision of sufficient frontage for pedestrian and vehicular access and parking and “adequate” landscaping. The driveway and car parking spaces must not dominate the property frontage. PO4 requires the adding of visual interest through articulation and the provision of differentiation between

³⁵ Ex. 2, s 6.2.1.2.

³⁶ Ibid Table 6.2.1-2.

³⁷ Ibid s 9.3.6.2.

³⁸ Ibid.

dwellings. PO7 requires the building to be orientated to facilitate casual surveillance by addressing the street.

Issues in dispute

[27] The issues in dispute narrowed dramatically in the course of the hearing of the appeal. Following the abandonment by the respondent of allegations that traffic and transport planning impacts warrant refusal, the remaining issues may be conveniently summarised as follows:

1. whether the proposed developments offend the relevant provisions of the planning scheme identified above, having particular regard to locational requirements and residential density considerations, notably from the perspective of amenity, character and intensity;
2. the respondent's relevant matter that Boydaw Road is a street of Low-density residential dwellings;
3. the Appellant's relevant matters which are essentially that:
 - (a) the proposed developments would be well-located on land that has convenient access to infrastructure and services;
 - (b) that the proposed developments are consistent with the character of the locality and of an acceptable built form and design;
 - (c) that the proposed developments would not result in any unacceptable town planning or amenity impacts; and
 - (d) that the proposed developments would be in the public interest in providing certainty of use rights while addressing a need for greater housing choice and flexibility identified by the State Government;³⁹ and
 - (e) any non-compliance with assessment benchmarks does not warrant refusal of the proposed developments and could be remedied by the imposition of lawful conditions.

Discussion

[28] In assessing applications for impact assessable development, it is necessary to assess the prospective impacts against a baseline of what the relevant current lawful land uses are. This is why s 31 of the Planning Regulation requires that impact assessment must be carried out having regard to, *inter alia* "any development

³⁹ Explanatory Notes, Planning Secondary Dwellings Amendment Regulation 2022 (Qld) p 2.

approval for, and any lawful use of, the premises or adjacent premises”.⁴⁰ The lawful use of each of the premises the subject of the development applications and their adjacent premises is as a Dwelling house. As a consequence of the current definition in the Planning Regulation, this extends to two dwellings, one of which is the secondary dwelling. The definition of secondary dwelling in the Planning Regulation is relevantly, “a dwelling on a lot that is used in conjunction with but subordinate to the other dwelling on the lot”, whether or not it is occupied by individuals who are related or associated with the household of the other dwelling.

[29] The Respondent submits that the purported secondary dwelling of each of the proposed developments is neither used in conjunction with nor is it subordinate to the other dwelling on the lot. It is convenient to deal with the question of whether the purported secondary dwelling is subordinate to the other dwelling before considering the more vexed question of whether the two are used in conjunction. The approved plans for the Dwelling houses the subject of the proposed developments all show a larger dwelling and a smaller dwelling.⁴¹ Only the larger dwelling has a front door providing direct access to Boydaw Road. In each instance the purported secondary dwelling is either accessed ultimately at the back of a carport or through a gate which leads to a narrow path along the side building and a side entrance. In each instance the purported secondary dwelling is significantly smaller than the other dwelling and in each of the plans for the Type B premises, the purported secondary dwelling is named as such. Accordingly, I find that the purported secondary dwelling is subordinate to the other dwelling in each instance.

[30] The question of whether or not the two dwellings are used in conjunction with each other is less straight forward. The term “conjunction” is defined in the Macquarie Concise Dictionary as, *inter alia* “the state of being conjoined” and the term “conjoined” is stated to mean “to join together; unite; combine; associate”.⁴² Kefford DCJ recently considered the question in a different context in *Lalis v Bundaberg Regional Council*.⁴³ The different context was that a dwelling house was defined as being a residential use of premises for one household. Her Honour concluded that there was no functional nexus between the two dwellings in

⁴⁰ *Planning Regulation 2017* (Qld) s 31(1)(f).

⁴¹ Ex. 4A and 4B.

⁴² Macquarie University (4th ed, 2006) ‘conjoined’ and ‘conjunction’.

