

SUPREME COURT OF QUEENSLAND

CITATION: *Council of the City of Gold Coast v DVB Projects Pty Ltd*
[2023] QCA 213

PARTIES: **COUNCIL OF THE CITY OF GOLD COAST**
(applicant)
v
DVB PROJECTS PTY LTD
ACN 169 015 712
(respondent)

FILE NO/S: Appeal No 518 of 2023
P & E Appeal No 1646 of 2021

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Planning and Environment Court Act*

ORIGINATING COURT: Planning and Environment Court at Brisbane – [2022]
QPEC 40 (Kefford DCJ)

DELIVERED ON: 3 November 2023

DELIVERED AT: Brisbane

HEARING DATE: 2 June 2023

JUDGES: Morrison and Flanagan JJA and Livesey AJA

ORDERS: **1. The application for leave to appeal is refused.**
2. The applicant pay the respondent’s costs of the application.

CATCHWORDS: ENVIRONMENT AND PLANNING – COUNCIL CONSENT AND APPROVAL – MATTERS FOR CONSIDERATION BY COUNCIL – GENERALLY – where the respondent applied to the applicant for a development permit for a material change of use in respect of land on which the respondent proposed to build a multiple dwelling building – where the applicant refused the application – where the respondent appealed the decision to the Planning and Environment Court – where the primary judge allowed the appeal against the applicant’s decision – where the primary judge held that the proposed developments complied with the relevant benchmarks, and ordered that the development application be approved subject to conditions – whether leave should be granted to appeal

Planning Act 2016 (Qld), s 43, s 45(3)

Australian Broadcasting Tribunal v Bond (1990)
170 CLR 321; [1990] HCA 33, cited

Body Corporate for Lindor Community Title Scheme 29204 and Planit Consulting Pty Ltd v Gold Coast City Council [2018] QPELR 265; [2018] QPEC 54, cited
DVB Projects Pty Ltd v Council of the City of Gold Coast [2022] QPEC 40, related
Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; [2010] HCA 32, cited
Redland City Council v King of Gifts (Qld) [2023] QPELR 96; [\[2021\] QCA 210](#), cited

COUNSEL: G J Gibson KC, with K W Wylie, for the applicant
M J Batty and M J Rodgers for the respondent

SOLICITORS: Corrs Chambers Westgarth for the applicant
MinterEllison Gold Coast for the respondent

- [1] **MORRISON JA:** The respondent (DVB) applied to the applicant (the Council) for a development permit in respect of a multiple dwelling building containing 35 apartments in a 26-storey building at Broadbeach. The Council refused the application.
- [2] DVB appealed to the Planning and Environment Court. On 2 December 2022, the P&E Court ordered that the appeal be allowed and the development application be approved subject to conditions.¹
- [3] The Council now seeks leave to appeal against that decision.

Background

- [4] The background facts are not controversial. They can be adapted from the learned primary judge's decision.²
- [5] On the corner of Broadbeach Boulevard, First Avenue, and Old Burleigh Road at Broadbeach is a vacant parcel of land. It is formally described as Lot 56 on SP 310444. It has a street address of 2 First Avenue and 88 Old Burleigh Road, Broadbeach. It is two blocks to the east of the Gold Coast Highway and the light rail stations and track.
- [6] The land has an area of 1,186 square metres. It has a generally rectangular shape, with its long sides facing First Avenue to the north and a multiple dwelling development known as Bedarra on the adjoining lot to the south. The northern frontage is approximately 50 metres, while the eastern and western frontages are 15 and 21 metres respectively. Opposite the land, on the other side of Broadbeach Boulevard, is a nature strip known as Sir John (Jack) Egerton Park, then the Broadbeach Foreshore and the beach.
- [7] The land sits in Broadbeach, a suburb of the Gold Coast. It is located in the High Density Residential Zone in the Gold Coast City Plan 2016 (version 8). The Building height overlay map in the City Plan includes the subject land in an unlimited height area.

¹ *DVB Projects Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 40.

² Reasons below at [1]–[6].

- [8] Broadbeach contains a mix of high-rise, medium-rise, and low-rise multiple dwelling buildings. The taller buildings are generally north of First Avenue (in the eastern part of Broadbeach).
- [9] Two of the buildings close to the land have a height of 25 storeys. They each have a frontage to First Avenue. There is also an 11-storey building on First Avenue, and a 15-storey building on Second Avenue. The area also contains buildings up to 48 storeys in height.
- [10] On 16 February 2021, DVB made a development application seeking a development permit for a material change of use for a multiple dwelling building containing 35 apartments in a 26-storey-high building. On 16 June 2021, the Council notified its decision to refuse the development application. On 21 June 2021, DVB commenced an appeal against the Council’s decision to the P&E Court.

The P&E Court proceedings

- [11] The development application was subject to code assessment, a category of assessment for assessable development, and prescribed by s 45(3) of the *Planning Act 2016* (Qld). Section 45(3) relevantly provides:

“45 Categories of assessment

...

- (3) A *code assessment* is an assessment that must be carried out only—
- (a) against the assessment benchmarks in a categorising instrument for the development; and
 - (b) having regard to any matters prescribed by regulation for this paragraph.”

