PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21
PARTIES:	**JAKEL PTY LTD AND NICKALL PTY LTD AND AGIA PTY LTD** (appellants) **v** **BRISBANE CITY COUNCIL** (respondent) **and** **RENEE ROLFE** (co-respondent by election)
FILE NO/S:	2970/17
DIVISION:	Planning and Environment
PROCEEDING:	Planning and Environment appeal
ORIGINATING COURT:	Brisbane
DELIVERED ON:	30 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	26, 27 and 28 February 2018 and 16 April 2018 and further written submissions received 26 April 2018
JUDGE:	Kefford DCJ
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – appeal against refusal of a development application seeking preliminary approval for building work (relocation of pre-1947 dwelling house and multiple unit dwelling) and development permit for material change of use (multiple unit dwelling – seven units) and a development permit for reconfiguring a lot (two into two lots) – whether the appeal is to be decided under the *Sustainable Planning Act 2009* assessment and decision regime or the *Planning Act 2016* regime – whether the development is within easy walking distance of a public transport node – whether the development is in close proximity to major transport nodes – whether the proposed development will have unacceptable impacts on the character and amenity of the area – whether the proposed landscaping and open spaces are adequate –

whether the access and servicing arrangements are acceptable – whether the development ought be approved

LEGISLATION: *Acts Interpretation Act 1954* (Qld), s 14

City of Brisbane Town Planning Act 1964, s 22B

Local Government Act 1936 (Qld), s 33(18D), s 34(15A)

Local Government (Planning and Environment) Act 1990 (Qld), s 3.14

Integrated Planning Act 1997 (Qld), s 4.1.52(2)(a)

Planning Act 2016 (Qld), s 229, s 230, s 285, s 286, s 288, s 311, s 312

Planning and Environment Court Act 2016 (Qld), s 7, s 43, s 45, s 46, s 47, s 76

Statutory Instruments Act 1992 (Qld), s 6, s 7

Sustainable Planning Act 2009 (Qld), s 339, s 341, s 461, s 462, s 462, s 464, s 465, s 466, s 467, s 495(2)(a)

CASES: *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172, cited

Behrens v Caboolture Shire Council (1979) 39 LGERA 138, approved

Blizzard v O'Sullivan [1993] QSC 123; [1994] 1 Qd R 112, applied

BTS Properties (Qld) Pty Ltd v Brisbane City Council & Ors [2015] QPEC 47; [2016] QPELR 943, approved

Builders Licensing Board v Sperway Constructions Pty Ltd & Anor [1976] HCA 62; (1976) 135 CLR 616, applied

Chalk v Brisbane City Council (1966) 13 LGRA 228, cited

CPT Manager Ltd v Central Highlands Regional Council [2010] QCA 183; (2010) 174 LGERA 412, cited

Gaven Developments Pty Ltd v Scenic Rim Regional Council [2010] QPEC 51; [2010] QPELR 750, cited

Gracemere Surveying and Planning Consultants Pty Ltd v Peak Downs Shire Council [2009] QCA 237; (2009) 175 LGERA 126, cited

Guerin & Anor v Scenic Rim Regional Council & Ors [2018] QPEC 16, not followed

Kanesamoorthy v Brisbane City Council [2016] QPEC 42; [2016] QPELR 784, followed

Lake Maroona Pty Ltd v Gladstone Regional Council [2017] QPEC 25; (2017) LGERA 166; [2017] QPELR 628, approved

Leach v Brisbane City Council [2011] QPEC 55; [2011] QPELR 609, cited

Lonie v Brisbane City Council [1998] QPELR 209, cited

McLean v Gilliver & Ors [1994] QSC 53; [1995] 1 Qd R 637, applied

Platinum Design Architects Pty Ltd v Brisbane City Council [2016] QPEC 58; [2016] QPELR 1003, 1009 [19], cited

R v Brisbane City Council; Ex parte Read [1986] 2 Qd R 22, cited

R v Lukin; Ex parte Sunshine Pty Ltd [1967] Qd R 49, cited

Re Coldham & Ors; Ex parte Brideson [1990] HCA 36; (1990) 170 CLR 267, applied

Scurr v Brisbane City Council [1973] HCA 39; (1973) 133 CLR 242, cited

SDW Projects Pty Ltd v Gold Coast City Council [2006] QPEC 74; [2007] QPELR 24, cited

Walker v Noosa Shire Council [1983] 2 Qd R 86, cited

COUNSEL:	K Wylie for the appellants
	B D Job QC for the respondent
SOLICITORS:	Natasha Patrick Town Planning Law for the appellants
	City Legal – Brisbane City Council for the respondent
	McInnes Wilson for the co-respondent by election

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Introduction

[1] This is an appeal by Jakel Pty Ltd, Nickall Pty Ltd and Agia Pty Ltd ("*Jakel Pty Ltd*") against the decision by the respondent, Brisbane City Council ("*Council*"), to refuse its development application. The development application seeks to facilitate development of land located at 28-30 Attewell Street, Nundah for infill development. The proposed development involves:

(a) partial demolition of a pre-1947 dwelling house and its relocation forward on the subject site;

(b) reconfiguration of the boundary of the existing two lots to create a front lot containing the pre-1947 dwelling house and a rear battle-axe lot; and

(c) development of the rear lot for a multiple dwelling containing six units.

[2] Ms Renee Rolfe is a resident of 18 Attewell Street, Nundah. She lodged a properly made submission objecting to the development application and opposes the proposed development.

The subject site

[3] The subject site has a total area of 900 square metres, with a frontage of 20.117 metres to Attewell Street. It is comprised of two narrow lots of about the same size, which are oriented east-west.[1] The subject site is relatively flat, with a slight fall of approximately 2.7 metres from Attewell Street to the rear boundary.[2]

[4] The subject site is improved by a pre-1947 dwelling house, which is located toward the street frontage. The dwelling house's pre-development location reflects the traditional setback pattern from the Attewell Street frontage. It straddles both lots. The vegetation that was present on the subject site, being trees and shrubs, has recently been cleared. Vehicle access is currently via a crossover and grassed driveway along the northern boundary of the subject site.[3]

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1 Town Planning Joint Expert Report – Exhibit 7 p 2 [2.2] and p 77; Book of Plans – Exhibit 2 p 1.

2 Town Planning Joint Expert Report – Exhibit 7 p 2 [2.4]; Visual Amenity Joint Expert Report – Exhibit 9 p 6 [14].

3 Town Planning Joint Expert Report – Exhibit 7 p 2 [2.3]-[2.5]; Visual Amenity Joint Expert Report – Exhibit 9 p 6 [14].

The locality

[5] Attewell Street is characterised by a mix of detached dwellings and multiple dwellings of varying eras and quality.[4]

[6] Immediately adjoining the subject site are:

(a) to the north, a two-storey multiple dwelling containing four units that is located behind a single unit dwelling;

(b) to the south, a two-storey pre-1947 character house (with an approval to construct a two-storey multiple dwelling containing three units on the rear of that site);

(c) to the east:

(i) along part of the subject site's rear boundary, a two-storey multiple dwelling comprising six units at 53 Hedley Avenue; and

(ii) along the balance of the rear boundary, a two-storey pre-1947 character house at 55 Hedley Avenue.[5]

[7] Attewell Street contains a predominance of houses that positively contribute to the street's character through a presence of, for the most part, pre-1947 traditional Queenslander architecture set in a landscaped environment. Vegetation, including significant shade trees located in the front setbacks and street reserve, gives the street a green, leafy character.[6]

[8] Attewell Street also contains a number of multiple dwellings of varied construction, including brick unit blocks and units of modern design and construction. There is one two-storey triplex, one two-storey duplex, three two-storey multiple dwellings and two three-storey multiple dwellings.

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4 Town Planning Joint Expert Report – Exhibit 7 p 2 [2.7].

5 Town Planning Joint Expert Report – Exhibit 7 p 2 [2.6].

6 Town Planning Joint Expert Report – Exhibit 7 p 2 [2.7] and [2.9], and p 3 [2.10]; Visual Amenity Joint Expert Report – Exhibit 9 pp 8-19 figures 2-23, p 25 [21]-[22] and p 27 [24]. The site inspection I undertook helped me appreciate this evidence.

[9] Overall, I accept the evidence of Ms Morrissy (the town planner retained by Council) that the residential building heights in Attewell Street are typically low-rise, and predominantly two-storey.[7]

[10] Further afield, particularly as one approaches the Toombul Shopping Centre, the locality includes three-storey residential development.[8]

[11] Other notable development in the broader locality includes:

(a) Toombul Shopping Centre, the nearest point of which is approximately 506 metres from the subject site;

(b) Toombul bus station, which is approximately 800 metres from the subject site;

(c) Toombul train station, the access for which is approximately 870 metres from the subject site;

(d) Nundah train station, the access for which is approximately 890 metres from the subject site;

(e) Nundah Village, which contains restaurants, shops and businesses and is approximately 623 metres from the subject site;

(f) various parks and sporting fields within 400 metres of the subject site; and

(g) three primary schools (Nundah State School, Northgate State School and St Joseph's Primary School) and one secondary school (Mary MacKillop College) within 900 metres of the subject site.[9]

The proposed development

[12] The proposed development considered by the court differed in a few respects from that considered by Council during the development application process. The changes included installation of a two-metre high rear acoustic fence and acoustic and opaque glass balustrading to the rear units. There was also a reduction in the number of units by one, with a consequential increase to the rear setback of the

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7 Town Planning Joint Expert Report – Exhibit 7 p 2 [2.8].
8 Town Planning Joint Expert Report – Exhibit 7 p 3 [2.11].
9 Town Planning Joint Expert Report – Exhibit 7 p 3 [2.12]-[2.13]; T2-39/L7-23 (Ovenden).

upper floor of the multiple dwelling. An additional space was also nominated for deep planting.[10]

[13] At the commencement of the hearing, I determined that the changes involved no more than a minor change and permitted the appeal to proceed on the basis of the changed development application.[11]

[14] The proposed development to be considered by the court involves:

(a) the relocation of the existing dwelling house forward on the subject site, raising it by approximately 1.8 metres, and demolishing part of the rear.[12] The dwelling house is identified as "*Unit 7*" on the plans, but was referred to as the "*dwelling house*" during the hearing and will be described as such herein;

(b) realignment of the existing lot boundaries, whereby the dwelling house is to be contained on a 241 square metre lot on the Attewell Street frontage;

(c) six units in a single three-storey building at the rear of the subject site. The "*height perspective*" plan confirms that approximately half of the roof area of the multiple dwelling exceeds 9.5 metres above ground level,[13] with the greatest extent of exceedance being about 450 millimetres;[14]

(d) 12 carparks, with four of the spaces in tandem. Although two spaces are noted for visitors, upon the severance of the proposed dwelling house lot, only one visitor parking space will remain available for the multiple dwellings on the rear lot;

(e) site cover of 508 square metres, equating to 56.4 per cent of the subject site; and

(f) proposed landscaping, and communal and private open space.

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10 T1-3/L33 – T1-4/L2.
11 T1-5/L8-9.
12 Visual Amenity Joint Expert Report – Exhibit 9 p 42 [41].
13 Book of Plans – Exhibit 2 p 2.
14 Book of Plans – Exhibit 2 pp 10 and 11; Visual Amenity Joint Expert Report – Exhibit 9 p 43 [46].

[15] The plans of the proposed development indicate an intention to undertake considerable earthworks, with the majority of the subject site proposed to be filled.[15] The eastern extent of the building will sit on fill, with the consequence of an increase in its perceived height when seen from neighbouring properties to the rear and from Hedley Avenue.

The decision framework

Development application made under the *Sustainable Planning Act 2009*

[16] The development application was properly made on 15 December 2016.[16] At that time, the *Sustainable Planning Act 2009* (Qld) was in force, as was Brisbane City Plan 2014 ("*City Plan*").

[17] The development application was subject to impact assessment, but did not require referral to any referral agencies.[17]

[18] The *Sustainable Planning Act 2009* was repealed by the *Planning Act 2016* (Qld) on 3 July 2017. Pursuant to s 288 of the *Planning Act 2016*, the *Sustainable Planning Act 2009* continued to apply to the assessment of, and decision with respect to, the development application.

[19] On 17 July 2017, Council refused the development application.[18]

[20] Jakel Pty Ltd filed a notice of appeal on 10 August 2017.[19]

[21] There is no dispute between the parties about the appropriateness of the application process.

[22] Further, Council accepts that, pursuant to s 311(4) of the *Planning Act 2016*, the administrative steps associated with commencing the proceeding are those outlined in the *Planning Act 2016*.[20] As such, there is no contest that the appeal was correctly commenced under s 229 of the *Planning Act 2016*, and that notice of the appeal was to be given in accordance with s 230 of the *Planning Act 2016*.

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15 Town Planning Joint Expert Report – Exhibit 7 p 61.
16 Appeal Book – Exhibit 6 p 128.
17 Appeal Book – Exhibit 6 p 129.
18 Appeal Book – Exhibit 6 pp 189-94.
19 Appeal Book – Exhibit 6 pp 1-10.
20 Submissions on behalf of the Respondent – Court Doc 16 p 7 [27].

[23] There is, however, a dispute between Jakel Pty Ltd and Council about the decision framework that applies in this appeal.

What assessment regime applies to appeals commenced after 3 July 2017?

[24] Jakel Pty Ltd submits that, despite Council's assessment and decision being undertaken pursuant to the *Sustainable Planning Act 2009*, on appeal the court is to assess and decide the application pursuant to s 45 of the *Planning Act 2016*.

[25] Council submits that determination of the issue either way would not affect the outcome of this particular appeal. It, nevertheless, provided detailed submissions to assist the court with respect to this issue.[21] Council submits that the court is required to carry out its assessment and make a decision pursuant to the regime in the *Sustainable Planning Act 2009*.

[26] In ascertaining the applicable regime, the starting point is the transitional provisions of the *Planning Act 2016*.

[27] Section 311 of the *Planning Act 2016* states:

> "**311 Proceedings generally**
>
> (1) Subject to section 312, **this section applies to a matter under the old Act, if a person**—
>
> (a) had started proceedings before the commencement but the proceedings had not ended before the commencement; or
>
> (b) had, immediately before the commencement, a right to start proceedings; or
>
> (c) **has a right to start proceedings that arises after the commencement in relation to**—
>
> (i) a statutory instrument mentioned in section 287; or
>
> (ii) **an application mentioned in section 288**.
>
> (2) For proceedings that were started in the Planning and Environment Court, Magistrates Court or the Court of Appeal—
>
> (a) the old Act continues to apply to the proceedings; and
>
> (b) this Act applies to any appeal in relation to the proceedings as if the matter giving rise to the appeal happened under this Act.

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21 Submissions on behalf of the Respondent – Court Doc 16 pp 6-9 [24]-[35]; Reply Submissions on behalf of the Respondent – Court Doc 17; Supplementary Submissions on behalf of the Respondent – Court Doc 20.

