SUPREME COURT OF QUEENSLAND

CITATION:	*Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257
PARTIES:	**PATRICIA ABELEDA** (first applicant) **HERSTON DEVELOPMENT COMPANY PTY LTD** ACN 617 139 009 (second applicant) **v** **BRISBANE CITY COUNCIL** (first respondent) **SILVERSTONE DEVELOPMENTS PTY LTD** ACN 159 139 947 (second respondent)
FILE NO/S:	Appeal No 14234 of 2019 P & E No 3718 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2019] QPEC 58 (R S Jones DCJ)
DELIVERED ON:	20 November 2020
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2020
JUDGES:	Mullins JA and Brown and Wilson JJ
ORDER:	**Application for leave to appeal refused with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the applicants operated car parks in the vicinity of a major public hospital – where the developer proposed to develop a car park near the hospital which was impact assessable – where the planning scheme required development on the subject site to "support non-residential uses that have a close nexus" with the hospital – where the primary judge found that while the proposed car park had a close nexus with the hospital, it would not support a non-residential use that had a close nexus with the hospital – where the primary judge held that there was non-compliance with the planning scheme – where the primary judge took into account that the car park had a close nexus with the hospital – where the primary judge concluded in respect of the decision under s 60(3) of the *Planning Act* 2016 (Qld)

that the balance of factors favoured the approval of the application despite non-compliance with the planning scheme – whether an aspect of non-compliance with the planning scheme can be taken into account as a relevant matter under s 45(5)(b) of the *Planning Act* 2016 (Qld) in the assessment of the development application

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the applicants operated car parks in the vicinity of a major public hospital – where the developer proposed to develop a car park on a site near the hospital which was impact assessable – where the relevant Acceptable Outcome under the planning scheme set a limit of three storeys or 10.5m in height for the site – where the height of the proposed development was six storeys and 19.25m – where the primary judge found that a car park of six storeys was not beyond community expectations which therefore complied with the Performance Outcome to which the Acceptable Outcome corresponded – where the primary judge found that there was an economic need and community need for the car park – whether, after accepting that the car park was not beyond community expectations and there was need for the car park, the primary judge had to consider if there was a need for the proposed development at the specific site

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the applicants operated car parks in the vicinity of a major public hospital – where the developer proposed to develop a car park near the hospital which was impact assessable – where the applicants were the long term developers for the priority development area that included the hospital and a number of car parks both existing and proposed – where the car parks operated by the applicants contributed significant funds to the charitable hospital foundation – where the applicants were concerned about the viability of the ongoing development of the priority development area and the revenue to the charity – where the primary judge found that the height of the proposed development was within community expectations – whether the expectations of the applicants as "significant stakeholders" should have been taken into account when assessing community expectations

Acts Interpretation Act 1954 (Qld), s 14D
Planning Act 2016 (Qld), s 3, s 5, s 43, s 44, s 45, s 59, s 60
Planning and Environment Court Act 2016 (Qld), s 43, s 46, s 63

AAD Design Pty Ltd v Brisbane City Council [2013]

1 Qd R 1; [2012] QCA 44, cited
Ashvan Investments Unit Trust v Brisbane City Council [2019] QPELR 793; [2019] QPEC 16, considered
Australian Capital Holdings Pty Ltd v Mackay City Council [2008] QPELR 608; [2008] QCA 157, cited
Bell v Brisbane City Council (2018) 230 LGERA 374; [2018] QCA 84, considered
Gold Coast City Council v K & K (GC) Pty Ltd (2019) 239 LGERA 409; [2019] QCA 132, considered
Lockyer Valley Regional Council v Westlink Pty Ltd [2013] 2 Qd R 302; [2012] QCA 370, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, considered
Redland City Council v King of Gifts (Qld) Pty Ltd [2020] QCA 41, considered
Smith v The Queen (1994) 181 CLR 338; [1994] HCA 60, cited
Williams McEwans Pty Ltd v Brisbane City Council [1981] QPLR 33, cited

COUNSEL: D R Gore QC, with M J Batty, for the applicants
B D Job QC, with J G Lyons, for the first respondent
C L Hughes QC, with H Stephanos, for the second respondent

SOLICITORS: Hicksons Lawyers for the applicants
City Legal – Brisbane City Council for the first respondent
Thynne & Macartney for the second respondent

[1] **MULLINS JA:** Pursuant to the Brisbane City Plan 2014 (the planning scheme), the Brisbane City Council approved a development application by Silverstone Developments Pty Ltd for a development permit for a material change of use for a multi-storey public car park facility in Butterfield Street, Herston opposite the Royal Brisbane and Women's Hospital which is impact assessable under s 45(5) of the *Planning Act* 2016 (Qld) (the Act). The appeal to the Planning and Environment Court against that approval by the applicants was dismissed: *Abeleda & Anor v Brisbane City Council & Anor* [2019] QPEC 58 (the reasons). The applicants apply for leave to appeal against the learned primary judge's decision pursuant to s 63 of the *Planning and Environment Court Act* 2016 (Qld) (PECA).

Background

[2] Silverstone's site is a regular shape that fronts Butterfield Street (with a frontage of 32 m) to the south, abuts Enoggera Creek to the north and, where the site fronts Butterfield Street, it is almost immediately adjacent to a roundabout intersection of Butterfield Street and Garrick Terrace. The site has the total area of 3,478m². The primary judge noted the site is located in an area notorious for being flooded from time to time (at [16] of the reasons) and is "in an intensely developed area" (at [17] of the reasons). Most of the site is located within the Low Impact Industry Zone and the balance adjacent to the creek is within the Open Space Zone. It is within the Ithaca District Neighbour Plan Code (Ithaca DNPC) in the Butterfield Street precinct and within the Butterfield Street sub-precinct (a). Under the hierarchy of assessment benchmarks set out in s 1.5 of the planning scheme, the Ithaca DNPC

prevails over the zone codes, use codes and other development codes for the subject site, to the extent of any inconsistency between the Ithaca DNPC and those other codes.

[3] On 18 November 2016 the Queensland Government declared the Herston Quarter to be a priority development area (PDA) under the *Economic Development Act* 2012 (Qld). The Herston Quarter PDA Development Scheme that came into effect on 22 December 2017 applies to the Herston Quarter PDA and involves seven stages to be completed over approximately 10 years. The master plan for the development includes parking facilities for the Hospital and the PDA. The planning scheme recognises that land the subject of that PDA is affected by that development scheme. Silverstone's site is outside, but very close to, the Herston Quarter PDA.

[4] Australian Unity Group (AU) was selected as the preferred tenderer for the Herston Quarter PDA. AU is the parent group of the second applicant Herston Development Company Pty Ltd which is the development company carrying out the development of the PDA. AU subleased the existing car park facilities within the development to International Parking Group Pty Ltd (IPG) (for which the first applicant is the agent). IPG's car parks are conducted under the name Metro and would have to compete with Silverstone's proposed car park. IPG has also committed to subleasing from AU three additional car parks to be developed by the second applicant in the PDA.

[5] The proposed development involves the construction of a new building of six storeys with five of the storeys to be used as a car park comprising 354 parking spaces and eight disabled parking spaces. As the primary judge accepted (at [13] of the reasons), because of the risk of serious flooding, the ground floor would not be used for car parking to allow floodwaters to rise and fall without placing at risk vehicles parked above the ground floor.

[6] The nature of the planning issues in dispute on the appeal to the P & E Court were identified at [5] of the reasons:

> "(a) The appropriateness of the proposed use having regard to the physical features of the subject land.
>
> (b) Traffic engineering issues.
>
> (c) Flooding and hydraulics.
>
> (d) The visual amenity of the proposed development having regard to, in particular, its height, built form and character.
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> (e) Demands on infrastructure.
>
> (f) Its compatibility with the existing and intended uses for the nearby priority development area; and
>
> (g) The community need for the proposed development."

[7] The appeal to the P & E Court involved extensive expert evidence in the fields of town planning, architecture, visual amenity, traffic engineering and flooding. There was a degree of overlap in the issues, particularly flooding, hydraulics and traffic (at [6] of the reasons). Pursuant to s 45(2) of PECA, Silverstone had to satisfy the primary judge that the appeal to the P & E Court should be dismissed.

The reasons

[8] The reasons addressed the disputed planning issues identified by the parties. Silverstone relied on the evidence of architect Mr Peabody whose evidence was to the effect that the proposed building "is a well-considered, aesthetically pleasing and carefully resolved design outcome" (set out at [23] of the reasons) and was not contradicted by a like expert. Mr Peabody's evidence on architectural matters was accepted by the primary judge (at [24] of the reasons). Silverstone also relied on landscape architect Mr Powell for matters of visual amenity and landscaping. As no like expert was called to contradict the evidence of Mr Powell, the primary judge found (at [26] of the reasons) that, on the basis of Mr Powell's evidence, visual amenity per se and landscaping issues would not of themselves or in combination with any of the other alleged issues of non-compliance warrant refusal of the proposed development. The primary judge recorded (at [27] of the reasons) that the only real issues with respect to the intended design of the building were those concerned with the number of storeys and its height.