- [12] “Categorising instruments” are prescribed by s 43 of the Act, and relevantly include a planning scheme. The only categorising instrument relevant to the assessment in this case was the City Plan. The parties to the appeal identified the pertinent benchmarks in the City Plan as including the High Density Residential Zone Code (**HDRZ Code**) and the High-Rise Accommodation Design Code (**HRAD Code**).
- [13] The issues in the P&E Court related only to the built form of the proposed development. They were summarised as follows:³
1. Is the amenity impact of the proposed development acceptable?
 2. Is the design of the proposed development appropriate?
 3. In the event of non-compliance, should the development application nevertheless be approved in the exercise of the planning discretion?
- [14] The primary judge allowed the appeal. The decision turned on the conclusion that the proposed development complied with relevant assessment benchmarks, specifically:

³ Reasons below at [15].

1. the HDRZ Code Overall Outcome s 6.2.3.2(2)(d)(iv),⁴ which requires that built form have “varying site cover to reduce building dominance and provide areas for landscaping”; and
2. the HDRZ Code Performance Outcome PO2(c), which requires that the development’s “[s]ite cover ... promotes slender bulk form”; and
3. the HRAD Code Overall Outcome s 9.3.10.2(2)(b), which requires that development comprise “slender towers”.

The Codes and Outcomes

[15] The HDRZ Code Overall Outcome 2(d)(iv) provides, relevantly:

“Built form ... –

...

(iv) has varying site cover to reduce building dominance and provide areas for landscaping.”

[16] The HDRZ Code Preferred Outcome 2⁵ relevantly provides:

“**PO2**

Site cover:

...

(c) promotes slender bulk form;”

[17] Finally, the HRAD Code Overall Outcome 2(b),⁶ relevantly provides:

“(b) Slender towers relate to existing high-rises and enhance views of the city skyline.”

[18] As is evident, Overall Outcome 2 and Preferred Outcome 2 each raise the same question, that of whether the proposed building is “slender”.

First proposed ground of appeal

[19] The proposed ground of appeal concerning Overall Outcome 2(d)(iv) presented itself in a constrained way.

[20] The issue centres around the evidence going to whether the proposed building “has varying site cover to reduce building dominance and provide areas for landscaping”. At first sight, the issue seems inevitably to involve questions of fact, namely: (i) whether there is varying site cover; (ii) is that varying site cover to reduce building dominance; and (iii) does the varying site cover provide areas for landscaping.

[21] When taxed about that, Mr Gibson KC, appearing with Mr Wylie of Counsel for the Council, contended that this was a case where there was no evidence upon which

⁴ To which I shall refer as Overall Outcome 2(d)(iv).

⁵ To which I shall refer as Preferred Outcome 2.

⁶ To which I shall refer as Overall Outcome 2(b).

the primary judge could find that Overall Outcome 2(d)(iv) was satisfied. In that respect, reliance was placed on various authorities to submit that a finding made in the absence of evidence supporting the finding is an error of law.⁷

Design of the building

[22] The learned primary judge set out the design features of the building in a way that was not challenged before this Court. That description was interspersed with her Honour's recording of the opinions expressed by one of the experts, Mr Curtis.⁸ Though somewhat lengthy, it is of use to set them out because her Honour ultimately accepted Mr Curtis' opinions:⁹

“[18] The proposed development is a 26-storey apartment development containing a total of 35 units. Car parking and services will be accommodated on three basement levels that will be accessed via a driveway from Old Burleigh Road. The driveway extends along the subject land's western boundary adjacent to three visitor car parks.

[19] The ground storey (level 01) includes a residential lobby with the main pedestrian entrance from First Avenue and a secondary entrance from Broadbeach Boulevard. It also includes two offices and an additional space to be used as an office or meeting space, a deliveries room, and a surf craft workshop.

[20] The first floor (level 02) will provide a communal recreation area that includes a sun deck, various pool and spa facilities, a sauna or steam room, and a gym or yoga space. The level is generally open to the east, north and west.

[21] Levels 3 to 15 comprise two units per floor, with each unit having three bedrooms. Levels 16 to 23 have one unit per floor, with each unit having four bedrooms. Levels 23, 24 and 25 comprise a three-storey penthouse with five-bedrooms, extensive open-plan living, kitchen and dining areas. The top level is dedicated to a private recreation inclusive of a sun lounge along the northern elevation, hot and cold pools, gym or sauna, and kitchen and bar amenities.

[22] Mr Curtis describes the design and appearance of the proposed development. He says the building comprises an extruded tower form from levels 3 to 26, with a generally consistent floor plate sitting on top of a two-storey podium. Mr Richards agrees with this description.

[23] Consistent with the size and shape of the subject land, the proposed development will have its longest façades orientated to face north and south. The principal north facing façade optimises solar access to the internal spaces in the building by

⁷ *Redland City Council v King of Gifts (Qld)* [2023] QPELR 96 at [3], citing *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 per Mason CJ at 355–6, and *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at 418 [90]–[91].

⁸ An architecture and visual amenity expert.

⁹ Reasons below at [18]–[41]. Citations omitted.

including extensive fenestration (such as windows) and balconies. These inform the appearance of the building.