> (3) For proceedings that were started in a building and development committee—
>
> (a) if the committee had been established before the old Act was repealed—
>
> (i) the old Act continues to apply to the proceedings; and
>
> (ii) this Act applies to any appeal in relation to the proceedings; and
>
> (iii) the committee must continue to hear the proceedings despite the repeal of the old Act; or
>
> (b) if the committee had not been established before the old Act was repealed—this Act applies to the proceedings, and any appeal in relation to the proceedings.
>
> (4) **For proceedings mentioned in subsection (1)(b) or (c), proceedings may be brought only under this Act**."
>
> (emphasis added)

[28] Section 311 of the *Planning Act 2016* draws a clear distinction between:

(a) proceedings that had already commenced when the *Planning Act 2016* came into force,[22] to which the *Sustainable Planning Act 2009* will continue to apply[23] by virtue of s 311(2) of the *Planning Act 2016*;[24] and

(b) proceedings that had not commenced when the *Planning Act 2016* came into force,[25] for which there is:

(i) no equivalent to s 311(2) of the *Planning Act 2016*; rather,

(ii) a requirement that the proceedings be brought under the *Planning Act 2016*.[26]

[29] Despite the absence of a provision such as s 311(2) of the *Planning Act 2016* in relation to appeals under s 311(1)(b) and (c), Council submits that the *Sustainable Planning Act 2009* applies. It submits that s 311(4) of the *Planning Act 2016* is capable of being construed as referring to an intention that the administrative requirements of the *Planning Act 2016* apply, such as those contained in Chapter 6, Part 1, or even other provisions such as s 279 regarding the electronic service of documents.

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22 See s 311(1)(a) of the *Planning Act 2016.*
23 other than for appeals with respect to those appeals, which are subject to the *Planning Act 2016*
24 It applies to proceedings that "*were*" started.
25 See s 311(1)(b) and (c) of the *Planning Act 2016.*
26 See s 311(4) of the *Planning Act 2016.*

[30] I do not accept that the effect of s 311(4) of the *Planning Act 2016* is so limited. There is nothing within the provision that warrants reading in such a limitation.

[31] Further, consideration of the provision in the broader legislative context of the *Planning Act 2016* and the *Planning and Environment Court Act 2016* support the legislative intent that any appeal about a development application filed after 3 July 2017 be heard and determined under the new legislative regime. The following provisions are relevant to that broader legislative context.

[32] Section 312 of the *Planning Act 2016* provides an exception to s 311. It stipulates that the *Sustainable Planning Act 2009* continues to apply to any appeal in relation to the matters nominated therein: this type of matter is not so nominated. The reason for the exception is apparent in the *Planning Bill 2015 Explanatory Notes*.

[33] With respect to s 311 and s 312, which were cl 308 and cl 309 in the *Planning Bill 2015* respectively, the *Planning Bill 2015 Explanatory Notes* states:

> **Proceedings generally**
>
> *Clause 308* provides for proceedings not started before the old Act was repealed to be brought under the Bill. However, if a proceeding was started in the Planning and Environment Court before the old Act was repealed, the started proceeding must be continued under the old Act. Any appeal in relation to the proceeding would be under the Bill.
>
> If the started proceeding was to a building and development dispute resolution committee under the old Act, and a committee had been established to hear the proceeding, the old Act continues to apply however any appeal would be under the Bill. If no committee had been established, the Bill applies to proceedings.
>
> **Particular proceedings**
>
> ***Clause 309* provides for the old Act to continue to apply to proceedings, and any appeal about the proceeding, brought after the commencement in relation to particular matters under the old Act**.
>
> **This is mostly because the Bill has no equivalent to the matters listed, and consequently provides no rights to start proceedings about them.**
>
> **However the table identifying the matters also includes a proceeding about a claim for compensation under the old Act, section 710 or 716. This is consistent with the intent to provide continuity for the resolution of compensation claims, as provided for under clause 293.**
>
> However the clause provides that the new, more comprehensive excusory powers under the P&E Court Act apply to the proceedings, notwithstanding that they are under the old Act.
>
> (emphasis added)

[34] The fact that s 312 of the *Planning Act 2016* limits the matters where appeals will be dealt with under the *Sustainable Planning Act 2009* to those where there is no equivalent appeal right in the *Planning Act 2016* supports the legislative intent that, where the *Planning Act 2016* provides a right of appeal, the appeal will be commenced, heard and determined under the *Planning Act 2016* regime.

[35] The *Planning and Environment Court Act 2016* (Qld) provides guidance on the powers and procedures of the Planning and Environment Court.

[36] The transitional provisions of the *Planning and Environment Court Act 2016* are as follows:

> "**76 Proceedings**
>
> (1) **This section applies to a matter under repealed SPA or an enabling Act if a person—**
>
> (a) had started proceedings under repealed SPA before the commencement but the proceedings had not ended before the commencement; or
>
> (b) had, immediately before the commencement, a right to start proceedings under repealed SPA; or
>
> (c) **has a right to start proceedings that arises after the commencement in relation to—**
>
> (i) a statutory instrument mentioned in the Planning Act, section 287; or
>
> (ii) **an application mentioned in the Planning Act, section 288**; or
>
> (iii) any provision of an enabling Act that provides for the continuation of the matter after the commencement.
>
> (2) This Act applies to any appeal in relation to proceedings mentioned in subsection (1)(a).
>
> *Example—*
>
> Proceedings are continued under the Planning Act, section 311(2)(a).
>
> This Act will apply to an appeal in relation to the proceedings.
>
> (3) **This Act applies to the proceedings mentioned in subsection (1)**(b) or **(c)** subject to subsections (4) and (5).
>
> ***Example—***
>
> **A person starts proceedings under the Planning Act, section 311(4).**
>
> **This Act will also apply to the proceedings.**
>
> (4) For proceedings brought under section 11—
>
> (a) a reference in that section to the Planning Act is taken to include a reference to repealed SPA; and

(b) a reference in that section to the Planning Act, chapter 3, part 6, division 2 is taken to include a reference to repealed SPA, chapter 6, part 11, division 1; and

(c) a reference in that section to the Planning Act, chapter 3, part 6, division 3 is taken to include a reference to a call in of an application under repealed SPA, chapter 6, part 11, division 2.

(5) For proceedings brought under section 12—

(a) a reference in that section to the application the subject of a call in under the Planning Act is taken to include a reference to an application under repealed SPA, chapter 6, part 11, division 2; and

(b) a reference in that section to the assessment manager is taken to include a reference to an assessment manager under repealed SPA.

(6) Also, to remove any doubt, it is declared that repealed SPA, section 440—

(a) applies also for a development approval that has lapsed; and

(b) is not limited to—

(i) circumstances in relation to a court proceeding under repealed SPA or a current P&E Court proceeding; or

(ii) provisions under which there is a positive obligation to take particular action; and

(c) applies as if a reference to a provision not being complied with, or not being fully complied with, is taken to include—

(i) non-fulfilment of part or all of the provision; and

(ii) a partial noncompliance with the provision.

(7) In this section—

provision includes a definition."

(emphasis added)

[37] Like s 311 of the *Planning Act 2016*, s 76 of the *Planning and Environment Court Act 2016* draws a distinction between:

(a) appeals commenced under the *Sustainable Planning Act 2009* before the commencement of the *Planning and Environment Court Act 2016*; and

(b) appeals commenced after the commencement of the *Planning and Environment Court Act 2016*, including with respect to appeals about a

development application assessed and decided by an assessment manager under the *Sustainable Planning Act 2009*[27].

[38] The regime under the *Sustainable Planning Act 2009* applies to the former, but the regime under the *Planning and Environment Court Act 2016* applies to the latter.[28]

[39] Other relevant provisions of the *Planning and Environment Court Act 2016* are as follows:

> "**43 Nature of appeal in general**
>
> Subject to any relevant enabling Act, **an appeal to the P&E Court is by way of hearing anew**.
>
> **46 Nature of appeal**
>
> (1) **If, for a Planning Act appeal, the appellant was the applicant or a submitter for a development application the subject of the appeal, section 43 applies subject to subsections (2) to (5)**.
>
> (2) **The Planning Act, section 45 applies for the P&E Court's decision on the appeal as if—**
>
> (a) **the P&E Court were the assessment manager for the development application**; and
>
> (b) **the reference in subsection (7) of that section to when the assessment manager decides the application were a reference to when the P&E Court makes the decision.**
>
> (3) The P&E Court can not consider a change to the development application unless the change is only a minor change to the application.
>
> (4) The P&E Court can not consider a change to the development approval the subject of a change application under the Planning Act, section 78, unless the change is only a minor change to the approval.
>
> (5) The P&E Court is not prevented from considering and making a decision about a ground of appeal (based on a referral agency response under the Planning Act) merely because that Act required the assessment manager to refuse the development application or approve it subject to conditions.
>
> (6) If the appeal is against a decision about a superseded planning scheme application under the Planning Act, the P&E Court must—
>
> (a) consider the aspect of the appeal relating to the assessment manager's consideration of the superseded planning scheme in question as if the application had been made under the superseded planning scheme; and

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27 pursuant to s 288 of the *Planning Act 2016*

28 Compare s 76(2) and s 76(3) of the *Planning and Environment Court Act 2016*.

(b) in considering the aspect, disregard the planning scheme in force when the application was made.

47 Appeal decision

(1) In deciding a Planning Act appeal, the P&E Court must decide to do 1 of the following (the *appeal decision*) for the decision appealed against—

(a) confirm it;

(b) change it;

(c) set it aside and—

(i) make a decision replacing it; or

(ii) return the matter to the entity that made the decision appealed against with directions the P&E Court considers appropriate.

(2) The appeal decision may also include other orders, declarations or directions the P&E Court considers appropriate.

(3) The appeal decision (other than one to confirm the decision appealed against or to set it aside and return the matter) is taken, for the Planning Act (other than chapter 6), to have been made by the entity that made the decision appealed against."

(emphasis added)

[40] A "*Planning Act appeal*" is defined in Schedule 1 of the *Planning and Environment Court Act 2016* as "*an appeal to the P&E Court for which the Planning Act is the enabling Act*." The Note that follows the definition refers to s 229 of the *Planning Act 2016*.

[41] The term "*enabling Act*" is defined in Schedule 1 of the *Planning and Environment Court Act 2016* by reference to s 7. Section 7 of the *Planning and Environment Court Act 2016* states:

"**7 Jurisdiction**

(1) The P&E Court has jurisdiction given to it under any Act (each an ***enabling Act***).

Notes–

1 Various Acts give the P&E Court jurisdiction. However, under the Planning Act, chapter 6 and schedule 1 and part 4 of this Act, its main heads of jurisdiction are–

- appeals against decisions under the Planning Act (in this Act, called 'Planning Act appeals')
- appeals against decisions of tribunals established under the Planning Act, section 235.

2 For when courts have jurisdiction, see also the *Acts Interpretation Act 1954*, section 49A."

[42] Council submits:[29]

> "The question obviously arises as to whether, in circumstances where s.288(2) of the PA provides that the SPA continues to apply to an application instead of the PA, whether that such an application would subsequently involve an appeal against a "*decision under the Planning Act*" (as referred to in the Note to s.7). It would appear that it would not."

[43] Council further submits that it is the *Sustainable Planning Act 2009* that confers jurisdiction in this matter. It submits:[30]

(a) the note to s 7 of the *Planning and Environment Court Act 2016* is part of the Act;[31]

(b) s 288 of the *Planning Act 2016* confirms that the *Sustainable Planning Act 2009* still applies to the development application instead of the *Planning Act 2016*;

(c) an approval the subject of a development application assessed and decided under the *Sustainable Planning Act 2009* would not take effect until, relevantly, if there is an appeal, when the appeal is finally decided or withdrawn.[32] Similarly, an applicant may apply for and possibly obtain a negotiated decision notice during an applicant's appeal period. Council submits those aspects of the *Sustainable Planning Act 2009* are intertwined with appeal rights and, logically, appeal rights arising under the *Sustainable Planning Act 2009* rather than the *Planning Act 2016*;

(d) in any event, the appeal provisions in the *Sustainable Planning Act 2009* refer, for example, to appeals:

(i) by an applicant against a length of a period (i.e. a "*relevant period*") in s 341 of the *Sustainable Planning Act 2009*;[33]

(ii) by a submitter against decisions under s 314 or s 327 of the *Sustainable Planning Act 2009*;[34]

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29 Supplementary Submissions on behalf of the Respondent – Court Doc 20 p 8 [36].
30 Supplementary Submissions on behalf of the Respondent – Court Doc 20 pp 9-11 [40]-[43].
31 Section 14(4) of the *Acts Interpretation Act 1954* (Qld).
32 Section 339(1)(c) of the *Sustainable Planning Act 2009*.
33 Section 461(1)(d) of the *Sustainable Planning Act 2009*.
34 Section 462(1)(a) and (b) of the *Sustainable Planning Act 2009*.

(iii) by an advice agency against decisions under s 314 or s 327 of the *Sustainable Planning Act 2009*;[35]

(iv) of the various types identified in s 465 to s 467 of the *Sustainable Planning Act 2009*;

(e) those appeal provisions would cause s 49A of the *Acts Interpretation Act 1954* (Qld) to have effect. That provision states:

> "If a provision of an Act, whether expressly or by implication, authorises a proceeding to be instituted in a particular court or tribunal in relation to a matter, the provision is taken to confer jurisdiction in the matter on the court or tribunal."

(f) s 285 of the *Planning Act 2016* is potentially relevant in that it applies to s 288 and s 311 of the *Planning Act 2016* and states:

> "(2) If this part applies a provision (the ***applied provision***) of the old Act to a thing, the following provisions also apply to the thing—
>
> (a) any other provision of the old Act, to the extent the applied provision refers to the other provision;
>
> (b) any definition in the old Act that is relevant to the applied provision or a provision stated in paragraph (a)."

[44] Section 288 of the *Planning Act 2016* applies to a development application made under the *Sustainable Planning Act 2009* that was not decided before that Act was repealed. It states, in s 288(2), that the *Sustainable Planning Act 2009* continues to apply to the application instead of the *Planning Act 2016*.

[45] Pursuant to s 288(5) of the *Planning Act 2016*, the document that results from the application:

(a) takes effect or is made when the application takes effect or is made under the *Sustainable Planning Act 2009*; but

(b) is taken to have been made under the *Planning Act 2016*, even if that type of document can not be made under this Act.

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35 Section 464(2)(a) and (b) of the *Sustainable Planning Act 2009*.

[46] Although the development approval that results from a development application will not take effect until any appeal is finally decided or withdrawn,[36] the *Sustainable Planning Act 2009* did not define an "*appeal*" by reference to appeals instituted under that Act. As such, s 285 of the *Planning Act 2016* does not call appeals under the *Sustainable Planning Act 2009* into play.

[47] Further, the type of appeal rights that existed under the *Sustainable Planning Act 2009*, such as those referred to by Council, continue to be available under the *Planning Act 2016*.[37]

[48] As such, there is no tension in the combined operation of s 288(5)(a) of the *Planning Act 2016* and s 339 of the *Sustainable Planning Act 2009*: the development approval will take effect when any appeal under the *Planning Act 2016* is finally decided or withdrawn.