[9] Three traffic engineers gave evidence. On the issue of the impact of additional traffic from the proposed development on the Butterfield Street roundabout and the intersection of Bowen Bridge Road and Butterfield Street, the primary judge accepted the evidence of Mr Holland and Mr Pekol, the traffic engineers for the Council and Silverstone respectively, who were both of the opinion that, subject to the imposition of appropriate conditions on the proposed development, refusal on traffic grounds would not be warranted. The primary judge also noted (at [32] of the reasons) that the concern of Mr Trevilyan, the traffic engineer for the applicants, about the potential delays causing unacceptable queuing on entry to the car park during morning peak hour events would be alleviated by an automatic number plate recognition (ANPR) system that operated without a boom gate and that was able to be addressed by the imposition of appropriate conditions. Again, the primary judge preferred (at [34] of the reasons) the evidence of Mr Holland and Mr Pekol as to the appropriateness of using the standard SIDRA traffic modelling, with the primary judge noting that "given the low speed environment of Butterfield Street, [Mr Trevilyan] had materially overstated the queuing problems at that roundabout". The primary judge rejected (at [38] of the reasons) Mr Trevilyan's sensitivity analysis, as Mr Trevilyan had used an occupancy rate for the proposal of between 95 per cent and 100 per cent which was appropriate for longer term users, such as employees and residents, but not for a car park with high turnover for which 85 per cent would be the optimal car parking occupancy rate. The last of the traffic issues was the impact on the amenity of neighbouring properties arising out of the egress arrangements. The primary judge considered (at [47] of the reasons) that this was "quite a minor issue". Subject to there being a condition that the ANPR system at the entry be operated without a boom gate, the primary judge therefore found (at [48] of the reasons) there were no reasons to refuse the proposed development on traffic grounds.

[10] In relation to flooding, the primary judge concluded (at [73] of the reasons) that subject to the imposition of appropriate conditions, the proposed development ought not to be refused because of the risks associated with flooding.

[11] The applicants had argued that, in respect of both the qualitative and quantitative aspects of need, the introduction of additional car parking was not warranted. The primary judge therefore dealt at length in the reasons with the issue of the need (or

the lack of need) for the proposed development. In respect of the first qualitative aspect of need, the primary judge found (at [76] of the reasons) that there was no probative evidence that the proposed development would prejudice and discourage investment in the Herston Quarter PDA. The primary judge rejected (at [80] of the reasons) the assertion that the approval of the Silverstone development might act as a disincentive to developers entering into developments of State significance as, on the evidence adduced before the primary judge, that was no more than a possibility and "one too vague and remote to militate against approving the proposed development".

[12] The next qualitative aspect of need identified by the applicants was prejudicing the revenue return to the Hospital Foundation. This was a matter on which Mr Hartley who is the managing director of the company which is the asset manager for IPG gave evidence. The primary judge noted (at [83] of the reasons) that Mr Hartley did not say that the financial contribution to the Hospital Foundation would be obliterated and then stated:

> "That there is the potential for a significant drop or even a total loss of revenue to the foundation from the profit generated from the Metro parking stations would be a serious and detrimental outcome indeed. However, I am unable to accept that that would be a basis for refusal. To fully protect the current and future financial arrangements between the RBWH Foundation and the Metro car parks would mean, in effect, placing a prohibition on competition in close proximity to the hospital at least into the foreseeable future. That would be an unacceptable planning outcome."

[13] The primary judge dealt (at [85] of the reasons) with the third qualitative aspect of need that the proposed development had the potential to prejudice the significant public investment in transport infrastructure relevant to the Hospital. The primary judge accepted the evidence of Mr Buckley who was the town planning expert for the applicants that the proposed development might have some cumulative negative impacts in regard to public transport infrastructure, but it would not be "the straw that would break the camel's back". The primary judge concluded (at [85] of the reasons) that to the extent there might be some negative impacts on public transport infrastructure, those impacts would not be sufficient to operate against the proposed development.

[14] In respect of the last qualitative aspect of need that Silverstone was providing an inferior car park, the primary judge accepted (at [88] of the reasons) that the proposed development would not be as convenient as most, if not all, of the Metro car parks conducted by IPG within the PDA nor provide for as much security for users and therefore would be inferior in that regard, but that did not mean it was an unsuitable site or would result in an unsafe parking environment. The primary judge was satisfied (at [89] of the reasons) that what is proposed would not put at risk to any material extent the viability of the development in the PDA and was satisfied (at [91] of the reasons) on the whole of the evidence that to the extent the qualitative aspects of need raised by the applicants were genuine, either separately or together, they would not militate against approving the proposed development.

[15] The primary judge then proceeded to deal with the quantitative aspects of need, noting at [93] of the reasons, that there was clearly a demand for more parking and expressing the issue as to whether there is a need for an additional parking facility

of the type proposed. In dealing with need, the primary judge was satisfied (at [101] of the reasons) that the most accurate estimate of the appropriate occupancy rate for a car park is in the range of 85 per cent to 90 per cent. The primary judge preferred (at [107] of the reasons) the evidence of Mr Duane (who was the economist engaged by Silverstone) on the topic of quantitative need. The primary judge concluded (at [109] of the reasons) that there is a clear economic need to ensure that appropriate competition exists to avoid one or only a few operations dominating the market and, as to the community need, the proposed development would meet a demand for convenient and secure off-street parking. The primary judge also noted (at [109] of the reasons) that Mr Buckley was prepared to accept at an "abstract" level or "first principles" basis that the proposed car park would provide a benefit to the community, car parks were needed for hospitals and that the demand for parking spaces for the Hospital was likely to continue to grow.

[16] The primary judge then dealt with land use and the planning scheme. The primary judge described (at [111] of the reasons) that the height, bulk and scale of the Hospital was "dense and imposing" and consistent with that was the seven storey car park located almost directly opposite the subject land. After identifying other nearby buildings, the primary judge concluded (at [111] of the reasons) that "the subject land is surrounded by a range of buildings of mixed heights and uses and in a locality that is dominated by the hospital and associated buildings by virtue of its size and elevation". The primary judge then noted (at [113] of the reasons) the evidence of Mr Buckley that the proposed development is inconsistent with two important elements of the planning scheme: first, the zoning was intended to preserve land to accommodate industrial uses within the inner Brisbane area which is in short supply and, second, what is proposed is to a material extent inconsistent with what the public expectations would be for the land under the Ithaca DNPC.

[17] The primary judge set out (at [118] of the reasons) paragraph 71 of the joint expert town planning report in which the significance to Mr Buckley of the distinction between Overall Outcome (3)(e) and Overall Outcome (4)(d)(i) was noted:

> "It is significant to **Mr Buckley** that the Butterfield precinct-specific provision is directly focussed on supporting non-residential uses which have a close nexus with the Hospital – not the Hospital itself. Compared to other provisions in the neighbourhood plan code, this is a deliberate differentiation in land use direction than other equivalent provisions."

[18] The primary judge was prepared (at [120] of the reasons) to accept the need to preserve land zoned for industrial uses in close proximity to the CBD, but that had to be seen in perspective and, importantly, the subject site fell within a precinct in the Ithaca DNPC that "clearly contemplates other than industrial uses", as "it supports non-residential uses that have a close nexus with the hospital". On the basis of the evidence that the dominant majority of the users of the proposed development would be visiting the Hospital either for medical treatment or to visit others, the primary judge was satisfied (at [121] of the reasons) that a parking station of the type proposed would be considered to have a close nexus with the Hospital.

[19] The primary judge concluded (at [122] of the reasons) that the zoning of the land to accommodate low density industrial uses did not militate to any material extent

against approval of the proposed development in the circumstances of the proceeding.

[20] The primary judge then dealt with the evidence of Mr Buckley that the proposed car park was a misalignment with Performance Outcome PO1 of the Ithaca DNPC, as the height would be in excess of reasonable community expectations and heights anticipated adjoining the creek frontage. The proposed development comprises six storeys and, at its highest point, would be 19.25m high which is double the prescribed number of storeys (three) and height (10.5m) in table 7.2.9.2.3B of the Ithaca DNPC that was part of Acceptable Outcome AO1 (that corresponds to PO1). The primary judge noted (at [129] of the reasons) that Mr Buckley's evidence made it clear that the height and/or the number of storeys involved in the proposed development were not, of themselves, major issues insofar as Mr Buckley was concerned. The primary judge considered (at [130] of the reasons) that Mr Buckley correctly recognised that the Ithaca DNPC "is designed to capitalise on its strategic location by developing both business and low impact industrial activities that are associated with the hospital" (which was referenced by the primary judge to Overall Outcome (3)(e) and Overall Outcome (4)(d)) and "that where circumstances warrant, community expectations in respect of height, bulk and scale may be disappointed" (which was a reference to Overall Outcome (3)(m)).