- [24] Mr Curtis says the appearance is also characterised by the exposed projecting edges of the floor plates. He explains that the floor plate edges layer the appearance of the façade to create a stack of human scale floors that fragment the overall bulk of the building and the appearance of the built form.
- [25] The composition of the façade is symmetrical. It locates deep recessed balconies at each end of the façade with a deep central recess that accommodates a garden space between the adjacent apartment units. Mr Curtis opines that the depth of these elements, when viewed together as vertical stacks, modulate the width of the façade, and reinforce the tower's vertical proportion to balance the layered horizontal appearance provided by the projecting floor plate edges.
- [26] Mr Curtis also says that the depth of the corner balconies provides a feathered edge to the built form, which is complemented by the depth of the garden to visually erode the bulk of the built form. This visual erosion is complemented by the transparency of the extensive fenestration that, in Mr Curtis' opinion, further contributes to the effective mitigation of the built form's visual bulk.
- [27] The south facing façade includes the external wall of the tower's central service core and the bedroom and bathroom spaces that flank it. The southern façade has a more solid appearance than the other façades. There is fenestration at the ends of the façade and within a narrow strip at the centre of the façade that provides access to views from the lift lobby. The fenestration is otherwise orientated at 90-degrees to the façade's south facing walls within the stepped breaks in the façade's horizontal alignment. Mr Curtis explains that each of the southern wall panels has fluting, which he says contributes to its articulation.
- [28] Mr Curtis opines that the fenestration located at the ends of the south façade, together with the recessed corner balconies, provide a similar feathering to the built form as that provided by the balconies to the northern façade. He says the fenestration is complemented by the projecting horizontal floor plate edges. These elements frame the central stepped area of the southern façade. In Mr Curtis' opinion, the stepped alignment and fluted wall panels modulate the width of the southern façade and reinforce its vertical proportion. Mr Curtis says that the juxtaposition of the vertical central elements with the horizontal end or corner elements balances the façade's visual composition to mitigate its visual bulk and provide an attractive secondary façade appearance.
- [29] The widths of the northern and southern façades are contrasted by the extreme slenderness of the eastern and western façades,

which share a similar appearance. The eastern and western façades are characterised by central fenestration flanked by corner balconies. Mr Curtis says that, when viewed together as vertical stacks, these elements modulate the narrow width of the façade and further accentuate the tower's extreme slenderness.

- [30] The tower is capped by the projecting roof top elements. Mr Curtis opines that they provide a distinctive skyline profile.
- [31] Underneath the tower, on levels 01 and 02, is the podium. The podium is clearly differentiated from the tower by the projecting roof line of its canopy and by the open sides of the second storey that address all the adjoining street frontages. Mr Curtis explains that the projecting roof over the podium is disengaged from the floor plate above, giving it the appearance of floating and extending towards the subject land's three frontages.
- [32] Mr Curtis opines that the visual differentiation of the podium provides a transition in height from the tower to the pedestrian scale of the street and a visual reference to the low-rise development in the local area. He says these attributes contribute to creating a cohesive streetscape and assist to mitigate the visual impact created by the contrasting differences in building height that otherwise characterise the local area.
- [33] Mr Curtis says that unlike the excessive bulk that often characterises typical podium forms, the proposed development has a hollowed-out appearance. This allows for views into the built form where human scale elements animate its appearance to provide complexity and visual interest. During his oral evidence, Mr Curtis further explained that the open recreational space element on level 02 provides a high level of engagement. It provides an opportunity for people recreating there to avail themselves of the view out to the sea, and to overlook people walking past in the street.
- [34] Mr Curtis says the recreation space at level 02 has a double height volume. This means that the ceiling is roughly twice as high as the other floors. This double height volume of level 02 sits above the ground storey (level 01) to provide a dramatic void space with the tower perched above. The void exposes the building's skeleton of supporting columns and accentuates the podium's roof canopy. It also reinforces the podium's tropical, pavilion-like appearance.
- [35] Mr Curtis opines that the podium's open appearance is balanced by the robust solidity and materiality of the human scale elements on level 1, which assist to ground the built form and connect it with the street. He says these elements are complemented by the integrated coastal style landscaping

within the setback, which softens the pedestrian level interface with the street.

- [36] The podium's pedestrian interface with the street frontages will be activated by the building entrances and communal facilities located at the ground level and the visual permeability provided by the extensive fenestration that extends along the frontages.
- [37] In Mr Curtis' opinion, the podium's interface with the neighbouring property to the south will protect the privacy of the adjoining property's communal open space and address it with a stepped alignment of solid walls. He says the stepped walls articulate and fragment the podium's bulk and allow landscaping to be accommodated within the setback.
- [38] Mr Curtis explains that the well-considered appearance and proportions of the façades are enhanced by a sophisticated palette of external finishes. He says the finishes balances [sic] recessive tones with brighter focal elements to add visual interest and complexity to the proposed development's detailed appearance.
- [39] Mr Curtis supports his evidence about the design of the proposed development, and the impact of the design elements on the building's appearance, particularly its apparent bulk, by reference to figures and perspectives. Mr Curtis' explanation accords with the details outlined in the plans, sections and elevations, and the depiction of the proposed development in the visual representations (including architectural perspectives) and photomontages.
- [40] Mr Curtis verified the accuracy of the visual representations and the photomontages. He says the photomontages provide an accurate depiction of the building that allows one to gain an appreciation of the actual appearance of the building, including how its [sic] articulated, its width, its height, its modulation and how it would appear to a person from the modelled viewpoints. Mr Curtis' evidence about the accuracy of the visual representations and the photomontages was unchallenged.
- [41] Mr Curtis' explanation of the built form elements of the proposed development and how, in combination, they influence the appearance of the proposed development does well to convey the appearance of the proposed development. I accept Mr Curtis' evidence."