[49] There is nothing in the operation of s 288 of the *Planning Act 2016* that tells against the legislative intent that appeals be assessed and decided under the new legislative regime. Rather, the stipulation in s 288(5)(b) of the *Planning Act 2016* that the resultant document is taken to have been made under the *Planning Act 2016* supports the legislative intention that the new planning legislation become operative as soon as a decision is made with respect to the application.

[50] In any event, I do not consider that the question of whether the appeal is a "*Planning Act appeal*" is limited to a consideration of whether the appeal is against a decision under the *Planning Act 2009* as is apparently contended by Council. The note in s 7 of the *Planning and Environment Court Act 2016* identifies the "*main*" heads of jurisdiction, not the only heads. One would not expect it to identify, as a "*main*" head, an appeal against a decision under the *Sustainable Planning Act 2009* given the number of such appeals will be limited: they will only arise during the transitional operation of the legislation.

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36 See s 339 of the *Sustainable Planning Act 2009*.

37 See s 229, schedule 1, table 1, items 1, 2 and 3 and schedule 2, table 2, items 2, 3 of the *Planning Act 2016*. The appeal rights include an appeal about a "*provision of a development approval*", which is defined in schedule 2 of the *Planning Act 2016* as "*all words or other matters forming, or forming part of, the approval*". The definition gives examples of conditions and the currency period.

[51] With respect to the "*enabling Act*", I accept the following submissions on behalf of Jakel Pty Ltd:[38]

> "3. First, the SPA could not be held to be an 'enabling Act' for the purpose of this provision. Enabling Acts are defined, in s.7(1) of the PEC Act, as Acts that confer jurisdiction on the P&E Court. Whilst the SPA, when in force, did confer jurisdiction on this Court, it had been repealed prior to determination of the subject development application (and the commencement of this Appeal). Absent express provisions contained within other in-force legislation, at the relevant times in this proceeding (determination of the development application on 17 July 2018, and the commencement of this appeal on 10 August 2018), SPA no longer (directly) conferred jurisdiction on this Court.
>
> 4. Relevant to this proceeding, on and from 3 July 2018 the jurisdiction of SPA was preserved pursuant to s.288(2) of the Planning Act, which required the SPA to continue to apply to any development application that had not been decided. However, properly constructed, it is submitted that such jurisdiction was limited to the determination of the development application, and no more. What gives support to this proposition that the SPA's jurisdiction was 'spent' upon deciding the application is the fact that s.288(5)(b) of the Planning Act makes plain that a document that results from any application is taken to have been made under the Planning Act. Accordingly, the consequence of s.288 read as a whole is that upon determination of the refusal of the subject application on 17 July 2018, the decision notice issued pursuant to s.334 of the SPA was deemed to be a decision notice issued under 63 of the Planning Act, with appeal rights conferred to the appellants pursuant to Planning Act s.229 and Schedule 1, Table 1, Item 1."

[52] Pursuant to s 43 of the *Planning and Environment Court Act 2016*, subject to any relevant enabling Act and s 46(2) to (5), an appeal commenced in this court after 3 July 2017 is by way of hearing anew.

[53] As was observed by the High Court in *Re Coldham & Ors; Ex parte Brideson* [1990] HCA 36; (1990) 170 CLR 267 at 273-4:[39]

> "… it is well settled that, when the legislature gives a court the power to review or hear an "appeal" against the decision of an administrative body, a presumption arises that the court is to exercise original jurisdiction and to determine the matter on the evidence and law applicable at the date of the curial proceedings: see *Ex parte Australian Sporting Club Ltd.; Re Dash*.[40] Nevertheless, whether the right of appeal against an administrative decision is given to a court or to an administrative body, the nature of the appeal

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38 Supplementary Outline of Argument for the Appellants – Application of *Planning Act 2016* Transitional Provisions – Court Doc 21 pp 1-2 [3]-[4].

39 See also *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172, 181-2 [23].

40 (1947) 47 SR (NSW) 283.

> must ultimately depend on the terms of the statute conferring the right: *Builders Licensing Board v. Sperway Constructions (Syd.) Pty. Ltd.*[41]"

[54] With respect to decisions on development applications made under the *Sustainable Planning Act 2009* but appealed under the *Planning Act 2016*, there is a discernible legislative intent that, subject to s 46(2) to (5) of the *Planning and Environment Court Act 2016*, the court is to exercise original jurisdiction and to determine the matter on fresh evidence and on the law applicable at the date of the proceedings.

[55] The legislative intent that the hearing be subject to the law applicable at the date of the proceedings finds support when one considers the effect of s 46(2) of the *Planning and Environment Court Act 2016*.

[56] Section 46(2) of the *Planning and Environment Court Act 2016* refers the reader to s 45 of the *Planning Act 2016*, which prescribes the nature of the assessment that is to be carried out for code assessment and for impact assessment. Both processes involve an assessment against the "*assessment benchmarks*" in a "*categorising instrument*".[42] Section 45 of the *Planning Act 2016* also, relevantly, states:

> "(6) An assessment carried out against a statutory instrument, or another document applied, adopted or incorporated (with or without changes) in a statutory instrument, must be carried out against the statutory instrument or document as in effect when the application was properly made.
>
> (7) However, if the statutory instrument or other document is amended or replaced before the assessment manager decides the application, the assessment manager may give the weight that the assessment manager considers is appropriate, in the circumstances, to the amendment or replacement."

[57] Council submits that applying the literal meaning of s 46(2) of the *Planning and Environment Court Act 2016* might, in some circumstances, involve potential absurdities associated with a change to prohibit development or a change in the level of assessment.

[58] The effect of s 45(6) and s 45(7) of the *Planning Act 2016* is similar to a provision introduced to the *Local Government Act 1936* (Qld)[43] following a decision of the

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41 (1976) 135 CLR 616, 621-2.

42 Pursuant to s 43 of the *Planning Act 2016*, a planning scheme is a "*local categorising instrument*" containing "*assessment benchmarks*". It is also a "*planning instrument*" and a "*local planning instrument*" under s 8 of the *Planning Act 2016*.

43 Section 33(18D) and s 34(15A) of the *Local Government Act 1936*, which were inserted by operation of s 16(q) and 17(b) of the *Local Government Act and Another Act Amendment Act 1980*. See also s 22B of the *City of Brisbane Town Planning Act 1964*. There was no provision that specifically

Local Government Court in *Behrens v Caboolture Shire Council* (1979) 39 LGRA 138. (It is also similar to provisions found in the *Local Government (Planning and Environment) Act 1990* (Qld),[44] the *Integrated Planning Act 1997* (Qld)[45] and the *Sustainable Planning Act 2009* (Qld)[46]).

[59] *Behrens v Caboolture Shire Council* involved an appeal against the local authority's refusal to allow a rural residential subdivision. After the third day of the hearing, the appeal had to be adjourned because of the illness of the presiding judge and, during the adjournment (which was lengthy), the local authority amended the relevant by-law to prohibit subdivision of any land outside a 5 000 metre radius of the Caboolture Post Office (as the appellant's land was in that case).

[60] As Professor Fogg records in *Fogg "Land Development Law in Queensland"* (1987) p 101, the Judge "*showed some restiveness with the course of action he felt obliged to follow*". The law at that time required the court to apply the law at the date of hearing, as well as the facts and circumstances relevant at that time.[47] Had that not been the law, Mylne DCJ would have approved the whole of the subject land for subdivision.[48]

[61] Absent s 46(2) of the *Planning and Environment Court Act 2016* and s 45(6) and (7) of the *Planning Act 2016*, a hearing anew would entail assessing and deciding the development application on the law at the time the court makes its decision, which would include changes to relevant planning instruments.

[62] The inclusion of s 46(2) of the *Planning and Environment Court Act 2016* and s 45(6) and (7) of the *Planning Act 2016* makes it apparent that the legislature intended that such an outcome ought be avoided. The effect of those provisions is to require the court to assess the development application against the statutory instruments that applied at the time the development application was properly made.

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related to the court's powers on appeal, but likewise there was no express provision that the appeal was by way of a hearing anew. That position was confirmed by numerous authorities including *Scurr v Brisbane City Council* [1973] HCA 39; (1973) 133 CLR 242, 258; *R v Brisbane City Council; Ex parte Read* [1986] 2 Qd R 22, 27; *Walker v Noosa Shire Council* [1983] 2 Qd R 86, 88; *Chalk v Brisbane City Council* (1966) 13 LGRA 228, 230-1.

44 Section 3.14 of the *Local Government (Planning and Environment) Act 1990*.

45 Section 4.1.52(2)(a) of the *Integrated Planning Act 1997*.

46 Section 495(2)(a) of the *Sustainable Planning Act 2009*.

47 *R v Lukin; Ex parte Sunshine Pty Ltd* [1967] Qd R 49.

48 *Behrens v Caboolture Shire Council* (1979) 39 LGERA 138, 149.

[63] Pursuant to s 80 of the *Sustainable Planning Act 2009*, a planning scheme made under that legislation was expressed to be a statutory instrument.

[64] Under s 286 of the *Planning Act 2016*, planning instruments continue to have effect under the *Planning Act 2016* as if they had been made under the *Planning Act 2016*. There is no equivalent to s 80 of the *Sustainable Planning Act 2009* in the *Planning Act 2016*. Nevertheless, it is my view that a planning instrument under the *Planning Act 2016* is a statutory instrument.

[65] Section 7 of the *Statutory Instruments Act 1992* (Qld) states:

> "**7 Meaning of statutory instrument**
>
> (1) A *statutory instrument* is an instrument that satisfies subsections (2) and (3).
>
> (2) The instrument must be made under—
>
> (a) an Act; or
>
> (b) another statutory instrument; or
>
> (c) power conferred by an Act or statutory instrument and also under power conferred otherwise by law.
>
> *Example of paragraph (c)—*
>
> an instrument made partly under an express or implied statutory power and partly under the Royal Prerogative
>
> (3) The instrument must be of 1 of the following types—
>
> - a regulation
> - an order in council
> - a rule
> - a local law
> - a by-law
> - an ordinance
> - a subordinate local law
> - a statute
> - a proclamation
> - a notification of a public nature
> - a standard of a public nature
> - a guideline of a public nature
> - another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity.
>
> (4) However, to remove doubt, an Executive Council minute is not itself a statutory instrument."

[66] By s 6 of the *Statutory Instruments Act 1992*, an instrument is defined as any document. As such, planning instruments, and the assessment benchmarks that they contain, satisfy s 7(2) of the *Statutory Instruments Act 1992*.

[67] In respect of s 7(3) of the *Statutory Instruments Act 1992*, in *Blizzard v O'Sullivan* [1993] QSC 123; [1994] 1 Qd R 112, Thomas J at 121 accepted as correct a submission made by the Solicitor-General that:

> "… the definition must be read in the context of examples and that these indicate a character which may be described as legislative, public or having an effect through unilateral exercise of power."

[68] At the time that observation was made, s 7(3) of the *Statutory Instruments Act 1992* had an inclusive definition that did not include the final bullet point, nor did it include the words "*of a public nature*" after a "*notification*", "*standard*" or "*guideline*". With respect to these later amendments, Lee J observed in *McLean v Gilliver & Ors* [1994] QSC 53; [1995] 1 Qd R 637 at 645-6:

> "Although the amendment replaces the older inclusive definition of "statutory instrument" with a new exclusive one, it is debatable whether the new provision has brought about any substantial change in the law. Indeed, in my opinion, it seems rather to simply clarify the position consequent on the decision of Thomas J. in *Blizzard v. O'Sullivan*. In that case Thomas J. at 121 said of the old s. 7:
>
> > "… the definition must be read in the context of [the] examples [which] indicate a character which may be described as legislative, public or having effect through unilateral exercise of power."
>
> The similarity between this passage and the language of the new s. 7(3) cannot be regarded as merely co-incidental. By adopting the remarks of Thomas J., the legislature has given its tacit approval to his Honour's interpretation of that section. This conclusion is also supported by the explanatory notes annexed to the amendment. See *Statute Law (Miscellaneous Provisions) (No. 2) Act* 1993 No. 76 s. 3 Sch. 1."

[69] In my view, planning instruments, and the assessment benchmarks that they contain, also satisfy s 7(3) of the *Statutory Instruments Act 1992*. They are a standard or guideline of a public nature. To the extent that a planning instrument is a categorising instrument under s 43 of the *Planning Act 2016* that prohibits development, a planning instrument is also an instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity.

[70] As such, although the combined operation of s 311(4) of the *Planning Act 2016* and s 76(3) and s 43 of the *Planning and Environment Court Act 2016* requires the court

to hear and determine the appeal under the new legislative regime, the assessment is to be against those planning instruments that applied at the time the development application was properly made, with weight given to new assessment benchmarks to the extent the court considers appropriate in the circumstances.

[71] For those reasons, I do not accept Council's submission that applying the literal meaning of s 46(2) of the *Planning and Environment Court Act 2016* might, in some circumstances, involve potential absurdities associated with a change to prohibit development or a change in the level of assessment. There would be no change to the level of assessment or the relevant criteria under a planning instrument. This is because the "*relevant instrument*" under s 326 of the *Sustainable Planning Act 2009* is carried forward as the "*assessment benchmark*" by operation of s 286 of the *Planning Act 2016*, s 45(6) of the *Planning Act 2016* and s 46(1) and (2) of the *Planning and Environment Court Act 2016*.

[72] Council also submits that:

(a) the potentially more narrow assessment for code assessable development that applies under the *Planning Act 2016* would lead to an absurd result,[49] or at the very least an unintended consequence of the operation of s 311(4) of the *Planning Act 2016*;[50] and

(b) the court's power to "*confirm*" the assessment manager's decision is language that does not sit well with a circumstance whereby a decision, which involved consideration of conflict and grounds under the regime in the *Sustainable Planning Act 2009*, could be "*confirmed*" under the "*quite different*" decision-making regime under the *Planning Act 2016*.[51]

[73] Chapter 3, Division 2 of the *Planning Act 2016* deals with decisions of an assessment manager. The court, standing in the shoes of the assessment manager, is bound to apply the statutory provisions for assessment and decision that apply to the assessment manager under the *Planning Act 2016*.

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49 The example given was with respect to a code assessable development application that was lodged under the *Sustainable Planning Act 2009* where there was conceded to be material conflict with the applicable codes but for which it was contended there were compelling grounds, such as need, justifying approval.