[21] The primary judge referred (at [131] of the reasons) to the "well established" principle that, subject to there being sound reasons to warrant otherwise, "the planning scheme will be the embodiment of the public/community interest", referring to *Bell v Brisbane City Council* (2018) 230 LGERA 374 and *Gold Coast City Council v K & K (GC) Pty Ltd* (2019) 239 LGERA 409. As both Overall Outcome (3)(m) and paragraph (b) of PO1 of the Ithaca DNPC refer to development being consistent with, or being in alignment with, community expectations, the primary judge considered (at [132] of the reasons) that the informed member of the community would know that the height and storey limits might be overridden, when there was both a community and economic need to do so. The primary judge also considered (at [133] of the reasons) that the informed member of the community would also be aware that the planning scheme stated an express intention to capitalise on business and low impact industrial activities which were proximate to key facilities such as the Hospital. (This was a direct reference to Overall Outcome (3)(e)). The primary judge observed (at [133] of the reasons) that the subject land "is located in an environment that is busy and dominated by the built form to a material extent" and endorsed the evidence of Mr Buckley that "the proposed structure would not be 'out of scale' given the character of the locality". The primary judge concluded (at [134] of the reasons) that, having regard to the relevant planning provisions and the physical characteristics of the location of the subject land, an architecturally designed six storey car park "would not be beyond what the community might reasonably expect".

[22] The primary judge then turned to the construction of Overall Outcome (4)(d) and set out (at [137] of the reasons) the three elements for development in sub-precinct (a) which were identified by the applicants and taken from Overall Outcome (4)(d)(i). These were, first, the development, second, that that development must support non-residential uses and, third, that those uses have a close nexus with the Hospital. The primary judge (at [143] of the reasons) construed Overall Outcome (4)(d) as encouraging development that supports non-residential uses with a close nexus with the Hospital and emphasised that the Outcome is not drafted to encourage

development that "provides" a non-residential use, but to "support" a non-residential use with the necessary nexus with the Hospital. The primary judge gave an example (at [144] of the reasons) of a building that accommodated physiotherapists, specialist rooms and/or pathology services might be considered to have a close nexus with the Hospital, so that a car park providing parking primarily for employees of those uses would be supportive of those uses with the nexus with the Hospital. Silverstone's proposed car park could therefore not be characterised as a development that supported a "use" with the relevant connection with the Hospital (at [144] of the reasons). The primary judge concluded (at [145] of the reasons) that the proposed development did not comply with Overall Outcome (4)(d)(i) to the extent identified.

[23] The primary judge then considered (at [146] of the reasons) that this construction of Overall Outcome (4)(d) was not decisive of the appeal, relying on s 60(3) of the Act. The primary judge noted that s 60(3) of the Act is in "stark contrast" to s 326 of the SPA and quoted from *K & K* at [60] where reference was made to the distinction between the application of s 326 of the SPA and the decision-making process under the *Local Government Act* 1936 (Qld) that was considered in *Williams McEwans Pty Ltd v Brisbane City Council* [1981] QPLR 33. The primary judge agreed with the observations in *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPELR 793 at [51] and considered that they reflected the reasoning in *Williams McEwans*.

[24] The primary judge set out (at [151] of the reasons) the factors that favoured granting the approval:

> "Accepting the level of non-compliance with OO4(d)(i), I have identified on the other side of the ledger is that there is a clear community and economic need for more car parking in the vicinity of the hospital and, for the reasons given, there will be no adverse impacts on amenity subject to suitable conditions being imposed. Further, also as identified above, a structure of the type proposed, given its surrounding built environment, would not offend public expectations to any material extent and, of particular significance, has a close nexus with the hospital, an important element of OO4(d)(i)."

[25] The primary judge concluded (at [153] of the reasons) that the balance of the relevant factors fell in favour of approval, despite the non-compliance with the planning scheme.

Proposed grounds of appeal

[26] The leave to appeal is sought on the basis that the primary judge erred in law in respects which materially affected his decision and that it is in the public interest that the correctness of the decision should be reviewed. There are seven proposed grounds of appeal. The applicants helpfully give each ground a shorthand description which I will use in summarising the grounds:

(a) Ground 1 is the nexus point. This ground is based on the effect and consequences of non-compliance with Overall Outcome (4)(d)(i) of the Ithaca DNPC.

(b) Ground 2 is the *Bell* point which is based on that decision. It is alleged the primary judge erred by failing to consider whether, for the purposes of Overall Outcome (3)(m) and PO1 of the Ithaca DNPC, there was a community need and an economic need for development of the type proposed that was double the height and the number of storeys set out in the table incorporated into Acceptable Outcome AO1, as compared with development that complied with that height.

(c) Ground 3 is the applicants' expectations point where it is alleged the primary judge failed to take into account the expectations of the applicants, as members of the community and entities closely associated with the development of the Hospital, in considering whether the height of the proposed development was consistent with community expectations for the purposes of Overall Outcome (3)(m) of the Ithaca DNPC.

(d) Ground 4 is the Hospital Foundation point where it is alleged that the primary judge erred in deciding that the potential for a significant drop or a total loss of revenue to the Hospital Foundation from the profit generated from the Metro Parking Station would not be a basis for a refusal.

(e) Ground 5 is the adverse amenity impact point. It is alleged the primary judge erred in deciding there would be no adverse impacts on the amenity caused by the proposed development.

(f) Ground 6 is the unreasonable decision point where it is alleged that the decision to dismiss the appeal must be legally unreasonable or unjust in view of the errors identified in grounds 1 to 5 and also in the light of the other matters specified in ground 6.

(g) Ground 7 is the inadequate reasons point where it is said the primary judge failed to give any reasons for failing to take into account the matters relied upon by the applicants and referred to in ground 5 and paragraphs (c),(d) and (e) of ground 6.

Deciding development applications under the Act

[27] The purpose of the Act set out in s 3(1) is "to establish an efficient, effective, transparent, integrated, coordinated, and accountable system of land use planning, development assessment and related matters that facilitates the achievement of ecological sustainability". Ecological sustainability is then defined in s 3(2) and (3) of the Act. Section 5(1) of the Act prescribes that an entity that performs a function under the Act "must perform the function in a way that advances the purpose of this Act". An entity is defined in the *Acts Interpretation Act* 1954 (Qld) to include a person. The expression "advancing the purpose of this Act" is expanded upon in s 5(2) of the Act and includes commendable aims for achieving the balance between preserving the environment and cultural heritage and meeting the demands on the environment of a functioning and expanding diverse community or, in other words, the balance between the interests of the present and future generations.

[28] Under s 43(3) of the Act, the planning scheme is a local categorising instrument. One of the characteristics of a local categorising instrument under s 43(1) of the Act is that it sets out the matters (referred to as the assessment benchmarks) that an assessment manager must assess assessable development against.

[29] Silverstone's application was for assessable development within the meaning of s 44(3) of the Act. It is common ground that Silverstone's application involved development that required impact assessment.

[30] What is required for an impact assessment is set out in s 45(5) of the Act:

> "An ***impact assessment*** is an assessment that –
>
> (a) must be carried out –
>
> (i) against the assessment benchmarks in a categorising instrument for the development; and
>
> (ii) having regard to any matters prescribed by regulation for this subparagraph; and
>
> (b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise."

[31] It is common ground that there were no matters prescribed by regulation for the purpose of the subject application. Examples of "another relevant matter" are set out in the Act after s 45(5)(b) and include a planning need, the current relevance of the assessment benchmarks in the light of changed circumstances, and whether assessment benchmarks or other prescribed matters were based on material errors.

[32] Whereas it is mandatory for the impact assessment to be carried out against the relevant assessment benchmarks (and any matters prescribed by regulation for the purpose of s 45(5)(a)(ii)), it is not mandatory for assessment to be carried out against, or having regard to, other relevant matters. The Explanatory Notes for the Bill that was enacted as the Act gave some explanation of the example given in respect of this provision of a planning need:

> "There is considerable judicial authority about need in a planning sense. Generally it does not refer to a pressing or urgent need, but refers to whether the community's interests in general, as opposed to the proponent's, or another individual's interests would be well served by a particular decision. For this reason need cannot be conflated with demand for a facility or service. It is a relative concept so it is not desirable to seek to define it in statute. It is best established on a case by case basis having regard to the circumstances of each case."

[33] Punctuation within the above quote faithfully reflects the Explanatory Notes, but the explanation would be better understood, if the comma after "proponent's" was moved to follow "individual's interests".

[34] The assessment manager's decision-making on a development application is regulated by division 2 of part 3 of the Act. The assessment manager is an entity whose decision-making must therefore be undertaken in a way that advances the purpose of the Act. Under s 59(2), an assessment manager must follow the development assessment process for the application and, relevantly under s 59(3), the assessment manager's decision must be based on the assessment of the development carried out by the assessment manager. The assessment manager is

required under s 60(3) of the Act, after carrying out the assessment, to make one of three possible decisions:

> "(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."

[35] The assessment and decision-making framework under the Act is different to the process under s 326(1)(b) of the *Sustainable Planning Act* 2009 (Qld) (SPA) where the assessment manager's decision on a development application could not conflict with the matters set out in a planning scheme against which assessment was carried out, unless there were sufficient grounds to justify the decision, despite the conflict. The term "grounds" was defined in the SPA to mean "matters of public interest".