Varying site cover

- [23] The term "site cover" is defined in the City Plan, Schedule 1, as:

"Of a development, the portion of the site, expressed as a percentage, that will be covered by a building or structure, measured to its

outermost projection, after the development is carried out, other than a building or structure, or part of a building or structure, that is:

- (a) in a landscaped or open space area, including, for example, a gazebo or shade structure; or
- (b) a basement that is completely below ground level and used for car parking; or
- (c) the eaves of a building; or
- (d) a sun shade.”

[24] As Overall Outcome 2(d)(iv) and the definition above suggests, the resolution of the question whether a proposed building has “varying site cover to reduce building dominance and provide areas for landscaping” is a question of fact.

[25] The learned primary judge adopted a passage from the decision of Rackemann DCJ in *Body Corporate for Lindor Community Title Scheme 29204 and Planit Consulting Pty Ltd v Gold Coast City Council*,¹⁰ where Overall Outcome 2(d)(iv) was discussed:

“Overall Outcome 2(d)(iv) seeks a built form with varying site cover to reduce building dominance and provide areas for landscaping. The provision provides no guidance as to the nature or extent of any variation of site cover and reduction of building dominance or any provision of landscaping by reference to which compliance or non-compliance is to be judged. **The provision should be construed as requiring a variation of site cover to reduce building dominance and provide for landscaping to more than a trivial or insignificant extent.** The proposal does have varying site cover, but does not significantly reduce building dominance in context. The building remains, as I have found, one of excessive height, scale and intensity which is bulky and visually intrusive in its context notwithstanding the variation of site cover. The podium element, which has a site cover of 97.1%, is not a feature which assists in reducing building dominance. The provision of landscaping is not insignificant albeit that I have found it to be inadequate in the context of other provisions.”

[26] The suggested qualification, “to more than a trivial or insignificant extent”, emphasises that the issue is a question of fact. The definition dictates a factual calculation (the portion of the site, expressed as a percentage, that will be covered by a building or structure, measured to its outermost projection), and the qualification adds an evaluative assessment on that question of fact.

[27] The primary judge accepted the Council’s submission as to the effect of Overall Outcome 2(d)(iv), namely that “the overall outcome calls for variations in floorplate area at different levels of the building to reduce building dominance and provide areas for landscaping”.¹¹

¹⁰ [2018] QPEC 54; [2018] QPELR 265 at [97]. Emphasis added.

¹¹ Reasons below at [106].

Was there varying site cover?

[28] It was uncontroversial that the plans for the proposed development incorporated floorplates of varying sizes:

1. a floorplate of 712.9 square metres for the podium (i.e., the ground floor and first floor), equating to 60.1 per cent of the site area;
2. a floorplate of 649 square metres for the tower (i.e., levels 03 to 25), equating to 54.7 per cent of the site area; and
3. a floorplate of 458.5 square metres for the rooftop terrace level (i.e., level 26), equating to 38.7 per cent of site area.

[29] That being so, it was the case there was varying site cover. The issues then were whether the varying site cover was, to more than a trivial or insignificant extent, to: (i) reduce building dominance; and (ii) provide for landscaping.

[30] On those issues, the learned primary judge had the benefit of evidence from experts, Dr McGowan, Mr Richards, and Mr Curtis.

[31] Dr McGowan said that the varying site cover did not have a meaningful impact on overall dominance. Mr Richards contended that a principle should govern the issue, namely that it is implicit within the performance outcomes that taller buildings or higher parts of buildings have reduced site cover and greater separation than that of lower height buildings. Her Honour rejected the evidence of Mr Richards, and only partially accepted the evidence of Dr McGowan. There is no challenge to those findings.

[32] Instead, her Honour generally accepted the evidence of Mr Curtis:¹²

“ ... in general I prefer the evidence of Mr Curtis. It is consistent with my impression of the visual impact of the proposed development from my consideration of the plans (including the elevations and sections), the visual representations, and the photomontages.”

[33] That her Honour made her own assessment of the evidence, including that related to the impact of the design of the building’s appearance, was also made clear at paragraph [39] of the Reasons below:¹³

“Mr Curtis supports his evidence about the design of the proposed development, and the impact of the design elements on the building’s appearance, particularly its apparent bulk, by reference to figures and perspectives. **Mr Curtis’ explanation accords with the details outlined in the plans, sections and elevations, and the depiction of the proposed development in the visual representations (including architectural perspectives) and photomontages.**”

The evidence as to varying site cover

¹² Reasons below at [86]. Citations omitted.

¹³ Emphasis added.

[34] The evidence as to varying site cover, drawn from the exhibits in the case, as well as from Mr Curtis (both as to matters of fact as well as opinion) which her Honour accepted, may be summarised as follows:

1. the site cover of the proposed development varies in that the shape of the podium footprint is not a uniform shape; the site cover of the podium (60.1 per cent of the site area) varies in relation to the site cover of the typical tower floor plates above (54.7 per cent of the site area) and in relation to the uppermost storey and roof structures (38.7 per cent of the site area);¹⁴
2. the ground storey of the proposed development includes landscaping around its perimeter that interfaces with the adjoining pedestrian footpath along the subject land's three street frontages and along the subject land's common boundary with the adjoining property to the south; Mr Curtis' opinion was that when these matters are considered in conjunction with the proposed development's setting and design, they are sufficient to meet the requirements of Overall Outcome (2)(d)(iv);¹⁵
3. the schematic landscape design plans show that, at the ground floor plane and podium level, the proposed development will include an area of deep planting in the northwest corner of the subject land, several areas of large shrub plantings, several street trees, and screen planting in deep soil; landscaping is also proposed to be included on level 02 in a manner that will make the landscaping visible from the public realm; there is also landscaping proposed on each level of the tower form along its northern façade; on some levels, the landscaping extends for the full length of the northern façade; the schematic landscape design plans also record that the landscaping layout has been designed with contiguous areas to maximise soil volume and to achieve optimal plant growth;¹⁶ and
4. her Honour accepted Dr McGowan's evidence that:¹⁷
 - (i) it is at the ground floor plane and podium level that there is pertinent interaction with the public realm; those levels provide the immediate interface for pedestrians;
 - (ii) the proposed landscaping will assist to provide a human scale to the proposed development; the site boundary sections in the schematic landscape design depict a well-considered landscaping scheme, and that the landscaping will assist in mitigating the impacts from the proposed development.

[35] Having made those findings, her Honour then made her ultimate findings on this issue:¹⁸

“[116] Having regard to the photos (including those from Bedarra), the plans (including the elevations and sections), the schematic landscape design, the visual representations, the

¹⁴ Reasons below at [111].

¹⁵ Reasons below at [113].

¹⁶ Reasons below at [114].

¹⁷ Reasons below at [115].

¹⁸ Reasons below at [116]–[117]. Citations omitted.

photomontages, and for other reasons already provided above, I accept the evidence of Mr Curtis.

- [117] The proposed development has varying site cover. While the variations are not as significant as those suggested in the acceptable outcomes, given the design features of the proposed development, to which I have already referred above, they are sufficient to appropriately reduce the building's dominance in its context and to provide an appropriate extent of landscaping."

Consideration

- [36] The Council's proposed challenge to those findings was expressed in its outline of submissions as:¹⁹

- "25. It is evident, both from the figures noted at paragraph 21²⁰ and the evidence accepted by the primary judge (noted at paragraph 22 above)²¹ that there is no variation in the areas of the floorplates for almost the entire height of the building (levels 3 to 25).
26. The limited variations in the floorplate areas of the proposed building neither 'reduce building dominance' of the development, nor do they 'provide areas for landscaping', as those expressions appear in the Scheme.
27. The primary judge's acceptance of the evidence of Mr Curtis is not the answer. His evidence did not address the issue correctly. In particular, his evidence of variations in site cover noted at RJ [111] addressed the first, but not the second or third, elements of the HDRZ Code OO2(d)(iv), and his evidence regarding ground storey landscaping noted at RJ [113] said nothing about the provision of areas for landscaping *by reason of* variations in floorplate areas at different levels of the building.
28. It was not open for the primary judge to hold that the proposed development complies with HDRZ Code OO2(d)(iv). The primary judge erred in law, either by:
- (a) misconstruing HDRZ Code OO2(d)(iv) so as to ignore the requirement that the proposed development include variations in site cover that reduce building dominance and provide areas of landscaping; or
 - (b) concluding that the limited variations in the site cover of the proposed building would reduce the dominance of the proposed development and provide areas of

¹⁹ Council's outline paragraphs [25]–[28]. Citations and record book references omitted. Emphasis in original.

²⁰ A reference to the figures for percentage floor space: see paragraph [28] above.

²¹ A reference to her Honour's acceptance that "from the base of the tower to the penthouse private open space level, at a height of 72.6 metres, there is no variation in site cover": Reasons below [108].

landscaping, notwithstanding the absence of any evidence to that effect.”

[37] In oral address, the contentions were put on the basis that her Honour’s finding at paragraph [117] of the Reasons “was simply not open as being unsupported by any evidence, and indeed contrary to the evidence ... because although there was some variation for site cover, ... it did not have the effect of reducing building dominance at all and it did not provide areas for landscaping”.²²

[38] Addressing the learned primary judge’s acceptance of Mr Curtis’ opinion that Overall Outcome 2(d)(iv) was met, it was submitted that it was not sufficient:²³

“Because it’s not consistent with the objective facts. The plans and elevation show that that conclusion is simply wrong, and, in fact, doesn’t even attempt – this is at paragraph 113 – doesn’t even attempt to refer to the variations in site cover with increasing height of the building, which is a critical element of the design code requirement – sorry, the zone code requirement. It’s not simply referring to varying site cover at ground level or podium level.”

[39] On the facts demonstrated by the evidence, the submission was:²⁴

“Now, our submission in a nutshell is that there is a variation in site cover, but just as there is clearly a variation in site cover, equally clearly, that variation in site cover does not and cannot be taken or accepted or understood as reducing the dominance of this building.”

[40] Those submissions must be rejected.

[41] First, an appeal from the P&E Court to this Court must be on a question of law, not one of fact. In order to turn this issue from one purely of fact into one of law, the Council had to frame the case as a no-evidence error of law. But there was evidence, in two forms. Not only was there the physical evidence (plans, elevations, sections, schematic landscape design, visual representations, and photomontages), there was also the expert opinion evidence of Mr Curtis. His opinions on the issue were admitted into evidence without objection, just as were those of Dr McGowan (though they were only partly accepted on this issue). Further, no suggestion was made that Mr Curtis lacked a factual basis for his opinions. Her Honour accepted those opinions as the basis for her finding of compliance with Overall Outcome 2(d)(iv). There was, thus, an evidentiary basis for the finding.