50 Supplementary Submissions on behalf of the Respondent – Court Doc 20 p 7 [30].

51 Submissions on behalf of the Respondent – Court Doc 16 p 9 [33(b)].

[74] For a code assessable development application, pursuant to s 45(3), (6) and (7) of the *Planning Act 2016*, the court must carry out the assessment of the development application only:

(a) against the planning instruments in place at the time the development application was properly made, but giving the weight the court considers is appropriate, in the circumstances, to any amendment to, or replacement of, a relevant planning instrument; and

(b) having regard to any matters prescribed by regulation, which include any development approval for, and any lawful use of, the premises or adjacent premises and the common material.[52]

[75] For an impact assessable development application, pursuant to s 45(5), (6) and (7) of the *Planning Act 2016*, the court:

(a) must carry out the assessment of the development application:

(i) against the planning instruments in place at the time the development application was properly made; and

(ii) having regard to any matters prescribed by regulation, which include any development approval for, and any lawful use of, the premises or adjacent premises and the common material;[53]

(b) may assess the development application against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise. Examples of another relevant matter include, but are not limited to:

(i) a planning need;

(ii) the current relevance of the assessment benchmarks in the light of changed circumstances; and

(iii) whether assessment benchmarks or other prescribed matters were based on material errors; and

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52 See s 27 of the *Planning Regulation 2017*.
53 See s 27 of the *Planning Regulation 2017*.

(c) may give the weight the court considers is appropriate, in the circumstances, to any amendment to, or replacement of, a relevant planning instrument.

[76] A comparison between the assessment regimes for code and impact assessment reveals that the identified matters relevant to code assessment do not include "*any other relevant matter*". Regard can, however, be had to the common material. This can include a very broad range of matters.[54]

[77] For both code and impact assessable development, pursuant to s 59(3) of the *Planning Act 2016*, the decision must be based on the assessment.

[78] For a code assessable application, pursuant to s 60(2) of the *Planning Act 2016*, the court:

(a) must approve the application to the extent the development complies with all of the assessment benchmarks for the development;

(b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks. Examples given in relation to this power include where an approval resolves a conflict between assessment benchmarks or between assessment benchmarks and a referral agency's response;

(c) may impose development conditions on an approval; and

(d) may, to the extent the development does not comply with some or all of the assessment benchmarks, decide to refuse the application only if compliance can not be achieved by imposing development conditions.

[79] For an impact assessable application, pursuant to s 60(3) of the *Planning Act 2016*, the court has the power to:

(a) approve all or part of the application; or

(b) approve all or part of the application, but impose development conditions; or

(c) refuse the application.

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54 See definition in Schedule 1 of the *Planning Regulation 2017*.

[80] As was identified by Council, the *Planning Bill 2015 Explanatory Notes*:[55]

(a) provide that s 60(2)(b) of the *Planning Act 2016*:

> "clarifies that nothing stops a development application requiring code assessment being approved, even if the development does not comply with some or all of the assessment benchmarks"

(b) add that the assessment and decision rules for both code assessment and impact assessment under the *Planning Act* dispense with the "*two part test*" under the *Sustainable Planning Act 2009* involving conflict and grounds; but

(c) state that:

> "Code assessment under the Bill is a bounded assessment, requiring assessment "inside the box" – in other words only against, and having regard to, the prescribed matters. Subject to the obligation to approve complying development and test whether conditions could be imposed to achieve compliance however, the assessment and decision rules for code assessment allow for weighing and balancing of any conflicting or competing prescribed matters for assessment in reaching a decision."

[81] Under this regime, the court is no longer required, as it was pursuant to s 326 of the *Sustainable Planning Act 2009*, to refuse the development application on the basis that there are insufficient grounds to justify approval of a development despite its conflict with a relevant planning instrument.

[82] However, the *Planning Bill 2015 Explanatory Notes* explain that:[56]

> "… as they are included in categorising instruments which have been the subject of significant public consultation, benchmarks are intended to carry substantial weight in development assessment. Consequently, assessment benchmarks are intended to have a **determinative** role in development assessment.
>
> By contrast, matters to which regard must be had are intended to have a **contextual** role for assessment against the benchmarks, but are not in themselves intended to be determinative."
>
> (emphasis added)

[83] Council submits that to construe the legislation in a manner that requires the court, on appeal, to make the decision on a different basis to that on which the assessment manager made the decision is an absurd result.

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55 *Planning Bill 2015 Explanatory Notes* p 74.
56 *Planning Bill 2015 Explanatory Notes* p 51.

[84] Although it is an outcome that differs to that which pertained on the transition from the *Local Government (Planning and Environment) Act 1990* to the *Integrated Planning Act 1997*, and on the transition from the *Integrated Planning Act 1997* to the *Sustainable Planning Act 2009*, I do not accept that the result is absurd. It is the consequence of the appeal being by way of hearing anew.

[85] Further, to the extent that the *Planning Act 2016* requires the court to make a decision on a different basis than that which applied during the assessment of the development application, this situation only applies to appeals instituted after the commencement of the *Planning Act 2016*. As such, it was a matter that a dissatisfied applicant for development approval could take into account before commencing any appeal. The development industry also had considerable notice of the changed regime. The *Planning Act 2016* and the *Planning and Environment Court Act 2016* were promulgated on 25 May 2016, but did not commence substantive operation until 3 July 2017.

[86] I also do not consider there to be any tension occasioned by the power to "*confirm*" the decision of Council. The decision is one to approve or refuse the development. It is the basis on which the decision is to be made (i.e. the assessment process and decision rule) that has changed, not the nature of the decision.

[87] Consideration of this broader legislative context demonstrates that the legislative intent apparent in s 311 of the *Planning Act 2016* can operate in a harmonious manner with the other legislative provisions.

[88] Accordingly, for the reasons stated above, an appeal with respect to a development application commenced after 3 July 2017 is to be heard and determined under the new legislative regime.

[89] For completeness, I note that I have read the decision of this court in *Guerin & Anor v Scenic Rim Regional Council & Ors* [2018] QPEC 16. The court reached a different conclusion in that case. However, it is apparent from the written submissions filed that:

(a) both the appellant and respondent in that case submitted that the appeal was to be heard and determined under the regime provided in the *Sustainable Planning Act 2009*; and

(b) the parties did not draw the court's attention to contextual matters that I consider relevant as outlined above, including:

(i) the distinction apparent from the combined effect of s 311(1)(a) and s 311(2) as compared to the combined effect of s 311(1)(b) or (c) and s 311(4) of the *Planning Act 2016*;

(ii) s 312 of the *Planning Act 2016* and the relevant Explanatory Notes for that provision;

(iii) the contextual matters that indicate the court is intended to exercise original jurisdiction and determine an appeal about a development application on fresh evidence and the law applicable at the date of the proceedings. The court was not taken to the relevant case law with respect to that issue, nor to the legislative history of such provisions in planning legislation in Queensland;

(iv) s 43 and s 286 of the *Planning Act 2016* and s 6 and s 7 of the *Statutory Instruments Act 1992* and the combined effect of reading those provisions with s 45(6) of the *Planning Act 2016* and s 46(2) of the *Planning and Environment Court Act 2016*; or

(v) s 59 and s 60 of the *Planning Act 2016*.

The decision framework for the subject appeal

[90] The subject appeal is a Planning Act appeal, commenced after 3 July 2017 under s 229 and s 311(4) of the *Planning Act 2016*. It is also an appeal under s 76(1)(c) of the *Planning and Environment Court Act 2016*.

[91] As such, the appeal is to be heard and determined under the *Planning Act 2016* and the *Planning and Environment Court Act 2016*.

[92] Pursuant to s 45 of the *Planning and Environment Court Act 2016*, Jakel Pty Ltd has the onus of establishing that the appeal should be upheld.

[93] The appeal is generally by way of hearing anew: the court is to determine the appeal standing in the shoes of the assessment manager and on the law as it presently stands.

[94] The development application required impact assessment, so the decision is to be based on the assessment under s 45(5), (6) and (7) of the *Planning Act 2016*,[57] subject to s 46(2) of the *Planning and Environment Court Act 2016*. As such, the court:

(a) must assess the development application against City Plan, being the planning instrument in place at the time the development application was properly made;

(b) may assess the development application against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise; and

(c) may give the weight the court considers is appropriate, in the circumstances, to any amendment to City Plan. Relevantly, Jakel Pty Ltd seeks to rely on an amendment to the Low-medium density residential zone code made on 1 December 2017.

The issues

[95] Council contends that the scale and density of the proposed development is not appropriate. It says it is not intended in this location as the land is not located within easy walking distance of a public transport node, or within close proximity of major transport nodes. It also contends that the proposed development offers inadequate landscaping; is inappropriate because of inadequate separation between the multiple dwelling and the dwelling house; and will represent an imposing development in the street. It submits that these matters give rise to material conflict with the provisions of City Plan that warrant refusal.

[96] Ms Rolfe adopts a similar position, but also says that the proposed development does not comply with refuse collection requirements and that the proposed kerbside collection will detract from the aesthetics and amenity of Attewell Street.[58]

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57 Section 59(3) of the *Planning Act 2016*.
58 Appeal Book – Exhibit 6 p 15.

[97] The issues in dispute with respect to the proposed development can be broadly categorised as relating to:

(a) proximity to public transport;

(b) built form, character and amenity considerations, including with respect to adequacy of landscaping and acceptability of access and servicing arrangements; and

(c) the extent to which other relevant matters warrant approval.

City Plan 2014

[98] Under City Plan, the subject site is, relevantly, located in the Low-medium density residential zone (2 or 3 storey mix precinct) and included in the Nundah district neighbourhood plan area. The subject site is also subject to various overlays, none of which are in issue in the appeal.

[99] For impact assessable development, City Plan requires development to be assessed against all identified codes in the assessment criteria column (where relevant) and the planning scheme, to the extent relevant.[59] These are the assessment benchmarks against which the assessment must be carried out.

[100] The codes that are relevant to an assessment of the proposed development in the context of this appeal are the Low-medium density residential zone code, the Nundah district neighbourhood plan code, the Traditional building character (design) overlay code, the Multiple dwelling code, the Subdivision code and the Transport, access, parking and servicing code. The Strategic framework is also relevant.[60]

[101] Council alleges that a decision to approve the proposed development would conflict with:

(a) Theme 3, s 3.5.3 specific outcome SO2 and land use strategy L2.1 of the Strategic Framework;

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59 See s 5.3.3(d) of City Plan – Planning Scheme Extracts - Exhibit 3 p 71.
60 Conflicts relied upon by Council – Exhibit 13.

(b) Theme 5, s 3.7.6 specific outcome SO4 and land use strategies L4.1 to 4.3 of the Strategic Framework;

(c) overall outcomes 3(a) and (f) of the Nundah district neighbourhood plan code;

(d) the purpose as outlined in (2)(e), and overall outcomes (5)(a), (b), (d) and (e), and (7)(a), (c) and (d) of the Low-medium density residential zone code;

(e) overall outcome (2)(a), and performance outcome PO7 and acceptable outcome AO7.1 of the Traditional building character (design) overlay code;

(f) with respect to the Multiple dwelling code:

(i) overall outcomes (2)(e), (i), (k), (l), (n), (o) and (q); and

(ii) performance outcome PO5 and acceptable outcome AO5;

(iii) performance outcome PO6 and acceptable outcomes AO6.1 and AO6.2;

(iv) performance outcome PO8 and acceptable outcome AO8.1;

(v) performance outcome PO10 and acceptable outcome AO10;

(vi) performance outcome PO14 and acceptable outcome AO14;

(vii) performance outcome PO25 and acceptable outcomes AO25.2 and AO25.3;

(viii) performance outcome PO30 and acceptable outcomes AO30.1 to AO30.4; and

(g) overall outcome 2(a) and (b), and performance outcome PO1 and acceptable outcome AO1.1 of the Subdivision code.

[102] In addition to these provisions, Ms Rolfe alleges conflict with performance outcome PO19 of the Transport, access, parking and servicing code.

Proximity to public transport

[103] An issue that attracted particular focus in the appeal was building height and the proximity of the proposed development to public transport.

Relevant requirement of the Low-medium density residential zone code

[104] Council alleges conflict with overall outcome (7)(a) of the Low-medium density residential zone code, which states:[61]

> "(a) Development comprises a mix of low-medium rise, low-medium density residential buildings:
>
> (i) of no more than 2 storeys, or of no more than 3 storeys in height where located within easy walking distance of a public transport node;
>
> (ii) located on suitable sites, in accessible locations, near to public transport and larger centres or key destinations."

[105] Council amended this provision on 1 December 2017. It now provides:[62]

> "(b) Development comprises a mix of low-medium rise, low-medium density residential buildings:
>
> (i) of **predominantly** 2 storeys, or of **up to** 3 storeys in height where located within easy walking distance of a public transport node;
>
> (ii) located on suitable sites, in accessible locations, near to public transport and larger centres or key destinations."
>
> (emphasis added)

[106] Council does not contend that weight ought not be given to the amended provision. However, there is a dispute between Council and Jakel Pty Ltd about the proper construction of the provision.

Is there a prescriptive two-storey limit where development is not within easy walking distance?

[107] Jakel Pty Ltd submits that the amendment to the overall outcome removes the prescriptive limitation on built form to two storeys where development is outside of "*easy walking distance*", subject to:[63]

(a) the area retaining a predominance of two-storey built form; and

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61 Planning Scheme Extracts - Exhibit 3 p 110.
62 Low-medium density residential zone code effective 1 December 2017 – Exhibit 4.
63 Outline of Argument for the Appellants – Court Doc 18 p 22 [52].

(b) the building height complying with other requirements of City Plan, in particular requirements with respect to height.

[108] Council accepts that the term "*predominantly*" admits of flexibility, but says the flexibility:

(a) relates to the precinct as a whole; and

(b) is immediately qualified by the more specific part of the provision, which maintains the clear indication that there may only be up to three storeys where located within easy walking distance of a public transport node.

[109] The construction contended for by Council admits of no appreciable difference in effect between the provision as it applied at the time the development application was made and the amended provision.

[110] Further, Council's construction fails to give any substantive operation to the word "*predominantly*". It seeks, instead, to ascribe a meaning that would see development limited to two storey, other than where it falls within the exception. Absent the inclusion of the word "*predominantly*", this result would obtain.

[111] With respect to the meaning of the phrase, given the inclusion of the word "*predominantly*", Jakel Pty Ltd relies on *Gracemere Surveying and Planning Consultants Pty Ltd v Peak Downs Shire Council* [2009] QCA 237; (2009) 175 LGERA 126, *CPT Manager Ltd v Central Highlands Regional Council* [2010] QCA 183; (2010) 174 LGERA 412, *Gaven Developments Pty Ltd v Scenic Rim Regional Council* [2010] QPEC 51; [2010] QPELR 750 and *Lake Maroona Pty Ltd v Gladstone Regional Council* [2017] QPEC 25; (2017) LGERA 166; [2017] QPELR 628.

[112] There are differences between the provisions considered in each of those cases and the provision in question here. However, the views expressed by Bowskill DCJ in *Lake Maroona Pty Ltd v Gladstone Regional Council* [2017] QPEC 25; (2017) LGERA 166; [2017] QPELR 628 at 645-7 [64]-[65] and [70]-[71] are apposite here, namely:

> "[64] Notwithstanding these differences, in my view, there are two points to be taken from these cases, which are apposite to the construction issue here:

(a) first, the point made in *Gracemere* at [23] that:

> "When the section says the predominant use of the Highway precinct is to be large retail showrooms and the like, and a minimised use of the precinct for motels and hotels, **it is expressing a preference for development in very general terms**. The section gives great **flexibility** to the Council when approving developments. It **eschews rigidity of category of use and the prohibition of particular uses**."