[36] The process of assessment that involved finding non-compliance and then considering whether there was sufficient grounds to justify an approval, despite the non-compliance, was referred to as the two stage test or the two part test. Section 60 of the Act eliminates that two part test, as it was not expressly incorporated into the Act. The fact that it was intended by the Legislature is confirmed by the relevant parts of the Explanatory Notes for the Bill that became the Act:

> "The form of the assessment and decision rules under the Bill is designed to address difficulties that arose in administering the old Act, due to the so-called 'two part test' for both code and impact assessment. Under that test, an assessment manager's decision could 'conflict' with a relevant instrument if there were 'sufficient grounds to justify the decision, despite the conflict'. In practice, as a result of judicial authority in several cases, this test resulted in a time consuming and unproductive enumeration of supporting and conflicting 'grounds', instead of the intended assessment of the merits of the proposal based on established policy, and other relevant considerations to reach a balanced decision in the public interest.
>
> The assessment and decision rules for both code assessment and impact assessment under the Bill dispense with the 'two part test'."

[37] At the time of hearing this application for leave to appeal, there had been no consideration by this court of the regime for assessment introduced by the Act and all parties referred to and embraced the helpful analysis of the Act in the decision of Williamson QC DCJ in *Ashvan* at [35]-[86]. This court had, however, in a number of recent decisions considered the assessment and decision-making framework under s 326(1)(b) of the SPA and, in particular, the nature of the planning scheme as a reflection of the public interest in the appropriate development of land: *Bell*, *K & K*, and *Redland City Council v King of Gifts (Qld) Pty Ltd* [2020] QCA 41. The change to the assessment and decision-making framework under the Act by eliminating the two stage test has not altered the fundamental nature of a planning scheme. Before referring to the analysis of the Act set out in *Ashvan*, I will consider (in the context of the propositions put forward by the parties on this application) whether, and to what extent, the observations made in these three authorities about the nature of a planning scheme remain applicable to the regime for assessment under the Act.

[38] In *Bell*, McMurdo JA (with whom Sofronoff P and Philippides JA agreed) observed at [66] that "a planning scheme must be accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land". McMurdo JA then stated at [67]:

> "It is not for the decision-maker (including in this context a Court), to gainsay the expression of what constitutes the public interest that is in a planning scheme."

[39] After referring at [68] of *Bell* to possible cases where circumstances had changed since the planning scheme was made, so as to enable the decision-maker to conclude that the planning scheme was no longer, in the particular case, an embodiment of what was in the public interest, McMurdo JA stated at [70]:

> "Consequently, any consideration of the application of s 326(1)(b) of the SPA must proceed upon the premise that it is in the public interest that the planning scheme, in each relevant respect, be applied, unless the contrary is demonstrated. Thus in the present case, it had to be assumed that the public interest would be served by confining the development of this land to buildings of a height that accorded with community expectations that buildings would not extend, or at least significantly extend, beyond 15 storeys. That was not an arbitrary limit; it was an expression of a means by which, in the public interest, the scale of any development would be kept in alignment with community expectations. The Scheme was unambiguous in providing, within AO1.1, that '[d]evelopment must comply with both parameters where maximum number of storeys and height in metres are specified'."

[40] The absolute terms in which McMurdo JA expressed in [67] and [70] of *Bell* that it is in the public interest that the planning scheme is applied, unless the contrary is demonstrated, are no longer applicable to the exercise of the discretion by the decision-maker under s 60(3) of the Act, as the outcome of the development application is not necessarily determined by the degree of compliance against the assessment benchmarks and the decision-maker is permitted to have regard to other relevant matters, in addition to the mandatory assessment against the assessment benchmarks in the planning scheme. I would anticipate in most instances, where a planning scheme is not affected by changed circumstances of the type referred to in *Bell* at [68], that the decision-maker would give significant weight to the public interest expressed in the planning scheme in undertaking the decision-making under s 60(3) of the Act.

[41] In *K & K*, Sofronoff P (with whom Fraser JA and Flanagan J agreed) after referring to a number of authorities that acknowledged that conformity with a planning scheme is, *prima facie*, in the public interest, observed at [48]:

> "That means that it can never be enough to satisfy a provision like s 326(1)(b) of the SPA for a party merely to prove that 'there is a need' for a proposed development. The existence of a need for a particular kind of development is the starting point. If the placement of a development in a particular location would conflict with a Planning Scheme, then it must be accepted that it is the intent of the Scheme that, subject to there being a matter of public interest that

> overrides the public interest in maintaining a Scheme, the need should met by a development on a site that does not give rise to a conflict. An applicant must identify reasons why the terms of the Planning Scheme should not prevail. Otherwise, there is a risk that, rather than applying s 326(1)(b), the decision maker will be doing no more than performing a general weighing of factors in order to determine whether, in the decision-maker's own view, it would or it would not be better to permit a development on the site to go ahead."

[42] The last sentence in the above quote in describing the process of decision-making that s 326(1)(b) of the SPA did not permit should not be treated as anticipating the process of decision-making under s 60(3) of the Act. 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 considered and balanced by the decision-maker with any other relevant factors.

[43] In view of the fact that s 60(3) of the Act reflects a deliberate departure on the part of the Legislature from the two part test under s 326(1)(b) of the SPA, it is no longer appropriate to refer in terms of one aspect of the public interest "overriding" another aspect of the public interest before a development application that is non-compliant with the assessment benchmarks can be approved. 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, particularly having regard to the purpose of the decision in the context of the Act and the obligation imposed on the decision-maker under s 5(1) of the Act to undertake the decision-making in a way that advances the purpose of the Act: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41.

[44] In the course of [60] in *K & K*, Sofronoff P made an observation about the process under s 326(1)(b) of the SPA in comparison to former legislation which has relevance now for distinguishing the process under s 326(1)(b) from the regime under the Act, on the basis that the decision-making process under the Act has reverted to a process that has similarities to the requirements of the former legislation:

> "The process under s 326(1)(b) does not involve a consideration of the 'competing merit and weight of the grounds relied upon to justify approval'. That was the process required by former legislation, namely the *Local Government Act 1936* (Qld). Section 17 of the *Local Government Amendment Act 1975* (Qld) established criteria (for the first time) for a decision to allow a rezoning application. In *William McEwans Pty Ltd v Brisbane City Council*, Carter DCJ said that the decision-making process under the *Local Government Act*

> *1936* (Qld) was a flexible one and that applicable statutory criteria would vary from case to case."

[45] The following statement of Sofronoff P in *K & K* at [67] does not apply to the decision-making under s 60(3) of the Act:

> "It is, in general, against the public interest to approve a development that conflicts with the Planning Scheme. To justify such a development it must be demonstrated that the desired deviation from the Planning Scheme serves the public interest to an extent greater than the maintenance of the status quo."

[46] Sofronoff P also made observations in *K & K* at [68] about the site specific nature of the need for a proposed development:

> "It may be accepted that the need for a particular development in a particular place may constitute a matter of public interest because an identified section of the public has an interest in seeing that need satisfied by a development in the particular location. Whether that is so is a question for the decision-maker to consider in the circumstances of the case. If, in the circumstances of a particular case, it is in the public interest that an identified need be satisfied by a development in a place that results in a conflict, it is necessary for the decision-maker to go on to consider whether the identified public interest in satisfying the need overrides the conflict with the Planning Scheme, which it is generally in the public interest to avoid."

The above passage was referred to with approval in *King of Gifts* and I will deal with the relevance of that observation after referring to *King of Gifts*.

[47] The application for leave to appeal in *King of Gifts* was brought by the Redland City Council against the decision of the P & E Court to allow an appeal by the respondents from Redland's decision to refuse their development application for a material change of use to develop land for a service station, including an associated shop, car wash facility and a drive through restaurant. Most of the uses were inconsistent uses for the purposes of the relevant zone codes and the proposed development was not a low-key use which the relevant planning scheme envisaged for the subject site. The judge who constituted the P & E Court had found there was a need for the proposed development. One of the proposed grounds of appeal to this court was whether the need for the proposed development was a sufficient ground to support approval of the development application under s 326(1)(b) of the SPA. All members of the court (Fraser, Philippides and McMurdo JJA) found the P & E Court erred in applying s 326(1)(b) and Redland's appeal succeeded.

[48] Philippides JA in *King of Gifts* stated at [129]:

> "However, the issue of need which was the primary basis relied on as constituting a 'sufficient ground', was not considered from the perspective of whether the need for the development was a matter of such public interest that it overrode the public interest embodied in the Redland Planning Scheme."

[49] McMurdo JA (with whom Fraser JA agreed) in *King of Gifts* referred to the finding by the P & E Court that there was a need for the proposed development and stated at [169]:

> "But it did not follow from those findings that there was a ground for approving the development inconsistently with the planning scheme. Unless it was demonstrated that, in the relevant respects, the planning scheme, as it applied to this site, no longer represented what was required in the public interest, it could not be said that there were 'grounds' (meaning matters of public interest) for permitting the development. What had to be established was not just that there was a need for such a development in the area, but that there was a need for the development in a location where the planning scheme provided that it should not occur. It had to be shown that, in the public interest, it was necessary to override the scheme as it applied to this land."