[42] Secondly, Mr Gibson KC eventually reframed the point, saying it was not a no-evidence point:²⁵

“ ... perhaps the correct characterisation is no probative evidence. But that’s actually what was being said in *Kostas* when spoken of ... ‘evidence fit to go to a jury’.

²² Transcript 1-3 lines 1–2; 1-8 lines 12–15.

²³ Transcript 1-14 lines 15–20.

²⁴ Transcript 1-19 lines 11–15.

²⁵ Transcript 1-20 lines 31–37.

It doesn't mean to say there's not a skerrick of evidence to be found anywhere, but there is not sufficient probative evidence to be put before a jury as a trier of fact. And in this case, that's the situation here."

- [43] But this runs into the same problem. As is evident from paragraph [116] of the Reasons below, there were two bases for her Honour's finding that Overall Outcome 2(d)(iv) was met. The first was her Honour's acceptance of Mr Curtis' opinion evidence. The second was her Honour's own assessment of the evidence including the photos, plans, elevations, sections, schematic landscape design, visual representations, and the photomontages.
- [44] Mr Gibson KC accepted that the learned primary judge had made her own assessment of the available evidence on this issue, reflected in what her Honour found at paragraphs [39] and [116] of the Reasons below: see paragraphs [33] and [35] above.²⁶
- [45] Thirdly, Mr Curtis' opinion was in accordance with her Honour's own assessment of the evidence:²⁷

"[39] Mr Curtis supports his evidence about the design of the proposed development, and the impact of the design elements on the building's appearance, particularly its apparent bulk, by reference to figures and perspectives. **Mr Curtis' explanation accords with the details outlined in the plans, sections and elevations, and the depiction of the proposed development in the visual representations (including architectural perspectives) and photomontages.**"

- [46] Fourthly, in *Australian Broadcasting Tribunal v Bond*,²⁸ Mason CJ addressed the question of findings in the absence of evidence, in the context of judicial review:²⁹

"The question whether there is any evidence of a particular fact is a question of law: *McPhee v. S. Bennett Ltd.* (1934) 52 WN (NSW) 8, at p 9; *Australian Gas Light Co. v. Valuer-General* (1940) 40 SR (NSW) 126, at pp 137–138. Likewise, the question whether a particular inference can be drawn from facts found or agreed is a question of law: *Australian Gas Light* (1940) 40 SR (NSW) 126, at pp 137–138; *Hope v. Bathurst City Council* (1980) 144 CLR 1, at pp 8–9. This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions: *Federal Commissioner of Taxation v. Broken Hill South Ltd.* (1941) 65 CLR 150, at pp 155, 157, 160. So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v. Maryborough Mining Warden* (1975) 132 CLR 473, at pp 481, 483.

²⁶ Transcript 1-16 lines 5–8; 1-18 lines 1–8.

²⁷ Reasons below at [39]. Emphasis added.

²⁸ (1990) 170 CLR 321; [1990] HCA 33.

²⁹ *Bond* at 355–356. Emphasis added.

But it is said that ‘[t]here is no error of law simply in making a wrong finding of fact’: *Waterford v. The Commonwealth* (1987) 163 CLR 54, at p 77, per Brennan J. Similarly, Menzies J. observed in *Reg. v. District Court; Ex parte White* (1966) 116 CLR 644, at p 654:

‘Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law.’

Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.”

- [47] In my view, the last paragraph of that passage is contrary to the submission made by the Council. There was evidence here from which the learned primary judge could make her finding. There is no error of law.
- [48] Leave should not be given to raise this proposed ground as it would fail.

Second proposed ground of appeal

- [49] These grounds raise the same question, namely whether the proposed building would be such that it comes within the requirement to be “slender”. That is the subject of Preferred Outcome 2 (“[s]ite cover ... promotes slender bulk form”), and Overall Outcome 2(b) (“[s]lender towers relate to the existing high-rise and enhance views of the city skyline.”)
- [50] Having noted that the terms “slender tower form” and “slender bulk form” are not defined in the *Planning Act*, the *Planning Regulation 2017*, the definitions in Sch 1 of City Plan, or the *Acts Interpretation Act 1954*, the learned primary judge considered they should be given their ordinary meaning. Her Honour turned to the Macquarie Dictionary to select:³⁰

“[174] ‘*Slender*’ is defined in the Macquarie Dictionary as ‘*small in circumference in proportion to height or length: slender column*’. ‘*Bulk*’ is defined in the Macquarie Dictionary as ‘*magnitude in three dimensions*’.

- [51] Her Honour also accepted the Council’s submission that consideration of the “slender” issues required that the proposed building be considered three-dimensionally.³¹
- [52] The learned primary judge then set out various facts relevant to the issue:³²

“[177] It is not otherwise necessary to define the phrase ‘*slender bulk form*’ as City Plan ultimately calls for a value judgment about

³⁰ Reasons below at [174]. Citations omitted.

³¹ Reasons below [176].

³² Reasons below at [177]–[179]. Citations omitted.

whether the proposed development, considered in its three-dimensional form, could properly be regarded as a slender tower and whether the site cover promotes a slender bulk form. These are questions of fact to be determined by reference to the circumstances that pertain in the case under consideration.

[178] In terms of empirically defined bulk, the proposed development has:

- (a) a height of 26 storeys and approximately 93.5 metres measured from ground level to the top of the roof;
- (b) an overall length (for the tower component, i.e., above level 2) of approximately 45 or 47 metres; and
- (c) an overall width (for the tower component, i.e., above level 2) of approximately 18 metres.