This was reiterated in *CPT Manager* at [39], where Chesterman JA observed that "[t]he expression of preference and discouragement are, as in *Gracemere*, very generally expressed giving rise to a Planning Scheme of great flexibility.

Similarly, here, in s 6.2.1.2(1) and (2) — there are no prohibitions; but a clear expression of a preference for particular types of residential housing, supported by some community uses and small-scale services and facilities that cater for local residents. There are no similar expressions of discouragement, such as there were in *Gracemere* or *CPT Manager*. But that does not mean the expressed preference ought to be interpreted in an exclusive manner.

(b) second, the point made in *CPT Manager*, as to the meaning of the word "predominant" in this context. As Chesterman JA observed, at [36], "[b]y referring to predominant use the outcome expresses a preference, but does not exclude other uses".

[65] That second point is consistent with the ordinary meaning of the word "predominantly", as "in a predominant manner; to a predominant degree … largely, chiefly, for the most part"; and of "predominant", relevantly, as "constituting the main, most abundant, or strongest element; prevailing, preponderating". As Robin QC DCJ succinctly observed in *Gaven Developments Pty Ltd v Scenic Rim Regional Council* [2010] QPELR 750; [2010] QPEC 51 at [16], "predominantly does not mean exclusively".

…

[70] In my view, the proper construction of the statements of purpose in s 6.2.1.2(1) and (2)(a) is that they express a clear preference for detached dwelling houses, and some dual occupancy, to predominate within the low density residential zone — that is, that such housing types are to constitute "the main, most abundant, or strongest element" within the relevant area, but that other types of (in particular) residential development are not excluded or prohibited, or necessarily in conflict with, or inconsistent with the purpose of the code. Relevantly, other housing types which are "low rise", "consistent with the low density character of the region's existing suburban areas" (s 6.2.1.2(1)), in buildings which "are of a scale, height and size that reflect a low density suburban character and create an attractive streetscape" (s 6.2.1.2(2)(b)) are also contemplated, as part of an overall outcome that sees a "range of housing … on appropriate lot sizes" (s 6.2.1.2(2)(a)) provided.

> [71] The Council's proposed construction, in my view, fails to give any meaning to the word "predominantly" where it is used in the relevant provisions."
>
> (foonotes omitted)

[113] In my view, the proper construction of this overall outcome, as it now appears in City Plan, is one that does not contain a prohibition. However, the overall outcome expresses a clear preference for two-storey development to predominate unless the development is within easy walking distance to a transport node. To adopt the language of Bowskill DCJ in *Lake Maroona Pty Ltd v Gladstone Regional Council*[64], two-storey development is to constitute "*the main, most abundant, or strongest element*" within the relevant area, but three-storey development is not excluded or prohibited, or necessarily in conflict with, or inconsistent with the purpose of, the Low-medium density residential zone code.

[114] The acceptability of a particular development will depend on consideration of other provisions of City Plan, including the other overall outcomes for the 2 or 3 storey mix zone precinct in the Low-medium density residential zone code. In the current version of City Plan, the other overall outcomes contemplate development:[65]

(a) comprising a mix of dwelling types, including two to three storey low rise multiple dwellings, to provide "*a sensitive transition both to adjoining sites that contain dwelling houses and between busier roads or centres and lower density residential areas*" (s 6.2.1.2(7)(a));

(b) that has a scale and bulk that "*co-exists comfortably with an adjoining dwelling house*" (s 6.2.1.2(7)(c));

(c) having a design, height and setbacks that "*provide a sensitive transition at the edge of the site to an adjoining dwelling house or land in a lower density zone or zone precinct*" (s 6.2.1.2(7)(d));

(d) with setbacks and landscaping which "*contribute to a cohesive and compatible human-scale streetscape*" (s 6.2.1.2(7)(e)); and

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64 [2017] QPEC 25; (2017) LGERA 166; [2017] QPELR 628, 647 [70].

65 Low-medium density residential zone code effective 1 December 2017 – Exhibit 4.

(e) that "*responds to local characteristics, ... reinforces a green landscape character and responds to the surrounding character and architecture*" (s 6.2.1.2(7)(f)).

[115] Greater encouragement is, however, provided for three-storey development if it is located within "*easy walking distance of a public transport node*".

Is the proposed development within easy walking distance of a public transport node?

[116] There is no definition of "*public transport nodes*" in City Plan. However, there is consensus between the parties that the relevant public transport nodes in this case are the Toombul and Nundah railway stations, and the Toombul bus interchange.[66] There is, sensibly, no suggestion by Jakel Pty Ltd that bus stops in the locality would qualify as a "*public transport node*".[67]

[117] City Plan defines "*walking distance*" as:[68]

> "The distance between two places, measured from reasonable pedestrian access points and along roads with verges, off-road pathways or other reasonable pedestrian connections."

[118] Mr Ovenden, the town planner retained by Jakel Pty Ltd, and Ms Morrissy agreed that the walking distance between the subject site and the identified public transport nodes are:

(a) 800 metres for the Toombul bus station;

(b) 870 metres for the Toombul train station; and

(c) 890 metres for the Nundah train station.[69]

[119] The phrase "*easy walking distance*" is not defined in City Plan.

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66 Town Planning Joint Expert Report - Exhibit 7 p 18 [7.6]. See also Outline of Argument for the Appellants – Court Doc 18 p 13 [37]; Submissions on behalf of the Respondent – Court Doc 16 p 10 [38]; Submissions on behalf of the Co-respondent by Election – Court Doc 19 p 5 [20].

67 In this respect, the parties relied on *Platinum Design Architects Pty Ltd v Brisbane City Council* [2016] QPEC 58; [2016] QPELR 1003, 1009 [19]. Council submitted that its submissions in that case were misstated and that bus stops ought not be construed as a "*public transport node*".

68 Planning Scheme Extracts - Exhibit 3 p 298.

69 Town Planning Joint Expert Report – Exhibit 7 p 3 [2.12]-[2.13]; T2-39/L7-23 (Ovenden)

[120] Mr Ovenden gave evidence that the subject site was within easy walking distance of the identified public transport nodes. He opined that the walking distance to the Toombul bus station was a "*comfortable 10 minute*" walk.[70] Mr Ovenden's opinion was formed on the following basis:[71]

> "7.7 Determining easy walking distance requires both quantitative and qualitative considerations.
>
> 7.8 The concept of 'walkable catchments' is a fundamental planning principle at the heart of contemporary planning for the distribution of centres and residential density allocation. It is linked strongly to the investment in public transport infrastructure and is a key sustainability measure in terms of promoting the use of public transport while reducing car dependency and traffic congestion.
>
> 7.9 It is generally accepted that the walkable catchment is an area that is within 800 metres – it represents a comfortable 10 minute walk time and for the average person. In my opinion, that is reasonably regarded as an 'easy walking distance'. This is the catchment around which planning for transit orientated development generally occurs. Generally speaking, the closer to the public transport node a development site is located, the planning framework promotes a greater density and scale of development.
>
> …
>
> 7.11 From my experience in both strategic planning and development assessment, best practice planning seeks to achieve an outcome in which existing and future residents are located:
>
> (i) 400 metres from lower order centres, public open space and bus stops; and
>
> (ii) 800 metres from major centres, bus stations and train stations.
>
> 7.12 This outcome is consistent with both the SEQ Regional Plan and the position adopted by the Queensland Government in its current State Planning Policy 2016 (SPP) framework. To support the implementation of the SPP, State Interest Guidelines have been introduced and of relevance to this appeal, is the guideline prepared to support the State interest in State Transport Infrastructure (the State Transport Infrastructure Guideline 2016). The State Transport Infrastructure Guideline relevantly states:
>
> "The walkable catchment is 400 metres from bus stops and 800 metres from rail and busway stations"
>
> 7.13 In the absence of defined terms around walkable catchments in City Plan it appropriate to revert to established planning principle and

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70 Town Planning Joint Expert Report – Exhibit 7 p 13 [6.6].

71 Town Planning Joint Expert Report – Exhibit 7 pp 18-9 [7.7]-[7.14]. Mr Ovenden, at [7.10] also made reference to PO21 of the Subdivision Code, which requires subdivisions deliver highly connected and legible neighbourhoods which include or are within an 800 metre walking distance of a local shop and services. However, in a low density residential area, AO50 of the Multiple dwelling code indicates that development within 400 metres walking distance of a public transport stop within 20-minute frequency peak-hour services (as compared to 800 metres of an existing neighbourhood, district, major or principal centre) would be deemed to satisfy PO50, which calls for development to be conveniently located near shops, public transport services and other community facilities – see Planning Scheme Extracts – Exhibit 3 pp 155-6..

> contemporary thinking on this matter. It is acknowledged that a specific provision in City Plan provides an advantage in terms of height where sites are located within a distance of 400 metres to a bus or train station but that is an acceptable outcome and should not be read as the only adopted measure for what represents a walkable catchment.
>
> 7.14 The site is Located in area which I would regard as "public transport rich". Like Ms Morrissy, I walked the shortest possible routes from the site to both the Toombul and Nundah train stations as well as the bus station. This was undertaken between 2pm and 3.30pm on Thursday 30th November. With respect to the closest of these nodes, the bus station, I comfortably made the walk in just under 10 minutes and with respect to the railway stations, as with Ms Morrissy's experience, the walk was slightly over 10 minutes.
>
> Attewell Street and the pedestrian pathways to these nodes are generally flat, and would be a relatively easy walk regardless of distance for a person of average fitness or ability."
>
> (footnotes omitted)

[121] Ms Morrissy considered that although the subject land was "*near*" public transport nodes, it was not "*within easy walking distance*" having regard to time and distance measurements.[72] Her opinion in that regard was informed by:[73]

(a) acceptable outcome AO5 and AO6.1(b) of the Multiple dwelling code[74] and the provisions that categorise when a multiple dwelling in the 2 or 3 storey mix zone precinct of the Low-medium density residential zone will be code assessable. Those provision nominate a maximum building height of three storeys and 11.5 metres (in Table 9.3.14.3.B) where sites are in the Low-medium density residential zone and have a dedicated pedestrian access point of the site that is within 400 metres walking distance of a dedicated public pedestrian access point of a railway or busway station;

(b) the fact that the distance here is double the distance from public transport nodes in the broader local area than that specified in those provisions referred to in paragraph [121](a) above;

(c) her view that 400 metres is widely adopted for planning walkable catchments on the basis that the distance generally equated to a five minute walk; and

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72 Town Planning Joint Expert Report – Exhibit 7 p 14 [6.9(vi)].
73 Town Planning Joint Expert Report – Exhibit 7 p 13 [6.9(ii)-(v)] and pp 18-25 [7.19].
74 Planning Scheme Extracts - Exhibit 3 pp 86-7, 127 and 157-8.

(d) while 800 metres, generally a ten minute walk, is also acknowledged as a walkable distance by other planning instruments (such as the Regional Plan) and non-statutory guidelines and academic papers on walkability, it is a greater distance than that adopted by Council for its neighbourhood planning.

[122] Ms Morrissy also had regard to the fact that the subject site was located within the Nundah district neighbourhood plan area and not the Toombul-Nundah neighbourhood plan area.[75] This was not determinative for Ms Morrissy, but provided relevant context. Ms Morrissy considered that it demonstrated the subject site was outside of a planned growth node, being an area intended to facilitate higher density around public transport.[76]

[123] In my view, the concept of what is "*walkable*" connotes a distance that can reasonably be reached by walking. A distance that is not "*walkable*" would be one that is beyond reasonable walking reach. This is a different concept to "*easy walking distance*". An "*easy walking distance*" is a distance that could be walked without great effort: it is a walk that presents few difficulties. Counsel for Jakel Pty Ltd accepted the submission on behalf of Council that a catchment that is within "*easy walking distance*" is a smaller subset of a "*walkable*" catchment.[77]

[124] In determining the distance that might be regarded as an "*easy walking distance*", it is relevant to have regard to other provisions of City Plan, given City Plan should be construed as a whole.

[125] Another provision where the phrase "*easy walking distance*" appears is overall outcome (3)(d) of the Toombul-Nundah neighbourhood plan code. It states:[78]

> "(d) Residential neighbourhoods are provided with convenience shops and services within an easy walking distance."

[126] Jakel Pty Ltd notes, by reference to Exhibit 22, that there are a significant number of residential lots greater than 400 metres from convenience shops and services (such as those in Jenner, Vernon and York Streets). It submits, therefore, that the drafters of City Plan had in mind that "*easy walking distance*" could encompass a distance much greater than 400 metres. I do not accept this submission. The statement in

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75 T3-3/L46 – T3-4/L11 (Morrissy).
76 T3-5/L30-43 (Morrissy). See also Town Planning Joint Expert Report – Exhibit 7 p 22 [7.19(vi)].
77 T4-49/L8-20.
78 Planning Scheme Extracts - Exhibit 3A.

the overall outcome is a statement of a planning objective, not a statement of fact. The extent to which an area contains convenience shops and services can change over time.

[127] There are a number of provisions in City Plan that indicate encouragement for three storey development where such development is in the 2 to 3 storey mix zone precinct of the Low-medium density residential zone and within 400 metres walking distance of a dedicated public pedestrian access point of a railway or busway station. They include:

(a) Table 5.5.2, being the Table of Assessment for material change of use for the Low-medium density residential zone. Pursuant to that table, a development application for material change of use for a three-storey multiple dwelling is code assessable if the site has frontage to a road with a reserve width of 15.5 metres or more and any part of the site is within 400 metres walking distance of a dedicated public pedestrian access point of a railway or busway station.[79] Where the site is further from a railway or busway station, impact assessment is required;

(b) Table 9.3.14.3.B in the Multiple dwelling code, which is called up by AO5(a) and AO6.1(b) and permits a maximum building height of three storeys and 11.5 metres if the site has frontage to a road with a reserve width of 15.5 metres or more and any part of the site is within 400 metres walking distance of a dedicated public pedestrian access point of a railway or busway station. The related performance outcomes seek:

(i) development of a bulk and scale consistent with the intended form and character of the local area having regard to, *inter alia*, proposed building heights in the local area (PO5);

(ii) development that has a building height that is consistent with the streetscape local context and intent for the area having regard to, *inter alia*, proximity to high-frequency public transport services (PO6);[80] and

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79 Planning Scheme Extracts - Exhibit 3 pp 86-7.
80 Planning Scheme Extracts - Exhibit 3 pp 127 and 157-8.

(c) Table 13 in section 6 of the Transport, access, parking and servicing planning scheme policy, which permits fewer car parking spaces for multiple dwellings that are located within 400 metres walking distance of a dedicated public pedestrian access point of a major public transport interchange.