[50] McMurdo JA then referred to [48] of *K & K* and the passage from [68] of *K & K* that I have quoted above and noted at [171] of *King of Gifts* that the respondents "were unable to demonstrate that the primary judge did consider whether there was a need for the development in a location where the planning scheme provided that it should not occur, as distinct from more generally in the area, or a part of the area, governed by the planning scheme".

[51] The focus in *K & K* and *King of Gifts* in respect of s 326(1)(b) of the SPA was whether the planning need for the proposed development overrode the planning scheme in relation to the development of that particular site. Under s 60(3) of the Act, the decision is made in respect of the development application for a particular site, but the parameters of the impact assessment undertaken by the decision-maker do not necessarily suggest that, where planning need is a relevant matter, the planning need must be limited to the need for the proposed development on that particular site only and no other site, rather than a planning need for that type of proposed development that would be appropriately satisfied by the development on that site. The weight to be given to the planning need may be greater if the evidence showed that the need would be satisfied only by the proposed development on the particular site. The process of decision-making provided for by the Act under s 45(5), s 59(2), s 59(3) and s 60(3) does not restrict planning need to the proposed development of the specific site in the manner discussed in *Bell*, *K & K* and *King of Gifts* for the purpose of s 326(1)(b) of the SPA, but the existence of other sites for which the proposed development is permitted under the applicable code may be a relevant matter.

[52] *Ashvan* was an unsuccessful appeal to the P & E Court against the Council's decision to refuse an impact assessable development application for a material change of use to develop a child care centre on a site that was situated in the low density residential zone. The Council had refused the development application on the basis that it did not comply with a number of provisions of the planning scheme. Ashvan disputed the refusal on that basis, but also argued that any non-compliance should not be determinative, as there were relevant matters, including planning need, that supported an approval in the exercise of the planning discretion. Although the zone code contemplated that land may be developed for non-residential purposes such as a child care centre, that was qualified by Overall

Outcome (4)(k) of the zone code which required the development to serve a local community facility need only and to be of a bulk and scale that was compatible and integrated with the build form intent for the zone. Williamson QC DCJ (at [125] and [142]) found non-compliance with the zone code, including that the proposal would not serve a local community facility need only and that the built form was not of a bulk and scale anticipated in the zone and would be out of character and have an unacceptable impact on the amenity reasonably expected in the zone. Ashvan had submitted there was a strong town planning, community and economic need for the proposed development, but Williamson QC DCJ was not satisfied (at [199]) that there was a need for the development which could not be met or adequately met by the planning scheme in its present form and (at [208]) that overall the proper exercise of the planning discretion required the application to be refused.

[53] Williamson QC DCJ referred at [51] of *Ashvan* to the Legislature's intention in enacting s 60(3) of the Act to dispense with the two part test under s 326(1)(b) of the SPA and observed that "means that non-compliance with assessment benchmarks, which include planning schemes, no longer has assumed primacy in the exercise of the planning discretion" and "the discretion conferred by s 60(3) of the [Act] admits of more flexibility for an assessment manager (or this Court on appeal) to approve an application in the face of non-compliance with a planning document in contrast to its statutory predecessor". I agree with those observations.

[54] Subject to recognition that the Act has not changed the characterisation of a planning scheme as the embodiment of the community interest, I also agree with the observations of Williamson QC DCJ at [53]-[54] of *Ashvan* on the role of non-compliance with a planning scheme in the exercise of the planning discretion under s 60(3) of the Act:

> "[53] An application must be assessed against the applicable assessment benchmarks, which will invariably include a planning scheme for appeals before this Court. That assessment will inform whether an approval would be consistent, or otherwise, with adopted statutory planning controls. The existence of a non-compliance with such a document will be a relevant '*fact and circumstance*' in the exercise of the planning discretion under s 60(3) of the [Act]. Whether that fact and circumstance warrants refusal of an application, or is determinative one way or another, is a separate and distinct question. That question is no longer answered by a provision such as s 326(1)(b) of the SPA. It will be a matter for the assessment manager (or this Court on appeal) to determine how, and in what way, non-compliance with an adopted statutory planning control informs the exercise of the discretion conferred by s 60(3) of the [Act]. It should not be assumed that non-compliance with an assessment benchmark automatically warrants refusal. This must be established, just as the non-compliance must itself be established.
>
> [54] In practical terms, the change to the statutory assessment and decision making framework may call for an assessment

> manager (or this Court on appeal) to reach a balanced decision in the public interest where two competing considerations are at play: (1) the need for the rigid application of planning documents on the one hand; as against (2) the adoption of a flexible approach to the application of planning documents to, inter alia, exercise the discretion in a manner that advances the purpose of the [Act]."

[55] An observation was then made at [55] by Williamson QC DCJ that it was not novel that "the exercise of the planning discretion may involve striking a balance between rigidity and flexibility" and referred to the discussion by Carter QC DCJ (as his Honour then was) in *Williams McEwans* at 34 in the course of which it was said:

> "The scheme, once it becomes law, must be seen to be an expression of the will of the community that its various needs are best provided for in the manner, by which the scheme controls the use to which land might be put."

[56] In view of the discretion that is conferred under s 60(3) of the Act, which is not fettered other than by reference to the purpose of the Act and the constraints under s 45 imposed on an impact assessment, the observations by Williamson QC DCJ at [60] of *Ashvan* are apposite:

> "The manner in which the balance between rigidity and flexibility is struck in any given case does not lend itself to a general statement of principle, or precise formulation. The planning discretion, and the inherent balancing exercise, is invariably complicated, and multi-faceted. It is a discretion that is to be exercised based on the assessment carried out under s 45 of the [Act]. It will turn on the facts and circumstances of each case, including the nature and extent of the non-compliances, if any, identified with an assessment benchmark."

[57] Those observations also reflect the intention of the Legislature expressed in the Explanatory Notes that relate to s 60(3) of the Act that the assessment is intended to be "of the merits of the proposal based on established policy, and other relevant considerations to reach a balanced decision in the public interest", where it is apparent that the reference to "established policy" is to assessment benchmarks such as the relevant planning scheme and the reference to the other relevant considerations are those which the decision-maker is permitted to consider under s 45(5)(b) of the Act.

[58] Williamson QC DCJ considered the nature of the discretion conferred by s 60(3) of the Act further at [62] of *Ashvan*:

> "Whilst s 60(3) of the [Act] confers a broad planning discretion, it does not follow that the repeal of SPA, coupled with the absence of a provision such as s 326(1)(b), means the discretion admits of an unbridled opportunity to approve, or refuse, impact assessable development applications. It is subject to three requirements, which I identified recently in *Smout* as follows:
>
> > 'The planning discretion conferred under the [Act] to decide an impact assessable application is broad. It is to be exercised

> subject to three requirements: (1) it must be based on the assessment carried out under s 45 of the [Act]; (2) the decision making function must be performed in a way that is consistent with s 5(1) of the [Act], namely the assessment and decision making function must be performed in a way that advances the purpose of the Act; and (3) the discretion is subject to any implied limitation arising from the purpose, scope and subject matter of the [Act]'." (*footnote omitted*)

[59] The first and second requirements follow from the requirements of the Act. The language used by Williamson QC DCJ in respect of the third requirement of implied limitation on the discretion to be exercised in deciding an impact assessable application reflects the statements made in many authorities about the relevant factors that can be taken into account in the exercise of a discretion by a decision-maker: see *Peko-Wallsend Ltd* at 39-40.

[60] Williamson QC DCJ dealt with what constitutes a relevant matter for the purpose of s 45(5)(b) of the Act at [80]-[85] of *Ashvan*. His Honour noted at [82] that the specific identification of "relevant matters" in any given case will be informed by the examples that follow s 45(5)(b) and the subject matter, scope and purpose of the Act. In respect of those examples, he observed that, historically, these were matters that were considered to be "grounds" that may justify an approval despite conflict with an adopted statutory planning control and noted, in reliance on (and consistent with) s 14D(a) and (b) of the *Acts Interpretation Act* 1954 (Qld) that they were examples only, were not an exhaustive list and did not limit, but may extend, the meaning of "relevant matters". That observation accurately reflects the identity between matters relied on as grounds for the purpose of s 326(1)(b) of the SPA and the examples and accurately records the effect of s 14D.

[61] The Council submits a relevant matter for the purpose of s 45(5)(b) of the Act that is not included as an example may be the absence of any negative impact from, or detrimental effect of a proposed development, in reliance on the observation of Holmes JA (as her Honour then was) in *Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 Qd R 302 at [25]. *Westlink* concerned a development application made when legislation that preceded the SPA was in force, but there was a similar provision in that legislation to s 326(1)(b) of the SPA. It was accepted by Holmes JA at [25] consistent with previous authority "that the mere absence of adverse effects will not amount to sufficient grounds to outweigh a conflict with the planning scheme; but it does not follow that the absence of a negative impact or detrimental effect is not a relevant consideration". The terms of s 45(5)(b) of the Act are wide enough in an appropriate case for the absence of a negative impact or detrimental effect to be taken into account as a relevant matter on an impact assessment.