⁴³ [2018] QPELR 861.

question, in circumstances where she found that there was not one household, ultimately finding that “the subject land contains two dwellings and that each dwelling is used for a separate household.”⁴⁴ In considering the question, her Honour accepted the observations made by Pearlman J in *Sweeney Pastoral Company v Snowy River Shire Council*⁴⁵ that the phrase required a “functional nexus” before concluding that:

Matters such as the dwellings being located on the same parcel of land and structural integration fall well short of demonstrating that the dwellings are being ‘*used in conjunction with*’ each other.⁴⁶

- [31] On the facts before me, the shared use infrastructure connections and the shared front driveway of each of the premises the subject of these appeals, fall short of satisfying the definitional requirement that the secondary dwelling in each instance be used in conjunction with the other dwelling. What is required is a higher level of functional integration between the two groups of occupants even though they need not be related to or associated with each other. The partitioning off of parts of the backyards of each of the Dwelling houses with continuous 1.8m high fences creates a level of separation which precludes the two dwellings being used in conjunction with each other. Were all the land around the buildings to be opened up so as to be available for use by each of the occupants of each of the dwellings, then in my view there would be a lawful use of a Dwelling house in each instance. This is because the occupants of the secondary dwelling, although not associated with the household of the other dwelling, would be using it in conjunction with the occupants of the other dwelling, by sharing the land around the building.
- [32] Accordingly, I am of the view that should areas of land outside each of the dwelling houses the subject of this appeal be available to each of the occupants of the building in question, the current use of the premises the subject of the appeals would be lawful as dwelling houses incorporating a secondary dwelling, applying the current definition in the Planning Regulation.
- [33] The Appellants ultimately submit that to the extent that there is any established non-compliance with the planning scheme, this is not material in the circumstances.⁴⁷ It

⁴⁴ *Lalis v Bundaberg Regional Council* [2018] QPELR 861 at 866, [39].

⁴⁵ [1993] NSWLEC 189.

⁴⁶ *Lalis* at 867 – 868, [48] and [54].

⁴⁷ Ex. 11, para 61.

is submitted that the proposed developments will not result in any unacceptable town planning, traffic, character or amenity impacts. It is further submitted that benefits will arise from the delivery of the proposed built form outcome, increased driveway width and a concreted side access and a more clearly defined pedestrian entry for the smaller dwelling in each proposed development.⁴⁸ To the extent that concerns were expressed on behalf of the respondent that the approval of the proposed developments would facilitate a reconfiguration in respect of each of the dwellings, the appellants now offer a condition in each instance that the development approval lapse on the date of registration of a plan of subdivision creating two or more titles over each lot.⁴⁹ I am satisfied that there will be minor improvements to the built form and functionality of the dwellings compared to what currently exists, however such benefits are largely cosmetic and, in my view, do not offset the significant detriment of enshrining the permanent partitioning of the backyards of each of the properties. I accept that the proposed condition adequately addresses concerns about potential future reconfigurations creating separate lots.

[34] Two town planners gave evidence, Mr Mewing gave evidence on behalf of the Appellants and Mr Perkins gave evidence on behalf of the Respondent. They agreed that the proposed developments presented to the street such that each of the proposed dual occupancy buildings has a scale, site cover and setbacks consistent with other dwelling houses in the street, and that they presented similarly to the surrounding detached housing.⁵⁰ Further, Mr Perkins conceded in cross-examination that approval of the proposed developments will not result in unacceptable character impacts for the street.⁵¹

[35] It is not enough however to demonstrate that the proposed developments will continue to look like Dwelling houses and function as five-bedroom residences. The planning scheme envisages different forms of housing in s 3.3.1 of the Strategic framework but mandates that housing is attractive and well-designed. In s 3.3.1(11) low-rise residential environments should retain and enhance local character and amenity. In the specific outcomes in s 3.3.3.1, the enhancing of local character, limited scale and a generous landscaped setting are important strategies. The option

⁴⁸ Ex. 11, para 7.

⁴⁹ Ibid, para 60.

⁵⁰ Ex. 3A, para 7.1, pp 39-40; Ex. 3B, para 7.1.

⁵¹ T1 – 72, ll 40 – 45.

of Dual occupancy dwellings is contemplated in suburban neighbourhoods in low concentrations where they achieve “a dispersed or gentle-scattering effect” but they are to be limited to lots with a dual frontage or lots identified on the Residential density overlay map or on the Minimum lot size overlay map. None of these measurable locational features apply to any of the proposed developments. I accept the evidence of Mr Perkins that the proposed developments represent low concentrations of dual occupancy uses.⁵² As to what is meant by “a dispersed or gentle-scattering effect”, this flowery, imprecise verbiage is not appropriate for a planning scheme. I am nonetheless satisfied that the proposed developments meet this amorphous concept in circumstances where they are in relatively low concentrations in the street and not adjoining each other.