[179] The length and width of each façade is less than the overall length and width of the proposed development due to the stepping employed in its design. The northern façade, which presents to First Avenue, is approximately 40 metres long. That part of the southern façade that is closest to the southern boundary is approximately 15 metres wide. The eastern façade, which presents to Broadbeach Boulevard, and the western façade, which presents to Old Burleigh Road, are each approximately 13 metres wide.”

[53] After having set out the opinion evidence of Mr Curtis, Dr McGowan, and Mr Richards, her Honour expressed her conclusion thus:³³

“[200] Although the proposed development has an elongated east to west axis, the proposed development is a three-dimensional structure that will be viewed from various vantage points. Having regard to the plans, elevations, and perspective views, including those extracted in the Architecture Joint Expert Report, and the photomontages, I accept the evidence of Mr Curtis. I prefer the evidence of Mr Curtis to that of Mr Richards and Dr McGowan, each of whom placed too heavy an emphasis on the built form metrics and gave little weight to the appearance of the proposed development in its context. I am satisfied that the proposed development is a slender tower, and that the site cover promotes a slender bulk form.”

[54] Mr Curtis’ evidence was quite detailed and thorough. It is summarised by her Honour in the Reasons below.³⁴ There is no present need to set out or further summarise that evidence, as there was no submission that it did not provide an adequate factual foundation for finding compliance with Preferred Outcome 2, and Overall Outcome 2(b), except to the extent dealt with in the consideration to follow.

[55] As is evident from paragraph [200] of the reasons below (see paragraph [53] above), her Honour’s acceptance of Mr Curtis was the consequence of “having regard to the

³³ Reasons below at [200]. Citations omitted.

³⁴ Reasons below at [180]–[191].

plans, elevations, and perspective views, including those extracted in the Architecture Joint Expert Report, and the photomontages”. In my view, that form of expression signified that her Honour’s conclusion was based upon her own assessment of the evidence, apart from acceptance of Mr Curtis’ opinions.

[56] The Council’s proposed challenge to the findings was expressed in its outline:³⁵

- “35. The primary judge identified the correct test but, notwithstanding the observations identified in paragraph 34 above,³⁶ failed to apply it. Her Honour did not specifically address the three-dimensional built form of the proposed development when considering the question whether the proposed building was ‘*slender*’. In particular, no consideration was given to the fact that the circumference of the proposed building – 126 metres – is greater than its height – 93.5 metres.
36. The dimensions demonstrate that the proposed building and, in consequence, the development is not ‘*slender*’.
37. The primary judge’s contrary conclusions that the proposed development did comply with HDRZ Code PO2 and HRAD Code OO2(b) were influenced by evidence that was not relevant to those issues, namely:
- (a) design features of the development, including its façade and fenestration, that did not relate to the building’s shape or ‘*slenderness*’ (at RJ³⁷ [180] to [182]);
 - (b) the visibility of the proposed development from external viewpoints (at RJ [184] to [188]); and
 - (c) the nature of existing development in the locality (at RJ [189] to [191]).
38. The primary judge erred in law by misconstruing HDRZ Code PO2 and HRAD Code 002(b) by considering the evidence referred to at paragraph 37 above to be relevant to the assessment against those benchmarks.
39. Furthermore, although the primary judge accepted the evidence of Mr Curtis on this issue, the only evidence he gave directly addressing the point was his statement in exhibit 7.01 (Joint Expert Report, Visual Amenity Experts) noted at RJ [183] that ‘*the extreme slenderness of the eastern and western façades provides a contrast to the widths of the northern and southern façades*’ and his reference to ‘*the narrow width of the façade*’. Self evidently, however, that evidence addressed only a two-dimensional assessment of the built form. He did not purport to undertake a three-dimensional assessment.”

[57] The Council’s contentions on these grounds must be rejected.

³⁵ Council’s outline paragraphs [35]–[39]. Citations and record book references omitted.

³⁶ A reference to the dimensions set out in paragraph [178] of the Reasons below: see paragraph [52] above.

³⁷ The letters “RJ” were used to refer to the reasons below.