[62] Subject to the comments that I have added above to the analysis of the Act undertaken by Williamson QC DCJ in *Ashvan*, I endorse the parties' approach of relying on that analysis as a helpful outline of the difference between the decision-making process under s 326(1)(b) of the SPA and the new regime under the Act.

Ground 1 – the nexus point

[63] The nexus point raises the relationship between the Overall Outcome (4)(d)(i) for Butterfield Street sub-precinct (a), the Overall Outcomes for the Ithaca DNPC, and Performance Outcomes and Acceptable Outcomes in the Ithaca DNPC. Part 7 of the planning scheme contains general provisions that explain the structure of each neighbourhood plan code. Section 7.1(6) of the planning scheme provides:

> "Each neighbourhood plan code identifies the following:
>
> (a) the application of the neighbourhood plan code;
>
> (b) the purpose of the neighbourhood plan code;
>
> (c) the overall outcomes that achieve the purpose of the neighbourhood plan code;
>
> (d) the purpose and overall outcomes for each precinct;
>
> (e) the performance outcomes that achieve the overall outcomes of the neighbourhood plan code;
>
> (f) the acceptable outcomes that achieve the performance outcomes of the neighbourhood plan code;
>
> (g) the performance and acceptable outcomes of a precinct that achieve the overall outcomes of the precinct."

[64] The purpose of the Ithaca DNPC is set out in s 7.2.9.2.2(1) as "to provide finer grained planning at a local level for the Ithaca district neighbourhood plan area". Section 7.2.9.2.2(2) then provides that the purpose of the Ithaca DNPC "will be achieved through overall outcomes of the neighbourhood plan area". The Overall Outcomes for the neighbourhood plan area are then set out in paragraphs (a) to (m) of s 7.2.9.2.2(3) of the Ithaca DNPC. This is then followed by Overall Outcomes specified for each of eight precincts in the Ithaca DNPC. There is no express provision in the planning scheme that deals with the relationship between the Overall Outcomes for the neighbourhood plan area and the Overall Outcomes for each precinct within the neighbourhood plan area, but it is implicit from s 5.3.3(4)(c) of the planning scheme that, to achieve compliance with the relevant neighbourhood plan code, a proposed development should comply with the applicable Overall Outcomes for both the neighbourhood plan area and the Overall Outcomes for the relevant precinct or sub-precinct. Section 5.3.3(4)(c) is concerned with code assessable development and the requirement that, for code assessable development to comply with the code, it must comply "with the purpose, overall outcomes and the performance outcomes or acceptable outcomes of the code". It is logical that requirement also relates to the assessment of impact assessable development for determining whether the proposed development complies with the relevant code which contains assessment benchmarks.

[65] The primary judge set out Overall Outcomes (4)(d)(i) and (4)(e)(i) for the Butterfield Street precinct of the Ithaca DNPC at [114] of the reasons (with emphasis added):

> "(d) **Development** in the Butterfield Street (a) sub-precinct (Ithaca District sub-precinct Neighbourhood Plan/NPP-OO1(a):
>
> (i) **supports non-residential uses that have a close nexus** with the Royal Brisbane and Women's Hospital

complex provided relevant amenity and site flooding issues are satisfactorily addressed.

(e) **Development** in the Butterfield Street (b) sub-precinct (Ithaca District sub-precinct Neighbourhood Plan/NPP-OO1(b):

(i) **may comprise higher intensity mixed uses to co-exist** with hospital uses, provided relevant amenity and site flooding issues are satisfactorily addressed."

[66] By using emphasis to draw attention to the distinction in the nature of the nexus with the Hospital respectively under Overall Outcomes (4)(d)(i) and (4)(e)(i), the primary judge highlighted that the distinction between the Overall Outcomes was deliberate. The primary judge accurately noted (at [115] of the reasons) that Overall Outcome (4)(d) has to be read in the context of other outcomes within the Ithaca DNPC and then set out paragraphs (e) and (m) from Overall Outcome (3) which sets out the Overall Outcomes for the entire neighbourhood plan area which takes in a number of suburbs, apart from Herston. Overall Outcome (3)(e) provides:

> "The neighbourhood plan area will capitalise on its strategic location by developing businesses and low impact industrial activities that support the City Centre and its fringe, or are associated with key facilities in the area, such as the Royal Brisbane and Women's Hospital;"

Overall Outcome (3)(m) provides:

> "Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development."

[67] The applicants divided Overall Outcome (4)(d)(i) into three elements for the purpose of their submissions to the primary judge, but they were not three independent elements, because the third element depended on the second element being applicable. Once the primary judge found that the development of Silverstone's proposed car park did not comply with the second element, because the car park was not a development that supported non-residential uses, there was no room for the operation of the third element which was tied to those non-residential uses having a close nexus with the Hospital. The applicants therefore submit that the primary judge erred in [151] of the reasons when he explained why the non-compliance with Overall Outcome (4)(d)(i) did not result in the refusal of the development application by reference to the particular significance that the proposed development "has a close nexus with the hospital, an important element of OO4(d)(i)". They argue that once the primary judge correctly concluded there was non-compliance with Overall Outcome (4)(d)(i), the third element that related to the second element of Overall Outcome (4)(d)(i) had no application to the proposed development. The applicants therefore submit that the primary judge took into account an irrelevant consideration that the proposed development had a close nexus with the Hospital, when the non-compliance with Overall Outcome (4)(d)(i) precluded that being taken into account.

[68] This submission of the applicants raises a question of construction of the Ithaca DNPC. The applicants argue that Overall Outcome (4)(d)(i) is very specific about the relationship between the development and the Hospital, in that it depended on the development supporting non-residential uses that had a close nexus with the Hospital, rather than the development having the close nexus with the Hospital. That very specific connection was inconsistent with Overall Outcome (3)(e) and, to the extent of the inconsistency, it is argued that the specific outcome should prevail over the general outcome.

[69] The respondents argue that the reference in [151] of the reasons to the "close nexus with the hospital" being an important "element" of Overall Outcome (4)(d)(i) corresponds with Overall Outcome (3)(e) and the element of "close nexus with the hospital" therefore remains a relevant consideration in determining the application, despite the non-compliance with Overall Outcome (4)(d)(i) in this respect. Mr Hughes of Queen's Counsel who appears with Ms Stephanos of Counsel on behalf of Silverstone also submits that, whilst the close nexus between the development site and the Hospital may be irrelevant with respect to Overall Outcome (4)(d)(i), it did not become irrelevant with respect to another assessment benchmark which is Overall Outcome (3)(m). It is therefore submitted the nexus between the development site and the Hospital is relevant to the public benefits that flow from co-locating a car park with the Hospital where there was found to be a planning need for the car park because of that co-location.

[70] These arguments require consideration of three disputed issues – what the primary judge actually meant by the last sentence of [151] of the reasons, whether Overall Outcome (3)(e) has any application when the second element of Overall Outcome (4)(d)(i) is not satisfied by the proposed development and, if not, whether the close nexus between the proposed development and the Hospital can still be a relevant matter for the purpose of the assessment of the development application.

[71] In ascertaining what the primary judge meant by the last sentence of [151] of the reasons, it is important to consider [151] of the reasons in the context of the whole judgment. The primary judge unequivocally decided the construction issue of Overall Outcome (4)(d)(i) in favour of the applicants and it would be inconsistent with that finding to read [151] of the reasons as reaching a conclusion as to the application of the third element of Overall Outcome (4)(d)(i) that was contrary to that construction. The close nexus with the Hospital is an important element of Overall Outcome (4)(d)(i), but even though the proposed development did not comply with that element in the sense in which it is qualified for the purpose of Overall Outcome (4)(d)(i), the fact remains that, because of location, the development would have a close nexus with the Hospital. The last sentence of [151] of the reasons contains a reference by the primary judge to the factual circumstance that the development has a close nexus with the Hospital which is an important element of Overall Outcome (4)(d)(i), even though the development does not comply with that element as expressed in Overall Outcome (4)(d)(i), as acknowledged at the commencement of [151] of the reasons. The reference to the close nexus to the Hospital in the closing words does not negate the finding of the primary judge that there is non-compliance by the proposed development with the second and third elements of Overall Outcome (4)(d)(i).

[72] I do not accept the respondents' argument that the concluding words of [151] of the reasons, namely "has a close nexus with the hospital, an important element of

OO4(d)(i)" should be taken to be a reference to Overall Outcome (3)(e). First, the primary judge did not refer to Overall Outcome (3)(e) in [151] of the reasons. Second, Overall Outcome (4)(d)(i) deals with the specific nature of the relationship between the use of the land within the Butterfield Street sub-precinct (a) and the Hospital for the purpose of complying with Overall Outcome (4)(d)(i), but Overall Outcome (3)(e) relevantly deals, in general terms, with the neighbourhood plan area capitalising on its strategic location by developing businesses or low impact industrial uses that are "associated" with key facilities in the area, such as the Hospital. As s 5.3.3(4)(c) of the planning scheme proceeds on the basis of compliance with all applicable Overall Outcomes, there should arguably not be any inconsistencies between an Overall Outcome for the neighbourhood plan area and the Overall Outcome for a sub-precinct.