- [36] The design parameters for Dual occupancy uses set out in the Strategic framework are further refined in the relevant codes. Given the findings above, pursuant to s 6.2.1.2(2)(a)(i), I am satisfied that the proposed developments can be classified as “low intensity” and otherwise there is compliance with the general locational requirements of s 6.2.1.2(2)(a)(iii). There is non-compliance with the specific design outcomes which are sought and, in particular, that the lots be either lots with a dual frontage or appropriately identified on the Residential density overlay map. In terms of amenity, although the proposed developments are of a similar character to the detached dwelling houses in the street, they are certainly not set amongst “generous landscaping” contemplated by s 6.2.1.2(b)(i). Because of the partitioning of the backyards I am of the view that the proposed developments detract from the residential amenity of the area contrary to the requirement in s 6.2.1.2(a)(vii). In terms of PO1, these requirements could arguably be complied with but for the partitioning of the backyards preventing access around the buildings. PO5 of the LDRZC appears to be complied with.
- [37] Unsurprisingly, the concept of a Dual occupancy in the DOC, which applies in assessing a material change of use for a Dual occupancy, is different to what is exhibited by the proposed developments before me. The purpose and overall outcomes in s 9.3.6.2 talk in terms of the individual Dual occupancies being appropriately located, achieving a high level of comfort and amenity for the occupants, overlooking streets and contributing positively to the local character and

⁵² T1 – 85, ll 5 – 7.

city image.⁵³ The smaller dwellings in the Type A proposed developments have no street frontage at all and absolutely no capacity to overlook the street. The larger dwelling merely overlooks the street to the extent that there is a bedroom window that does so. So far as the Type B proposed developments are concerned, only the master bedroom of the larger dwelling overlooks the street and again the smaller dwelling does not have any connection with the street at all. In circumstances where each of the proposed developments is designed to blend in with other Dwelling houses in the street but still provide for car parking for 4 vehicles at the front of the dwellings, it cannot be said that any of the proposed developments contribute positively to the local character and city image. At best their contribution can be said to be neutral in this regard.

- [38] In terms of the Performance Outcomes identified as relevant in the DOC, I am of the view that so far as PO1 is concerned, the driveway and covered car parking spaces dominate the property frontage, that the landscaping adjacent to the road frontage is, in each instance, inadequate and therefore PO1 is not complied with. PO4 is such an amorphous provision that the degree to which it is said there is non-compliance is difficult to measure. The minor architectural treatments in the vicinity of and to the gates which provide access to the smaller dwelling in the proposed developments constitute minimal building articulation and minimal differentiation between dwellings. Together with the pathways and the relocated letterboxes, these measures fall well short of what the planning scheme envisages for Dual occupancies when they are read in conjunction with the planning scheme provisions which encourage dual frontages and positive contributions to local character and city image. Finally, PO7 is not complied with as the building in each instance is not orientated to facilitate casual surveillance by addressing the street, as one bedroom in a building overlooking the street does not facilitate casual surveillance.
- [39] In Schedule 1 of the planning scheme it is important to note that, regardless of the precise wording of the definition, a Dual occupancy is defined to not include a Dwelling house and that a Dwelling house is defined to not include a Dual occupancy. Each of the properties the subject of the proposed developments was designed as a single Dwelling house and it is not appropriate to ignore the

⁵³ The term “Dual occupancies” is used in the context of these assessment benchmarks as opposed to the general term “Dual occupancy” which proceeds them.

differences between the two uses and to retrofit a Dual occupancy use into a Dwelling house. The result on the facts before me would be a cramped separation of two dwellings which do not operate in conjunction with each other. This is not the outcome the planning scheme seeks for a Dual occupancy. Essentially this use is contemplated on mapped or dual frontage sites which address the street in circumstances where they contribute positively to the local character. There is no concept of one dwelling being subordinate in a Dual occupancy use. The partitioning of the backyards to create separate exclusive areas for occupation by the occupants of each of the proposed separate dwellings leads to a particularly undesirable amenity consequence from a low-density residential perspective. Whether this is considered in the context of the requirement pursuant to s 31(1)(f) of the Planning Regulation or s 6.2.1.2(2)(vii) of the LDRZC or as a relevant matter raised by the Respondent, it is an impact of the proposed developments which does not represent a good planning outcome.

- [40] As far as the Appellants' relevant matters are concerned, I accept that the proposed developments have convenient access to infrastructure and services. Parks, a school and the Ormeau Village centre which includes a Coles Supermarket are all proximate to Boydaw Road.⁵⁴ What is proposed however is an outcome which has unreasonable town planning and amenity impacts when the locational requirements for Dual occupancies are considered. While the built form and design is acceptable for a Dwelling house, it is not acceptable for a Dual occupancy. Any need for greater housing choice and flexibility, which led to the amendment of the relevant definitions in the Planning Regulation,⁵⁵ can be met through lawful Dwelling houses incorporating secondary dwellings.

Conclusion

- [41] The proposed developments seek to enshrine a poor planning outcome which is not consistent with the outcomes the planning scheme seeks for Dual occupancies. The Appellants have not demonstrated that the appeals should be upheld. The appeals are therefore dismissed.

⁵⁴ Ex. 3A, para 21, p 8. I also find that s 3.3.1(4) and s 6.2.1.2(1) of the planning scheme are complied with in this regard.

⁵⁵ Explanatory Notes, Planning Secondary Dwellings Amendment Regulation 2022 (Qld) p 2.