- [58] First, as the Council’s outline states, it is accepted that the learned primary judge identified the correct test in paragraph [177] of the Reasons below: see paragraph [52] above. That involved the application of a value judgment. As Her Honour rightly said: “These are questions of fact to be determined by reference to the circumstances that pertain in the case under consideration”.³⁸ What is then submitted is that the evaluative judgment miscarried. I find it difficult to understand how that is not merely an error of fact.
- [59] Secondly, in so far as it is submitted that the learned primary judge did “not specifically address” the three-dimensional built form of the proposed development, and “no consideration was given to the fact that the circumference of the proposed building ... is greater than its height...”, the submission mischaracterises the reasoning process. The learned primary judge plainly had regard to the various documents that revealed the dimensions and the circumference. Her Honour specifically said she did, referring to the “plans, elevations, and perspective views, including those extracted in the Architecture Joint Expert Report, and the photomontages”. The dimensions were set out in the Reasons below.³⁹
- [60] Thirdly, the Council’s submissions focus too much on the definition adopted for “slender” without taking into account that the phrases are “slender tower form” and “slender bulk form”. Nor does it properly factor in the full definition adopted by the learned primary judge: “small in circumference in proportion to height **or length**”.⁴⁰ Proper consideration should accommodate the combination of concepts within the definitions. On the definitions adopted by the learned primary judge, “bulk” focusses on the building’s “magnitude in three dimensions”. That does not mean only that the building has to be considered three-dimensionally, but also requires that its magnitude in three dimensions be brought to account.
- [61] In my view, that means that a consideration of whether the building or tower is slender must involve an assessment of the bulk (the body of the building) in three dimensions, i.e. width, height, and length. So, for example, there is no reason, in my view, why a long but narrow building could not be considered “slender”, even though its circumference was larger than its height. So, for example, it may be that a long but narrow building could be considered slender, even though its circumference was larger than its height.
- [62] Fourthly, the Council’s approach pays insufficient attention to the terms of PO2, which is that “[s]ite cover ... promotes slender bulk form”. As is plain, consideration of only whether a building is slender does not take into account the other words in the provision, which focus on “site cover”. When it is realised that PO2 requires attention to whether the **site cover** promotes slender bulk form, it becomes apparent that the focus on the relationship between circumference and height is not enough. In my view, the combined phrase emphasises that a building’s bulk form could be slender even though its circumference is larger than its height.
- [63] Fifthly, the mere fact that the circumference is greater than the building’s height does not automatically equate to the building being incapable of being found to be slender. The Macquarie Dictionary definition of “slender” says “small in

³⁸ Reasons below at [177].

³⁹ At [178].

⁴⁰ Emphasis added.

circumference in proportion to height or length”. As her Honour found, the dictionary definition did not really assist:⁴¹

“[175] Considered in the abstract, with only the assistance of these definitions, it is difficult to ascribe a meaning to the phrase ‘*slender bulk form*’. The architects were not able to assist with a meaning as ‘*slender bulk*’ is not an architectural term.”

- [64] I pause to note that the learned primary judge did not attempt to construe the meaning of the term “slender”, or the phrase “[s]ite cover ... promotes slender bulk form”, by reference to its meaning as drawn from the text and context of the planning provisions themselves. In my view, that course would have been appropriate before resort is had to dictionary definitions. The considerations I have referred to above, notably that it may be that a long but narrow building could be considered “slender”, even though its circumference was larger than its height, serve to emphasise the flexibility of design solutions that would meet Preferred Outcome 2, and Overall Outcome 2(b).
- [65] Sixthly, the learned primary judge found that the design of the building is informed by the shape of the land.⁴² There is no challenge to that finding. The shape of the land is rectangular, and the design of the building follows that shape.
- [66] Seventhly, as far as Overall Outcome 2(b) is concerned, the provision refers to “[s]lender towers relate to the existing high-rise and enhance views of the city skyline”. The observations made above apply equally here, especially when one bears in mind that both provisions apply. A tower can be slender, even when it is long and narrow or its circumference is greater than its height.
- [67] Eighthly, as I have endeavoured to demonstrate above, the factors relevant to a consideration of whether the proposed building complies with Preferred Outcome 2 and Overall Outcome 2(b) go beyond simple measurements of length, breadth, and height. That is plainly so when the provisions call for a consideration of whether its “[s]ite cover ... promotes slender bulk form”, or as built it will relate to existing high-rise and enhance views description, as in the phrase “[s]lender towers relate to the existing high-rise and enhance views of the city skyline”.
- [68] For that reason, the Council’s submission⁴³ that it was irrelevant to consider the design features of the development, including its façade and fenestration, the building’s visibility of the proposed development from external viewpoints, and the nature of existing development in the locality, cannot be accepted. Mr Curtis’ evidence showed how those elements were integral to a full assessment of the impact of the proposed building. No error of law was involved in the learned primary judge’s consideration of them.
- [69] Nor is it correct, in my respectful view, to characterise Mr Curtis’ evidence as being limited to a two-dimensional assessment.⁴⁴ It went well beyond that. It is notable,

⁴¹ Reasons below at [175].

⁴² Reasons below at [23].

⁴³ Council’s outline, paragraphs [37]–[38].

⁴⁴ Council’s outline, paragraph [39].

as her Honour recognised, that the Council's expert (Dr McGowan) did not disagree with Mr Curtis' approach:⁴⁵

“[194] Dr McGowan does not cavil with Mr Curtis' evidence about:

- (a) the qualitative considerations that inform the appearance of the bulk or visual mass of a development;
- (b) the overall distribution of the proposed development's volume in space vertically and horizontally;
- (c) the treatments and design measures used to provide visual articulation to the proposed development; or
- (d) the appearance of the proposed development when viewed in its local context, including Mr Curtis' analysis of the photomontages.”

[70] However much the Council tried to characterise the findings as involving a question of law, or an error of law, that was misconceived. The resolution of whether the proposed building complied with Preferred Outcome 2 and Overall Outcome 2(b) was one of fact, as the learned primary judge described it. It was an evaluative judgment that was called for, and that is what it remained.

[71] This proposed ground fails.

Conclusion

[72] For the reasons expressed above, the proposed grounds do not involve questions of law and cannot succeed. Leave to appeal should be refused.

[73] I propose the following orders:

1. The application for leave to appeal is refused.
2. The applicant pay the respondent's costs of the application.

[74] **FLANAGAN JA:** I agree with Morrison JA.

[75] **LIVESEY AJA:** I agree with Morrison JA.

⁴⁵ Reasons below at [194].