[128] These provisions are not conclusive in determining an "*easy walking distance*". However, it is relevant that the distances from the subject site to the relevant public transport nodes are double the distances identified in the above provisions.

[129] It is also relevant to have regard to qualitative considerations. As Mr Ovenden accepted during cross-examination,[81] such considerations may include:

(a) climate and whether shade or cover is provided between the proposed development and the public transport node;

(b) the nature of any road crossings, including by reference to how busy the road is and whether there are any pedestrian aids such as lights or pedestrian crossings;

(c) the gradient; and

(d) the extent of lighting available to illuminate the walk in the evening.

[130] With respect to qualitative considerations, Ms Morrissy gave evidence about her experience in walking to the closest train station (Toombul train station) and the bus station at Toombul shopping centre. She undertook the walk on 23 November 2017 at 9.15am, after the morning peak period. Ms Morrissy observed that:[82]

(a) she walked what she considered to be the most direct route from the subject site to the train station;

(b) the topography is relatively level for most of the journey (although Mr Ovenden acknowledged that the walk is up a gradual incline for effectively the entire distance[83]);

(c) footpaths are available on either both or one side of the road for the journey;

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81 T2-59/L1 – T2-61/L26 (Ovenden).
82 Town Planning Joint Expert Report – Exhibit 7 pp 24-5 [7.19(xi)].
83 T2-61/L1-3 (Ovenden).

(d) the footpaths are shaded in part;

(e) the journey involved crossing the street four times. There is an un-signalised 4-way intersection at Melton Road and Hows Road, where pedestrian movement is not given priority. This can add to travel time as a pedestrian has to wait for a safe time to cross the road. The same applies at the intersection of Kreutzer Street and Hows Road;

(f) except for the intersection at Sandgate Road, there are no pedestrian crossings to give pedestrians priority at any points on the journey;

(g) the intersection at Sandgate Road is a major intersection and can add to the journey time;

(h) it took:

(i) approximately ten minutes to walk to the bus station at the Toombul shopping centre;

(ii) approximately 13 minutes to walk to the entrance of the train station (foot of the stairs); and

(iii) approximately 14 minutes to walk to Platforms 1 and 2 at the train station (being the platforms closest to Sandgate Road).

[131] Ms Rolfe, as a resident of the area, also gave evidence about the quality of the walk. She noted that while she regularly walks to and from the Toombul train station or Nundah train station, she regarded the walk as part of her regular exercise routine and, as such, would change into comfortable walking shoes and carry a water bottle.[84] She identified Melton Road, which is a district road,[85] as presenting particular challenges.

[132] Having regard to all of those matters, I am not satisfied that the subject site is within "*easy walking distance*" of a public transport node.

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84 Statement of Ms Rolfe - Exhibit 15.
85 Exhibit 24.

Conclusion regarding conflict with provision regarding "*easy walking distance*"

[133] As the proposed development is for more than three storeys and is not within easy walking distance of a public transport node, it would conflict with overall outcome (7)(a) of the Low-medium density residential zone code as it applied at the time the development application was made.

[134] With respect to the current version of City Plan, as I have noted in paragraph [113] above, two-storey development is to constitute "*the main, most abundant, or strongest element*" within the relevant area, but three-storey development is not excluded or prohibited, or necessarily in conflict with, or inconsistent with the purpose of, the Low-medium density residential zone code.

[135] Both Mr King[86] and Ms Morrissy[87] accepted that if the proposed development was approved, the relevant streetscape would still present as one of a predominant two-storey character.

[136] As such, I am satisfied that, while there is no express encouragement for three-storey development, there is no clear conflict with the current version of the overall outcome: the area will retain a predominance of two-storey built form.

Is the proposed development medium density housing in close proximity to major transport nodes?

[137] Council also relies on overall outcome (3)(a) of the Nundah district neighbourhood plan code to contend for refusal of the proposed development. That outcome states:[88]

> "(a) **The district has a mix of low density and low–medium density housing as its dominant land use. Medium density housing is concentrated in close proximity to major transport nodes** such as the Toombul, Nundah, Northgate and Virginia railway stations and the Toombul—Nundah Major centre. The design of infill residential development is sympathetic to the established streetscapes, character and amenity of the district;"
>
> (emphasis added)

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86 T2-31/L37 – T2-32/L3 (King).
87 T3-13/L9-16 (Morrissy).
88 Planning Scheme Extracts - Exhibit 3 pp 100-1.

[138] There was a dispute between the parties about whether the proposed development ought properly be characterised as "*medium density housing*" and whether it is in "*close proximity*" to a major transport node.

[139] Jakel Pty Ltd submits that the proposed development would be in "*close proximity*" to public transport nodes as the subject site is within the walkable catchment and within "*easy walking distance*".[89]

[140] As to whether the proposed development is in "*close proximity*" to major transport nodes, Council submits that it is informative to refer to the Multiple dwelling code. Overall outcome (2)(b) of that code refers to development that is transit supportive and where the multiple dwelling is situated in the "*immediate vicinity*" of a railway or bus station.[90] Overall outcome (2)(f) requires development to include an adaptable ground storey where in strategic locations such as "*in close proximity*" to high-frequency public transport.[91] Performance outcome PO4 of the same code refers to development adjoining, or in "*the immediate vicinity*" of, a railway or bus station being required to actively support a high level of personal and community safety.[92] Corresponding acceptable outcome AO4 refers to development within a 200 metre walking distance of a dedicated public pedestrian access point of a railway or bus station being treated as having an active frontage designed to include an adaptable ground storey.[93] Council submits that the combination of those provisions is illustrative of City Plan treating a 200 metre walking distance as a guide to what is in close proximity to high-frequency public transport.[94]

[141] I accept that acceptable outcome AO4 of the Multiple dwelling code, when considered with performance outcome PO4 and overall outcomes (2)(b) and (f) of the Multiple dwelling code, indicates that development that is within 200 metres walking distance of high-frequency public transport would be in close proximity. However, I do not regard it as definitive of the concept of "*close proximity*".

[142] "*Proximity*" is defined in the *Macquarie Dictionary* as "*nearness in place, time or relation*" and "*close*" is defined as "*near, or near together, in space, time or*

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89 Outline of Argument for the Appellants – Court Doc 18 p 18 [43].
90 Planning Scheme Extracts – Exhibit 3 p 123.
91 Planning Scheme Extracts – Exhibit 3 p 123.
92 Planning Scheme Extracts – Exhibit 3 p 126.
93 Planning Scheme Extracts – Exhibit 3 p 126.
94 Submissions on behalf of the Respondent – Court Doc 16 pp 17 [66]-[67].

relation". Having regard to those definitions, the phrase "*close proximity*" might be regarded as a tautology. However, as *Merriam-Webster's Dictionary of English Usage* says, "*Of course there are degrees of proximity, and close proximity simply emphasizes the closeness*."[95]

[143] I do not consider the proposed development to be in "*close proximity*" to a major transport node, for the same reasons that I do not consider it to be within "*easy walking distance*".

[144] Jakel Pty Ltd submits that this is not determinative, as the proposed development could not be described as "*medium density*".[96]

[145] City Plan does not define "*low–medium density housing*" or "*Medium density housing*". In terms of the planning outcome intended to be achieved by overall outcome 3(a) of the Nundah district neighbourhood plan code, it is informative to note:

(a) there is no land in the Nundah district neighbourhood plan area zoned "*medium density residential*";[97]

(b) there is no land in the Nundah district neighbourhood plan area zoned "*Low-medium density residential (up to 3 storeys)*";[98]

(c) the 2 to 3 storey mix precinct in the Low-medium density residential zone code anticipates a mix of "*low-medium rise and low-medium density*" residential buildings.[99] It envisages a sliding scale of density across the precinct, whereby medium density is the greatest that can be achieved. That density is encouraged within close proximity of a transport node; and

(d) the 3 storey precinct in the Low-medium density residential zone code envisages "*low-medium rise, medium density*" residential buildings,[100] with buildings "*of predominantly (but no more than) 3 storeys in height*".

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95 E Ward Gilman (ed), *Merriam-Webster's Dictionary of English Usage* (Merriam-Webster Incorporated, 1994), 254.
96 Outline of Argument for the Appellants – Court Doc 18 pp 18-9 [43].
97 Exhibit 29.
98 Exhibit 29.
99 Planning Scheme Extracts – Exhibit 3 p 98.
100 Planning Scheme Extracts – Exhibit 3 pp 98-9.

[146] Ms Morrissy considers the proposed development represents medium density development.[101] In forming her view, Ms Morrissy had regard, *inter alia*, to the planning assumptions in the Priority Infrastructure Plan, which assume:

(a) a density of 44.3 dwellings per hectare for multiple dwellings in the 2 storey mix zone precinct and the 2-3 storey mix zone precinct of the Low-medium density residential zone, which equates to one unit per 225.7 square metres of site area; and

(b) a density of 84.6 dwellings per hectare for multiple dwellings in the 3 storey mix zone precinct of the Low-medium density residential zone, which equates to one unit per 118.2 square metres of site area.

[147] The proposed development would result in one dwelling per 128.5 square metres, i.e. 7 dwelling units on an overall site of 900 square metres.

[148] Ms Morrissy accepted that the Priority Infrastructure Plan is not intended to be read and applied on an individual site basis, but considered it provided a general indicator in terms of densities planned across the City.

[149] Further, as was acknowledged by Ms Morrisy, the Priority Infrastructure Plan is concerned with the density of population, rather than density of built form. As such, a change to the size of the units within the same built form envelope could result in a different population density.[102] For this reason, I have placed no weight on the provision of the Priority Infrastructure Plan in determining whether the proposed development is properly regarded as medium density.

[150] Mr Ovenden is of the view that the proposed development would be low-medium density, given the retention of the pre-war house at the front of the subject site.[103] However, as Mr Ovenden accepted, regardless of whether the subject site was within close proximity to a transport node, the three dimensional scale of the building is as large as could be achieved on the subject site: even if the subject site was in the 3 storey precinct, greater density could not be achieved.[104]

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101 Town Planning Joint Expert Report – Exhibit 7 p 24 [7.19(x)], p 33 [8.28(iii)] and p 42 [12.3].
102 T3-3/L14-44 (Morrissy).
103 Town Planning Joint Expert Report – Exhibit 7 pp 16 [6.21], p 25 [7.21] and p 26 [7.25].
104 T2-46/L1 – T2-48/L2 (Ovenden).

[151] I consider that the proposed development represents development of a density encouraged to concentrate in close proximity to major transport nodes. The proposed development does not accord with this desired planning outcome. However, I do not regard the failure to achieve this desired planning outcome as determinative in itself, as:

(a) overall outcome (3)(a) of the Nundah district neighbourhood plan code:

(i) expresses a preference that low density and low-medium density housing be the "*dominant*", but not the only, land use; and

(ii) expresses an intent that medium density housing be "*concentrated*", but not only located, in close proximity to major transport nodes; and

(b) having regard to the mix of dwellings in the broader area, and those that exist and have been approved in Attewell Street,[105] I am satisfied that approval of the proposed development would not result in either a dominance of other than low density and low-medium density housing or a concentration of medium density housing distant from major transport nodes.

Built form, character and amenity considerations

[152] Council alleges that the proposed development would be of an unacceptable built form, including with respect to building height, bulk, scale, transition, setbacks and separation. It alleges that this unacceptable built form, together with the inadequate provision of landscaping and open space, results in an imposing development on the street that will not serve as a positive contribution to the streetscape.

[153] There is a multitude of provisions with which Council alleges conflict. Many of the provisions identified by Council deal with overlapping considerations with respect to built form, character and amenity. As such, it is convenient to outline the requirements of each of the identified provisions before assessing the proposed development against them.

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105 Book of Plans – Exhibit 2 p 26.

Relevant assessment benchmarks

Strategic framework

[154] The strategic framework sets the policy direction for City Plan and forms the basis for ensuring appropriate development occurs in the planning scheme area for the life of the planning scheme.[106] It prevails over all other components of City Plan to the extent of inconsistency for impact assessment.[107]

[155] Theme 3, s 3.5.3 specific outcome SO2 of the Strategic framework requires the provision of an amenity that is appropriate to the proposed use and the development intensity planned for the different parts of the City.[108] The related land use strategy L2.1 requires development to accord with the pattern of zones, neighbourhood plans and overlays, as they provide the basis for managing, *inter alia*, amenity impacts and interfaces between land uses and activities.[109]

[156] Theme 5, s 3.7.6, specific outcome SO4 and land use strategies L4.1 to 4.3 of the Strategic framework relate to Element 5.5 – Brisbane's Suburban Living Areas.[110] Land use strategy L4.1 requires infill development to be limited to instances where the resulting lot size reflects that that predominates in the neighbourhood.[111] Land use strategy L4.2 requires the siting, scale and lot coverage of new housing to be consistent with the existing neighbourhood character of well-spaced houses and vegetated backyards.[112] Land use strategy L4.3 requires development to support "*high levels*" of local amenity through, relevantly, the retention of private open space capable of supporting trees and gardens.[113] Specific outcome SO4 requires the maintenance of local character, which is typically defined by features such as consistent block size and house spacing, a predominance of detached housing and the presence of mature vegetation and gardens.[114]

[157] It is accepted by Council that non-compliance with these provisions of the Strategic framework could not, of themselves, give rise to conflict that would warrant refusal

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106 See s 3.1 of City Plan.
107 See s 1.5 of City Plan.
108 Planning Scheme Extracts - Exhibit 3 p 25.
109 Planning Scheme Extracts - Exhibit 3 p 25.
110 Planning Scheme Extracts - Exhibit 3 pp 49-50.
111 Planning Scheme Extracts - Exhibit 3 p 49.
112 Planning Scheme Extracts - Exhibit 3 pp 49-50.
113 Planning Scheme Extracts - Exhibit 3 p 50.
114 Planning Scheme Extracts - Exhibit 3 p 49.

of the proposed development. Council submits the provisions are, nevertheless, important in supporting the lower order provisions of City Plan.[115]

[158] These higher order provisions indicate that City Plan:

(a) is concerned to ensure a satisfactory level of amenity is provided to new residents of a proposed development, not just existing residents. As such, it is important to have regard not only to the external impact of a proposed development, but also to the amenity that would be achieved on-site;

(b) calls for assessment of potential impacts on neighbourhood character, which is informed by consideration of block sizes, house spacing and the landscape character of a neighbourhood.

Nundah district neighbourhood plan code

[159] The purpose of the Nundah district neighbourhood plan code is to "*provide finer grained planning at a local level for the Nundah district neighbourhood plan area*".[116]

[160] The relevant overall outcomes of the Nundah district neighbourhood plan code provide:[117]

> "(3) The overall outcomes for the Nundah district neighbourhood plan area are:
>
> (a) **The district has a mix of low density and low–medium density housing as its dominant land use. Medium density housing is concentrated in close proximity to major transport nodes** such as the Toombul, Nundah, Northgate and Virginia railway stations and the Toombul—Nundah Major centre. **The design of infill residential development is sympathetic to the established streetscapes, character and amenity of the district**;
>
> …

115 Submissions on behalf of the Respondent p 26 [94].
116 Planning Scheme Extracts - Exhibit 3 p 100.
117 Planning Scheme Extracts - Exhibit 3 pp 100-1.