[73] If the difference between the general association with the Hospital under Overall Outcome (3)(e) and the specific nexus between development in sub-precinct (a) and the Hospital under Overall Outcome (4)(d)(i) is treated as an inconsistency, there is no specific provision within the planning scheme on how inconsistencies between Overall Outcomes for the neighbourhood plan area and Overall Outcomes for a precinct or sub-precinct within that neighbourhood plan area should be dealt with. The orthodox approach to construction of a statutory instrument where there are provisions within the same instrument that have a conflicting operation could be followed, as the principles and canons of statutory construction apply to a planning scheme: *AAD Design Pty Ltd v Brisbane City Council* [2013] 1 Qd R 1 at [37], [51] and [73]. It would therefore be presumed that the specific provision prevails over the general provision: *Smith v The Queen* (1994) 181 CLR 338, 348. That would mean that Overall Outcome (3)(e) therefore would not apply to the nexus between the development site and the Hospital, for the purpose of determining whether the development complied with the specific nexus contemplated by Overall Outcome (4)(d)(i) that applied to the development site. Another way of looking at the difference between Overall Outcome (4)(d)(i) and Overall Outcome (3)(e) on the issue of nexus between the proposed development and the Hospital is that the specific nature of the nexus under Overall Outcome (4)(d)(i) modifies the application of Overall Outcome (3)(e) as to the nature of the association between the proposed development and the Hospital for the purpose of Overall Outcome (3)(e). Under either approach of addressing the inconsistency, the concluding words of the primary judge in [151] of the reasons were not a reference to the general association between the development and the Hospital that is referred to in Overall Outcome (3)(e).

[74] The applicants argue that, once it is established there is non-compliance with Overall Outcome (4)(d)(i), because the close nexus with the Hospital was not of the specific type contemplated by that Overall Outcome, the fact that Silverstone's development had a close nexus with the Hospital could not be taken into account either as, or in connection with, a relevant matter pursuant to s 45(5)(b) of the Act. Mr Gore of Queen's Counsel who appears with Mr Batty of Counsel for the applicants submits that the Act did not contemplate that non-compliance with a mandatory assessment benchmark under s 45(5)(a) could "somehow be transformed into a positive relevant matter" under s 45(5)(b).

[75] This argument overlooks the proximate location of the subject site to the Hospital. As Silverstone submits, even allowing for the non-compliance of the development with Overall Outcome (4)(d)(i), the nexus between the development and the

Hospital must be relevant by virtue of the planning principle that was accepted in evidence that it is important for there to be an adequate supply of car parks for visitors to the Hospital. Depending on what relevant matters pursuant to s 45(5)(b) of the Act arise for consideration, the close nexus between the proposed development and the Hospital may still be a relevant matter that has to be taken into account in conjunction with the non-compliance with Overall Outcome (4)(d)(i). It is not appropriate to make inflexible statements about whether or not an aspect of the non-compliance with an assessment benchmark can never be taken into account in connection with another relevant matter. It will obviously depend on the factual circumstances but, as this application shows, an aspect of the non-compliance may, in particular circumstances, remain a relevant consideration pursuant to s 45(5)(b).

[76] Even though I have construed Overall Outcome (4)(d)(i) as being the assessment benchmark that applies to the nature of the nexus between the car park and the Hospital to the exclusion of the more general statement of association between development in the Ithaca neighbourhood plan area and the Hospital, I accept the submission of Silverstone that Overall Outcome (3)(e) remains an applicable assessment benchmark and may still be relevant in considering compliance issues with assessment benchmarks other than Overall Outcome (4)(d)(i) and, in particular, Overall Outcome (3)(m). This was, in fact, how the primary judge determined (at [134] of the reasons) that the proposed development was consistent with community expectations under Overall Outcome (3)(m), by having regard to Overall Outcome (3)(e).

[77] The applicants' submission that, as a matter of interpretation of the Ithaca DNPC, it was not intended that a car park with a close nexus with the Hospital be developed on the subject site amounts to a submission that non-compliance with an assessment benchmark is equivalent to a veto of the proposed development. That approach is inconsistent with the process of decision-making under s 45(5), s 59(2), s 59(3) and s 60(3) of the Act.

[78] The primary judge accurately identified (at [143]-[145] of the reasons) as to why the proposed development did not comply with Overall Outcome (4)(d)(i), but considered (at [151] of the reasons) that, despite that level of non-compliance and for the reasons that are set out in [151], there existed a planning need for more car parking in the vicinity of the Hospital which took into account the close nexus of the proposed development with the Hospital, there would be no adverse impacts on amenity (subject to suitable conditions being imposed) and the structure of the type proposed would not offend public expectations to any material extent. There was no error of law on the part of the primary judge in placing weight on the close nexus between the proposed development and the Hospital, despite the non-compliance with Overall Outcome (4)(d)(i), in finding the existence of this planning need. Pursuant to s 43 and s 46 of PECA, the primary judge had to decide the appeal to the P & E Court, as if the primary judge were the assessment manager for the development application. It is apparent from the reasons (that culminated in the conclusions at [151] and [153]), that the primary judge undertook the task required by s 60(3) of the Act in assessing the Silverstone application under s 45(5) of the Act against the mandatory assessment benchmarks and the other relevant matters identified in the reasons and found the balance of the factors favoured the approval of the application, despite the non-compliance with Overall Outcome (4)(d)(i). The proposed ground of appeal based on the nexus point therefore cannot succeed.

Ground 2 – the *Bell* point

[79] The applicants rely on the fact that Overall Outcome (3)(m) (which is set out above) and paragraph (b) of PO1 of the Ithaca DNPC were in materially identical terms to Overall Outcome (3)(h) and paragraph (b) of PO1 of the Toowong-Auchenflower Neighbourhood Plan (TANP) considered in *Bell*. Paragraph (b) of PO1 of the TANP provides:

> "Development is of a height, scale and form that achieves the intended outcome for the precinct, improves the amenity of the neighbourhood plan area, contributes to a cohesive streetscape and built form character and:
>
> (a) …
>
> (b) is aligned to community expectations about the number of storeys to be built;"

[80] *Bell* was an appeal from the decision of the P & E Court to uphold the Council's approval for a material change of use under which the developer would develop land mainly for residential use by the construction of three towers, two of 24 storeys and one of 27 storeys containing a total of 555 units. Mrs Bell lived on adjoining land and relied on the failure of the development proposal to comply with the planning scheme. The land was within the major centre zone and the TANP. The judge who constituted the P & E Court had found that the height of the proposed buildings was not consistent with community expectations and therefore did not meet paragraph (b) of PO1. The corresponding Acceptable Outcome to paragraph (b) of PO1 of the TANP specified the maximum number of storeys applicable to the area and frontage of the relevant site as 15 storeys. The P & E Court found that, under Overall Outcome (3)(h), even though the heights of the towers exceeded community expectations, there was a community need and an economic need for the development, despite the non-compliance with PO1(b). It was held by McMurdo JA (with whom Sofronoff P and Philippides JA agreed) at [49] of *Bell* that the judge's findings provided no basis for a conclusion that, upon the proper interpretation of Overall Outcome (3)(h), there was a demonstrated community need and economic need for this particular development which meant the development was inconsistent with Overall Outcome (3)(h). McMurdo JA explained (at [43] of *Bell*) that the question for the purpose of Overall Outcome (3)(h) was not whether the particular development would satisfy community and economic needs, but "whether there is a need for this development, or put another way, whether it is necessary to develop their site by buildings of this height". McMurdo JA noted (at [45] of *Bell*) that the P & E Court had not considered whether a development had to be of the height of the three towers in the proposed development to satisfy community and economic needs.

[81] The P & E Court in *Bell* had also found there were sufficient grounds in the public interest under s 326(1)(b) of the SPA to approve the proposed development, notwithstanding the conflicts with the planning scheme that were identified in the P & E Court's reasons, including that the proposed towers were of a height which exceeded "reasonable" expectations. One of the matters that the P & E Court relied on to find there were sufficient grounds was the finding there was a community need and an economic need under Overall Outcome (3)(h). McMurdo JA concluded at [78] of *Bell* that there was a legal error which affected the primary

judge's conclusion under s 326 of the SPA by the primary judge substituting his own view of the public interest for that which was expressed in the planning scheme and his conclusion was also affected by the legal error in the interpretation of Overall Outcome (3)(h) of the TANP.

[82] The applicants assert that the primary judge failed to address the question of whether there was both a community and economic need for Silverstone's car park that was double the height limitation, as opposed to development in keeping within those limitations of three storeys or 10.5m in height. (Although the applicants also assert that the primary judge failed to address the question whether a building at nearly 20m in height was consistent with community expectations, the primary judge did deal expressly with that question at [131]-[134] of the reasons and there was no challenge in the proposed grounds of appeal to the finding that "an architecturally designed six storey car park would not be beyond what the community might reasonable expect".)