> (f) **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**."
>
> (emphasis added)

[161] The proposed development does not accord with the encouraged form of development in that it is of a density that is intended to be concentrated in close proximity to major transport nodes, which it is not. That does not, of itself, demonstrate that the proposed development conflicts with the Nundah district neighbourhood plan code.

[162] The acceptability of the built form of the proposed development must, however, also be assessed having regard to the requirement that it be "*sympathetic to the established streetscapes, character and amenity of the district*" and consistent with the amenity and character intended for the area.

[163] Jakel Pty Ltd does not contend that a greater height, scale and form is justified by an identifiable community need and economic need for the development.

Low-medium density residential zone code

[164] The purpose of the Low-medium density residential zone code is to implement the policy direction set in the Strategic framework, particularly Theme 5, Element 5.5 – Brisbane's Suburban Living Areas. Relevant provisions from the Strategic framework are identified in paragraph [156] above.

[165] The purpose of the code, as outlined in (2)(e), is also to:[118]

> "Ensure development occurs on **appropriately sized and configured lots** and **is of a form and scale that reinforces a distinctive subtropical character of** low to **low-medium rise buildings with a landscaped streetscape and recreation areas.**"
>
> (emphasis added)

[166] A note in the Low-medium density residential zone code records that as neighbourhood planning is undertaken by Council, if greater housing diversity would assist in meeting resident housing needs:[119]

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118 Planning Scheme Extracts - Exhibit 3 p 94.

119 Planning Scheme Extracts - Exhibit 3 pp 94-5.

"the 2 or 3 storey mix zone precinct or 2 storey mix zone precinct may be applied to land suited to a house-sensitive scaled multiple dwelling and other residential accommodation options".

[167] Overall outcomes (5)(a) to (h) relates to built form. They, relevantly, state:[120]

> "(a) Development for a residential building is of a **height**, bulk, scale and form which is **tailored to its specific location** and to the characteristics of the site within the Low-medium density residential zone and the relevant zone precinct.
>
> (b) Development provides for a building to have a building height and bulk that responds to:
>
> (i) the nature of adjoining dwellings;
>
> (ii) site characteristics, including the shape, frontage, size, orientation, slope, and nature of adjoining dwellings.
>
> (c) …
>
> (d) Development supports a **subtropical character** by ensuring that:
>
> (i) **the building form, spacing, orientation and design ensure dwellings are well designed and sensitive to the city's climate**;
>
> (ii) **residents on the site, as well as residents of existing or future dwellings on adjoining sites, have** sufficient privacy and **good access to daylight, sunlight and breezes to enable the intended use of indoor and outdoor spaces**.
>
> (e) Development provides **quality private and public open spaces and landscaping**, including **deep planting that softens the scale of the dwellings**, provides **spaces for outdoor activity areas and encourages outdoor living**."
>
> (emphasis added)

[168] Overall outcomes (7)(a) to (f) relate to the 2 or 3 storey mix zone precinct. They, relevantly, state:[121]

> "(a) Development comprises a mix of low-medium rise, low-medium density residential buildings:
>
> (i) of no more than 2 storeys, or of no more than 3 storeys in height where located within easy walking distance of a public transport node;
>
> (ii) located on suitable sites, in accessible locations, near to public transport and larger centres or key destinations.
>
> (b) …
>
> (c) Development for a residential use other than a dwelling house is of a **scale and bulk that co-exists comfortably with an adjoining dwelling house**, even though it might have a bulk and scale greater than a dwelling house.

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120 Plannin Planning Scheme Extracts - Exhibit 3 p 94.g Scheme Extracts - Exhibit 3 pp 96-7.

121 Planning Scheme Extracts - Exhibit 3 p 110.

> (d) Development design, height and setbacks provide a **sensitive transition at the edge of the site to an adjoining dwelling house** or land in a lower density zone or zone precinct."
>
> (emphasis added)

[169] These provisions require residential development to be of a built form that provides sufficient space around the building to provide quality open spaces and quality landscaping. The separation between buildings and space on site to achieve quality open space and landscaping is important to achieving a *"landscaped streetscape and recreation areas*".

Traditional building character (design) overlay code

[170] The Traditional building character (design) overlay code has relevance for the proposed development given the existence, and proposed retention, of a pre-1947 dwelling house.

[171] Overall outcome (2)(a) of the Traditional building character (design) overlay code requires that:[122]

> "Development reflects or strengthens the traditional character and traditional building character through compatible form, scale, materials and detailing."

[172] Performance outcome PO7 and the related acceptable outcomes state:[123]

Performance outcomes	**Acceptable outcomes**
If in the Low-medium density residential zone or the Character residential zone, where for a dwelling house, dual occupancy, multiple dwelling or rooming accommodation	
PO7 Development provides **roof forms which complement traditional roof styles** of dwelling houses constructed in 1946 or earlier that are located nearby in the street in terms of roof pitch and proportion.	**AO7.1** Development provides roof forms which are one or more of a combination of pyramids, hips or gables of similar pitch and proportions to those of dwelling houses constructed in 1946 or earlier nearby in the street.
	AO7.2 Development includes eaves that are of similar proportions to eaves on dwelling houses constructed in 1946 or earlier nearby in the street.

(emphasis added)

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122 Planning Scheme Extracts - Exhibit 3 p 110.

123 Planning Scheme Extracts - Exhibit 3 pp 111 and 113.

Multiple dwelling code

[173] Overall outcomes of the Multiple dwelling code with which Council alleges conflict are:[124]

> "(e) Development has a **bulk, scale, form and intensity that integrates with the existing and intended neighbourhood structure** for the area **as expressed by zone, zone precinct and neighbourhood plan outcomes**, and is **consistent with**:
>
> (i) the **location and street context of the site**;
>
> (ii) its **proximity to** an activity centre, **higher capacity public transport services**, or other community facilities;
>
> (iii) the capacity of infrastructure.
>
> …
>
> (i) Development provides **setbacks and separation** of buildings **that contribute to the amenity of residents within and adjoining the site and to** Brisbane's **high-quality subtropical streetscapes** and public spaces.
>
> …
>
> (k) Development of a multiple dwelling **positively contributes to the immediate streetscape** and pedestrian environment with **highly articulated building facades** and **varied roof form elements**.
>
> (l) Development ensures that the **proportion of buildings**, design features, **on-site open spaces and landscaping provide**:
>
> (i) an **attractive streetscape interface** that contributes to Brisbane's character and identity, high quality subtropical streetscapes and public space network;
>
> (ii) a **high level of amenity for occupants and adjoining residents** including access to natural light, sunlight and breeze **to support outdoor subtropical living**.
>
> …
>
> (n) Development **provides open space** consistent with the following:
>
> (i) **communal open space and covered outdoor private open spaces** provided for each multiple dwelling capitalise on Brisbane's subtropical climate, **maximise outdoor living opportunities and enhance amenity for residents**;
>
> (ii) large-scale multiple dwelling development provides useable high-quality communal open space for residents that is accessible and attractive;
>
> (iii) small-scale multiple dwellings provide greater private open space for each dwelling rather than communal open space.
>
> (o) Development provides **on-site landscaping that contributes to the subtropical landscape character** and microclimate of the neighbourhood and site with **deep-planting areas for the** protection or **establishment of large, subtropical shade trees**.

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124 Planning Scheme Extracts - Exhibit 3 pp 123-5.

…

(q) Development interfaces with adjoining residential uses and is managed to mitigate amenity impacts including **protecting visual privacy through appropriate separation of buildings and screening**."

(emphasis added)

[174] Overall outcome (2)(e) of the Multiple dwelling code provides traction to the planning goals in the Nundah district neighbourhood plan code and the Low-medium density residential zone code. Although the proposed development does not conflict with overall outcome (7)(b) of the current version of the Low-medium density residential zone code or overall outcome (3)(a) of the Nundah district neighbourhood plan code, the failure to advance the preferred planning outcome is relevant to the issue of compliance with overall outcome (2)(e) of the Multiple dwelling code.

[175] The overall outcomes otherwise call for consideration of proximity to public transport services, the extent of built form and open space, and the quality of landscaping outcomes.

[176] Relevant performance outcomes and acceptable outcomes include:[125]

Performance outcomes	**Acceptable outcomes**
PO5 Development is of a **bulk and scale that is consistent with the intended form and character of the local area having regard to**: (a) existing buildings that are to be retained; (b) significant infrastructure or service constraints such as tunnels; (c) **existing and proposed building heights in the local area and street**; (d) **adjoining buildings and separation of buildings** necessary to ensure **impacts on residential amenity and privacy are minimised**; (e) the impact of slope.	**AO5** Development is contained within the building envelope for the site created by applying: (a) the maximum building height in Table 9.3.14.3.B; (b) front, rear and side boundary setback requirements in Table 9.3.14.3.C; (c) car parking boundary setback requirements in Table 9.3.14.3.E; (d) building separation requirements in Table 9.3.14.3.F; (e) acceptable outcomes for building height transitions where required. Refer to Figure b and Figure c. Note—This acceptable outcome can be demonstrated by the preparation of a building envelope plan, elevations and sections.

125 Planning Scheme Extracts - Exhibit 3 pp 127-30, 132, 139 and 143-4.

PO6 Development has a building **height** that is **consistent with the streetscape local context and intent** for the area having regard to: (a) **proximity to high-frequency public transport services**; (b) **the predominant height of existing or approved buildings in the street**; (c) providing **appropriate separation and a sensitive transition** between houses and higher scale building forms; (d) street conditions such as street width; (e) the topography of the area and site slope; (f) view points and corridors; (g) solar access to key public spaces and adjoining buildings.	**AO6.1** Development has a maximum building height that complies with: (a) a neighbourhood plan; or (b) if no neighbourhood plan applies or no requirements are specified in the neighbourhood plan, the requirements set out in Table 9.3.14.3.B.
	AO6.2 Development in the 2 or 3 storey mix zone precinct of the Low–medium density residential zone where adjoining a lot containing a dwelling house (where no approval for development other than a dwelling house exists) has a building height within 10m of the common boundary that does not exceed 9.5m or 2 storeys.
PO8 Development **separates buildings from existing or future buildings within a site or on an adjoining site to**: (a) be consistent with the **form and character intent for the local area**; (b) **protect residential amenity** including access to natural light, sunlight and breeze; (c) **provide visual privacy to reduce the need for fixed screening**.	**AO8.1** Development provides building placement and design that: (a) complies with Table 9.3.14.3.F; or (b) positions the primary balcony or private open space to face the street frontage or rear boundary or adjoining public open space; (c) offsets balconies or habitable rooms so that they are positioned outside the cone of vision of existing or approved habitable rooms or outdoor spaces. Refer to Figure g and Figure h. Note–This is demonstrated by a site context plan that includes adjoining and adjacent buildings and strategies to address separation issues. Note–Considered site planning and design and strategies such as offsetting balconies, the location of private space, selective screening or other design elements can reduce building separation requirements.
	AO8.2 Development with a secondary private open space or balcony used for drying or services is located to the side boundary with fixed screens.

PO10 Development provides a **rear boundary setback that**: (a) **supports the separation of buildings** to provide visual and acoustic privacy **without reliance on screening**; (b) **maximises the opportunity to** retain significant vegetation and protect or **establish large subtropical shade trees in deep-planting areas.**	**AO10** Development provides a rear boundary setback that complies with: (a) a neighbourhood plan; or (b) if no neighbourhood plan applies or no requirements are specified in the neighbourhood plan, the requirements set out in Table 9.3.14.3.C.
PO14 Development ensures that the **proportion of buildings to open space and landscaping** on a site: (a) is **in keeping with the intended form and character intensity of the local area and immediate streetscape**; (b) **contributes to modulation of the building form**; (c) supports residential amenity including access to natural light, sunlight and breeze; (d) supports private outdoor subtropical living; (e) provides for communal open space; (f) **provides for deep-planting areas to** retain significant vegetation and protect or **establish large subtropical shade trees**.	**AO14** Development has: (a) a building footprint within the building envelope; (b) a maximum site cover that: (i) complies with the requirements set out in a neighbourhood plan; or (ii) if no neighbourhood plan applies or no requirements are specified in the neighbourhood plan: (A) where in the Medium density residential zone, Low–medium density residential zone, the Infill housing zone precinct of the Character residential zone or Low density residential zone, is 45%; or (B) where in the High density residential zone, is 40%.
PO25 **Development ensures** significant vegetation and **large subtropical shade trees are** protected or **established to balance the bulk, scale and form of the building and provide a subtropical landscape setting**. Note—Guidance about retention of existing trees is provided by the Vegetation planning scheme policy.	**AO25.1** Development ensures that the location of a new building, car parking, driveway or a crossover will not adversely impact the long-term viability of trees to be retained. Note—Invasive species identified in the Planting species planning scheme policy are not required to be retained unless the tree is a significant, mature and healthy shade tree. Note—Guidance about retention of existing trees is provided by the Vegetation planning scheme policy.
	AO25.2 Development provides or retains one tree within the site per 20m of frontage that is capable of growing to a minimum height of 15m at maturity. Note—Landscape design incorporates planting in accordance with the Planting species planning scheme policy. Note—Guidance about retention of existing trees is provided by the Vegetation planning scheme policy.

	AO25.3 Development provides tree species that are selected and planted to provide a minimum 50% shade cover to a site's open space within 10 years. Note—Shade cover is to be measured at 12pm on 21 December.
PO30 Development provides **deep planting** that: (a) is open to the sky with access to light and rainfall and into the natural ground with no underground development or infrastructure; (b) **contains subtropical tree species that at maturity are complementary in scale and height to the building form** or respond to the site location and design needs; (c) **softens the impact of building and hardstand areas** and reduces impervious areas to improve stormwater; (d) **provides shade and informal recreation spaces that are easily accessible for building occupants**; (e) is located to retain existing site features such as significant vegetation or grouped with deep-planted areas on adjacent sites to maximise contiguous areas of deep planting.	**AO30.1** Development locates **deep-planting areas**: (a) to protect significant vegetation; (b) to protect or **establish large subtropical shade trees**; (c) to provide an opportunity for the co-location of deep soil plants and large subtropical shade trees within the street or on adjoining premises; (d) within the front or rear set back in the Medium density residential zone and High density residential zone.
	AO30.2 **Development provides deep-planting areas that are**: (a) a minimum of 10% of the site area; (b) **exclusively for landscaping**; (c) **able to accommodate trees planted in natural ground**; (d) 100% open to the sky; (e) can be accessed for maintenance purposes.
	AO30.3 Development provides **trees in deep-planting areas** which: (a) are **capable of growing to a minimum canopy diameter of 5m and a minimum height of 5m within 5 years of planting**; (b) are subtropical tree species consistent with the Planting species planning scheme policy. Note—Tree species should be chosen to respond to particular site location or design needs. Where site circumstances permit, tree species that are complementary in scale and height to the building form should be selected. Tree height and canopy spread will be dependent on species.