[83] The applicants also seek to rely on the statements from *Bell* that were applied in *K & K* and *King of Gifts* to the effect that it was not sufficient for there to be a general need for a car park, but it had to be shown that there was a need for car parking on this particular site. This latter submission has been addressed by my conclusion above that statements in those three authorities for the purpose of the application of s 326(1)(b) of the SPA do not support the transposition of the strict site specific focus of the planning need to the regime under the Act.

[84] The respondents seek to distinguish the nature of the development in *Bell* in the circumstances of that case from the provision of car parking spaces for Hospital visitors in the circumstances where the primary judge found there was an ongoing demand for such spaces (and this finding is not challenged in the proposed grounds of appeal).

[85] Silverstone submits that because the primary judge found that Overall Outcome (3)(m) was satisfied in that the proposed car park was a building of a height, scale and form within community expectations that also satisfied paragraph (b) of PO1 with respect to height, as it was "aligned to community expectations about the number of storeys to be built" (and this finding is also not challenged), it was unnecessary for the primary judge even to consider whether compliance with the relevant assessment benchmarks could be achieved through the qualification in Overall Outcome (3)(m) that would permit a building of a greater height where there was both a community need and an economic need for the development.

[86] This submission on behalf of Silverstone accurately reflects the process of the primary judge's reasoning. Because of the finding the primary judge made about the proposed height of the Silverstone car park being within community expectations and therefore paragraph (b) of PO1 was satisfied, the primary judge did not need to, and did not, consider whether compliance was achieved through the alternative requirement in Overall Outcome (3)(m) which was a community and economic need for the proposed development. Although the applicants' submissions emphasise that the proposed height of the car park was effectively double that intended by AO1, in context that is a reference to the difference between a three storey building and a six storey building in respect of which one storey was for the purpose of addressing the flooding issues. The primary judge did not need to resort to AO1, because of the finding (at [134] of the reasons) that the six storey car park was not beyond community expectations in the locality. In light of this finding

by the primary judge on community expectations, it is not correct, as the applicants assert, that the relevance of community and economic need for the proposed development was confined by the table incorporated into AO1. The primary judge gave extensive consideration (at [74] to [109] of the reasons) to the question of community and economic need for the proposed development as a planning need that was a relevant matter under s 45(5)(b) of the Act.

[87] Despite the coincidence between the provisions of the TANP and Overall Outcome (3)(m) and paragraph (b) of PO1 of the Ithaca DNPC, the factual circumstances in *Bell* and the error that had been made at first instance in *Bell* in interpreting Overall Outcome (3)(h) of the TANP for the purpose of the application of s 326(1)(b) of the SPA mean that the applicants' endeavour to apply the approach in *Bell* to the decision that was before the primary judge in this matter cannot succeed.

Ground 3 – the applicants' expectations point

[88] The applicants submit that, in considering community expectations, the primary judge paid no regard to the expectations of stakeholders like the applicants, and confined the consideration of expectations to that of ordinary members of the public. In support of this submission, the applicants reprised the analogy with the retail hierarchy cases which they put before the primary judge on the issue of need to contend that, consistent with the decision in *Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157, where the importance of the hierarchy of retail shopping centres established by planning schemes was noted, and the viability of the established hierarchy should not be prejudiced. On the basis of that decision, the applicants submit that they had expectations based on existing planning where their car parks were within the Herston Quarter PDA (which equated to the "centre") and Silverstone's proposed car park was "out of centre". The applicants emphasise that their expectations as "significant stakeholders" which are based on published planning documents and "give rise to significant investments" and which would be undermined by "opportunistic unplanned development" is a relevant consideration.

[89] The analogy was relevant to the issue of need and was disposed of by the primary judge in dealing with the issue of need (at [89] of the reasons). In any case, community expectations, when considering the height of buildings for which community expectations were relevant, are directed at expectations of the ordinary members of the community generally as to questions of height which are based on the planning scheme. If the applicants' expectations about height were to be considered at all, it would be as part of the community and not as commercial competitors of Silverstone. To the extent that the argument is based on the applicants' significant investments, it comes very close to being a consideration that is based on the applicants' financial circumstances that is proscribed as a relevant matter pursuant to s 45(5)(b) of the Act. In view of the conclusion as to which members of the community are relevant for determining community expectations, it is not necessary to express a concluded view on whether the applicants' expectations point is precluded by s 45(5)(b) of the Act. The applicants cannot succeed on this ground.

Ground 4 – the Hospital Foundation point

[90] There are two aspects to the applicants' argument on this ground. First, it is submitted that for the primary judge to treat as irrelevant the impact of the proposed

development on an existing matter of public interest, namely the financial contribution made by IPG to the Hospital Foundation, was an error of principle, as the primary judge was, in effect, substituting his own view as to what was in the public interest. The second argument is that the primary judge failed to deal with the applicants' argument that the financial contribution to the Hospital Foundation would be obliterated.

[91] This ground can be disposed of by dealing with the applicants' second argument. The primary judge made a factual finding (at [83] of the reasons) that his Honour did not accept that the financial contribution to the Foundation would be obliterated by Silverstone's car park. That also disposes of the first argument as the necessary factual finding was not made to support the argument. The primary judge did make an observation that, as a matter of principle, the potential for a significant drop or total loss of revenue to the Foundation from the profit generated from the applicants' car parks would be "a serious and detrimental outcome", but not a matter that warranted refusal of the development application, but that observation was not necessary to the primary judge's decision. If it were, it was an unremarkable observation in the context of the finding of fact made by the primary judge that additional competition from the proposed car park would be beneficial for the community. There is no substance to this ground of appeal.

Ground 5 – the adverse amenity impact point

[92] The applicants submit the primary judge did not deal with the intangible aspects of amenity that were raised by the applicants with several witnesses and were not referred to by the primary judge. The particular aspect that is relied upon is the unsatisfactory means that Silverstone proposed for warning visitors to the Hospital of a flood event with a consequent impact on already distressed relatives visiting at the Hospital who may have to choose, when floodwaters are rising, whether they stay visiting or move their car away from the car park or otherwise they may find that they cannot access their car. Mr Schomburgk accepted in his evidence that was a matter relevant to the impact assessment, as it has a "social bearing". Although this scenario was referred to when the primary judge dealt with the issue of flooding, the applicants assert it was also advanced by them as a distinct aspect of amenity which the primary judge failed to deal with.

[93] The respondents point out that this aspect of amenity was not included in the applicants' final list of issues that was set out at [8] of the reasons. The respondents argue that the applicants' case before the primary judge did not advance any adverse amenity argument in respect of flooding by reference to the scenario of the hospital visitor. The primary judge was therefore not asked to adjudicate upon that scenario in that context. In addition, the Council submits that the evidence given in cross-examination by Mr Clark and Mr Schomburgk was not sufficient to rely on the hospital visitor scenario as an adverse amenity point.

[94] The hospital visitor scenario was a relatively minor aspect of the evidence that was dealt with by the primary judge at [66] and [69]-[73] of the reasons, when dealing with flooding issues. In view of the manner in which the applicants conducted their case before the primary judge, I am not persuaded that the issue raised by the hospital visitor scenario was required to be dealt with by the primary judge as an adverse amenity point. This proposed ground of appeal cannot succeed.

Ground 6 – the unreasonable decision point

[95] The applicants rely on the acceptance by the primary judge that the proposed development did involve some negative impacts or other difficulties associated with traffic, flooding and qualitative aspects of need and did not specifically address the fact the proposal was not consistent with provisions of the planning scheme, the Brisbane Industrial Strategy 2019, the main purpose of the *Economic Development Act* 2012 and the purposes of the Act to submit that the primary judge's decision "lacks an evident and intelligible justification" in the sense of *Wednesbury* unreasonableness. The problem for the applicants is that, to the extent necessary, the primary judge did, in fact, deal with these issues. Neither the non-statutory Brisbane Industrial Strategy 2019 nor the *Economic Development Act* 2012 contains assessment benchmarks for the proposed development. To the extent that the *Economic Development Act* 2012 was the authority for the establishment of the Herston Quarter PDA, the existence of the PDA and provision for car parking within the PDA was considered by the primary judge in dealing with the issues, where appropriate, and the primary judge was, in fact, satisfied (at [89] of the reasons) that the proposed development would not put at risk, to any material extent, the viability of the development in the PDA. After assessing the proposed development against the assessment benchmarks and balancing the outcome of that assessment with all relevant matters, the primary judge found in favour of approving the development application. Rolling up the issues relied on by the applicants into a *Wednesbury* unreasonableness claim does not give those issues greater validity.

Ground 7 – the inadequate reasons point

[96] The assertion of inadequate reasons is a catch-all ground that brings together the various respects in which the applicants contend the reasons the primary judge were inadequate that are otherwise dealt with under the other grounds of appeal. This separate ground adds nothing to the other grounds of appeal disposed of by these reasons.

Order

[97] The applicants have not succeeded in showing there was an error of law made by the primary judge on any of the proposed grounds. The order which should be made is:

Application for leave to appeal refused with costs.

[98] **BROWN J:** I agree with the reasons for judgment of Mullins JA and the orders proposed by her Honour.

[99] **WILSON J:** I also agree with the reasons of Mullins JA and the orders proposed by her Honour.