	AO30.4 **Development ensures that deep-planting areas do not contain**: (a) vehicle driveways, manoeuvring or hardstand areas and pedestrian paths; (b) surface structures and infrastructure such as water conservation services or utilities (c) **sub-surface structures or infrastructure such as piping, bioretention pits**, basement car parking structures. Note—Water conservation services or utilities and stormwater treatment measures are devices such as tanks and bioretention areas. These devices limit the space available for tree planting within deep-planting areas.

(emphasis added)

[177] These performance outcomes raise similar considerations to the overall outcomes.

Subdivision code

[178] Overall Outcomes (2)(a) and (b) of the Subdivision code provide:[126]

> "(a) Development for reconfiguring a lot facilitates the creation of suitable lots for their intended use while not adversely impacting on the lawful use or identified values of other premises.
>
> (b) Development for reconfiguring a lot creates a lot of an appropriate size, dimensions and arrangement consistent with the outcomes of the zones, zone precincts, neighbourhood plans and overlays which apply to the site."

[179] Reflecting those overall outcomes, performance outcome PO1 and its related acceptable outcomes state:[127]

Performance outcomes	**Acceptable outcomes**
PO1 Development creates a lot with dimensions which enable lawful uses appropriate to the intended use and consistent with zones, zone precincts, neighbourhood plans and overlays which apply to the site and are intended for the locality under the planning scheme.	**AO1.1** Development provides lots which enable the relevant outcomes and standards required by the planning scheme to be complied with for the intended use.
	AO1.2 Development provides lots with dimensions in compliance with Table 9.4.10.3.B.

[180] The Subdivision code has relevance to the proposed development given the proposal to reconfigure the lots to provide a separate title to the dwelling house.

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126 Planning Scheme Extracts - Exhibit 3 p 180.
127 Planning Scheme Extracts - Exhibit 3 p 181.

Assessment against relevant benchmarks

[181] In broad terms, the City Plan provisions outlined above call into consideration whether the proposed development:

(a) is consistent with the location and street context, and planning intent with respect to building height, bulk and scale and proximity to an activity centre or higher capacity public transport services;

(b) is of a design that is sympathetic to or consistent with the established streetscapes, character and amenity of the district;

(c) provides setbacks and separations that contribute to the amenity of residents both within and adjoining the site;

(d) will have a positive contribution to the streetscape by providing:

(i) setbacks and separation of buildings, and proportionality between built form and open space and landscaping, that contribute to subtropical streetscapes; and

(ii) highly articulated building facades and varied room form elements; and

(e) provides on-site landscaping that contributes to the subtropical landscape character, with deep-planting areas for the establishment of large, subtropical shade trees.

[182] Mr Ovenden and Ms Morrissy expressed different opinions about whether the proposed development was of an appropriate form and density.

[183] In considering that broader issue, Mr Ovenden notes that the relevant land use and character principles that underpin the provisions of City Plan include:[128]

(a) creating walkable communities, and locating low-medium density residential development in areas well serviced by public transport and close to centres and community facilities;

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128 Town Planning Joint Expert Report – Exhibit 7 p 12 [6.2]-[6.3].

(b) increasing density around public transport nodes and limiting density remote from public transport to ensure compatibility with housing and to avoid isolation of population density from public transport (with the consequent increase in car dependency); and

(c) protecting Brisbane's historic built form character by retaining pre-war houses and ensuring infill development respects the streetscape character.

[184] Like Mr Ovenden, Ms Morrissy recognises that City Plan encourages development that capitalises on existing public transport infrastructure and centres. However, she opines that:

(a) high and medium density residential outcomes are intended to occur close to and around key destinations in the Toombul-Nundah neighbourhood plan area;

(b) as the distance from these destinations increase, the zoning pattern changes, as does the corresponding land use intent, with development density and intensity reducing at the more distant locations. She opines that all low-medium density residential development is intended to be well located in respect of public transport services and, in this respect, observes:

(i) in respect of the 2 storey mix zone precinct, overall outcome (6)(a)(ii) of the Low-medium density residential zone code encourages development that is located "*along identified public transport corridors*";[129]

(ii) in respect of the 2 or 3 storey mix zone precinct, overall outcome (7)(a)(ii) of the Low-medium density residential zone code encourages development that is located "*in accessible locations, near to public transport*";[130] and

(iii) in respect of the 3 storey mix zone precinct, overall outcome (8)(a)(ii) of the Low-medium density residential zone code encourages development that is located "*in well-located parts of the city, in close*

129 Planning Scheme Extracts – Exhibit 3 p 97.
130 Planning Scheme Extracts – Exhibit 3 p 98.

proximity to or on the periphery of significant centres, or along growth corridors";[131] and

(c) the difference in density is important to housing choice and diversity.[132]

[185] Ms Morrissy also opines that the applicable City Plan provisions suggest the proposed development's response to adjoining dwellings and its contribution to the street are particularly important.[133]

[186] Ms Morrissy's observations appropriately summarise relevant planning strategies in City Plan that can be discerned from reading the document as a whole.

[187] While I do not regard Mr Ovenden's summary of the relevant land use and character principles as inaccurate, it does not sufficiently recognise the differences in planned density. It also gives no recognition to the importance City Plan places on providing space around built form to provide amenity to residents of, and adjoining, a development, and to accommodate landscaping that contributes to the streetscape.

Building height, bulk and scale and proximity to higher capacity public transport services

[188] Jakel Pty Ltd submits that residents of the local area must have a legitimate expectation of buildings up to 9.5 metres in height in this area. It submits that the expectation derives from:

(a) overall outcome 7(a) of the Low-medium density residential zone code, which provides for development of three storeys in height where located within easy walking distance of a public transport node;

(b) overall outcome (2)(h) of the Multiple dwelling code, which stipulates that:

> "Development is of a height that is appropriate to the strategic and local context and meets community expectations consistent with the following:
>
> …
>
> (v) 2 or 3 storeys in the 2 or 3 storey mix zone precinct of the Low-medium density residential zone;"

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131 Planning Scheme Extracts – Exhibit 3 pp 98-9.
132 Town Planning Joint Expert Report – Exhibit 7 p 14 [6.10] and p 17 [6.22(iii)].
133 Town Planning Joint Expert Report – Exhibit 7 p 14 [6.11].

(c) acceptable outcomes AO5 and AO6.1 of the Multiple dwelling code, which prescribe maximum building heights that comply with the Table 9.3.13.3.B. That table relevantly provides:

Zone	**Zone Precinct**	**Maximum building height**
Low-medium density residential zone	2 or 3 storey mix where: (a) the site has frontage to a road with a reserve width of 15.5m or more; (b) a dedicated pedestrian access point of the site is within 400m walking distance of a dedicated public pedestrian railway or busway station	3 storeys and 11.5m
	2 or 3 storey mix in all other circumstances	2 storeys and 9.5m

Jakel Pty Ltd also submits that the corresponding PO6(b) does not refer to storeys, and instead requires development to have a height that is consistent with the streetscape local context and intent for the area having regard to "*the predominant height of existing or approved buildings in the street*";

(d) acceptable outcome AO6.2 of the Multiple dwelling code, which requires development in the 2 or 3 storey mix zone precinct where adjoining a lot containing a dwelling house to have a building height within 10 metres of the common boundary that does not exceed 9.5 metres or two storeys. Jakel Pty Ltd submits that the corresponding Performance Outcome PO6(c) also does not refer to building storeys, and instead requires development to have a height that is consistent with the streetscape local context and intent for the area having regard to "*providing adequate separation and a sensitive transition between houses and higher scale building forms*".

[189] I do not accept that there is a correlation, as apparently contended by Jakel Pty Ltd, between:

(a) acceptable outcome AO6.1 and performance outcome PO6(b) of the Multiple dwelling code; or

(b) acceptable outcome AO6.2 and performance outcome PO6(c) of the Multiple dwelling code.

[190] If there is not compliance with both AO6.1 and AO6.2 of the Multiple dwelling code, consideration must be given to whether the proposed development complies with performance outcome PO6 in its entirety. Similarly, if there is not compliance with acceptable outcome AO5, it is necessary to consider the entirety of performance outcome PO5.

[191] The proposed development includes a three-storey building. At its highest point, the proposed development is approximately 9.95 metres above ground level.[134] Approximately half of the roof area of the multiple dwelling exceeds 9.5 metres above ground level.[135] That part of the roof that exceeds 9.5 metres above ground level is also within 10 metres of the common boundary of the proposed lot containing the existing dwelling house[136] and the adjoining neighbouring lots that contain a dwelling house. As such, the proposed development does not comply with acceptable outcomes AO5, AO6.1 or AO6.2 of the Multiple dwelling code.

[192] To the extent that the building height exceeds 9.5 metres, I accept the evidence of Mr McGowan, the visual amenity expert retained by Jakel Pty Ltd, that:[137]

> "the casual observer wouldn't comprehend that difference, because it's in the order of half a metre or less, at the back of the site."

[193] Mr King, the visual amenity expert retained by Council, likewise opined that the building would appear as a 9.5 metre high building,[138] which is a height that is consistent with the reasonable expectation for height in the area.[139] Ms Morrissy accepted that a building with an apparent height of 9.5 metres would be unsurprising.[140]

[194] I accept that the height of the building at a little over 9.5 metres does not, of itself, present a material conflict. However, the minimal extent to which the building exceeds a height of 9.5 metres does not provide a complete picture in terms of the consistency of the height of the proposed development with what might reasonably be expected.

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134 Visual Amenity Joint Expert Report – Exhibit 9 p 43 [46] and Book of Plans – Exhibit 2 pp 10 and 11.
135 Book of Plans - Exhibit 2 p 2.
136 See Book of Plans – Exhibit 2 pp 2, 8 and 10, particularly having regard to the dimensions on the plans, such as the width of the lot and the extent of the elevations depicted as in excess of 9.5 metres.
137 T1-73/L12-25 (McGowan).
138 T2-28/L35-38 (King).
139 T2-30/L28-38 (King).
140 T2-86/L32 – T2-87/L2 (Morrissy).

[195] In terms of expectations with respect to height, it is also relevant that:

(a) overall outcome 7(a) of the Low-medium density residential zone code, and now overall outcome 7(b) of the current version of the Low-medium density residential zone code, only encourages three storeys in height where located within easy walking distance of a public transport node, which the proposed development is not;

(b) overall outcome (2)(h) of the Multiple dwelling code does not alter that expectation: the strategic context includes the planning outcomes encouraged in the Low-medium density residential zone code and the Nundah district neighbourhood plan code;

(c) PO5 of the Multiple dwelling code requires development to have a bulk and scale that is consistent with the intended form and character of the local area; and

(d) PO6 of the Multiple dwelling code requires development to have a building height that is consistent with the streetscape local context and intent having regard to:

(i) not only "*the predominant height of existing or approved buildings in the street*" and the whether the proposed development will provide "*adequate separation and a sensitive transition between houses and higher scale building forms*"; but also

(ii) proximity to high-frequency public transport services.

[196] The established character of Attewell Street is one that includes built form of two and three storeys in height,[141] but with a predominance of houses (many of which are pre-1947) and a predominance of two-storey residential buildings.[142]

[197] If the only relevant metric were the absolute height of the proposed building, the proposed development would be consistent with streetscape local context. However, I am not satisfied that the proposed development is consistent with the streetscape local context having regard to issues of separation and transition.

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141 Book of Plans – Exhibit 2 p 26.

142 Town Planning Joint Expert Report – Exhibit 7 p 14 [6.11(ii) and (iii)] and p 29 [8.11].

[198] In my view, the three-storey building does not provide appropriate separation from, or transition to, the adjoining dwelling house on the subject site (which is to be located on a separate title and will not function as part of the multiple dwelling complex). It does not co-exist comfortably with it; rather, it crowds the dwelling house.

[199] Mr Ovenden considers the proposed development to be acceptable, given its location on a site that is "*relatively large*".[143]

[200] The location of the proposed development on a site that meets the minimum site area of 600 square metres, in compliance with acceptable outcome AO1 of the Multiple dwelling code, does not demonstrate that there is an appropriate outcome in terms of building height and transition to adjoining dwelling houses. Jakel Pty Ltd has applied for a reconfiguration of the land, with the result that the three-storey multiple dwelling building is to be located on a lot of 660 square metres, not a lot of 900 square metres. In forming his opinions, Mr Ovenden does not appear to have addressed the consequences of the reconfiguration.

[201] With respect to the distance between the proposed development and high-frequency public transport, in addition to noting the public transport nodes at Toombul and Nundah, Mr Ovenden notes what he regards as "*regular bus services along Buckland Road a few hundred metres to the north of the site*."[144] For the purpose of assessing compliance with performance outcome PO6, I do not regard the bus stop in Buckland Road as providing "*high-frequency public transport*".[145]

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143 Town Planning Joint Expert Report – Exhibit 7 p 29 [8.12].

144 Report of Mr Ovenden – Exhibit 8 p 6 [3.9(i)].

145 See timetable for route 307 in Exhibit 26. It provides a service only once in each hour between 8 am and 4pm on Monday through to Friday, about once every hour and a half on Saturdays between 9 am and 3.30 pm and provides no service on Sundays.

Established streetscapes, character and amenity of the district

[202] Paragraphs [5] of [11] above contain a general description of the development in the locality. In addition to the built form noted in those paragraphs, the visual amenity experts record that trees surrounding the subject site on neighbouring properties and within the road reserve include:[146]

(a) a large Mango tree on the neighbouring property to the rear of the subject site (55 Hedley Avenue);

(b) two Leopard trees (pruned around the transmission lines) in the road reserve adjacent to 32-34 Attewell Street;

(c) a Poinciana tree in the road reserve adjacent to 24-26 Attewell Street; and

(d) two trees within the front garden of 21 Attewell Street, opposite the subject site.

[203] It is evident from the photographs in the report that this list is by no means an exhaustive catalogue of the vegetation that forms part of the streetscape in Attewell Street.[147]

[204] In determining the character of Attewell Street, it is appropriate to consider the visual character of the street as a whole, not the character of dwellings or groups of dwellings in isolation.[148]

[205] My impression of Attewell Street in general, confirmed by the site inspection and the many photos included in the Visual Amenity Joint Expert Report,[149] is of a green, leafy street with generously spaced dwellings that have the benefit of sizeable trees (in the front setback and road verge) and yard space that is conducive to recreation and a pleasant outlook. Although the western side of Attewell Street has a stronger landscape character, the character is present on both sides of the street.

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146 Visual Amenity Joint Expert Report – Exhibit 9 p 7.

147 The extent of vegetation in the street can also be gleaned from the aerial photographs – see Visual Amenity Joint Expert Report – Exhibit 9 p 8 figures 1 and 2.

148 *Kanesamoorthy v Brisbane City Council* [2016] QPEC 42, [2016] QPELR 784, 794 [29], citing *Leach v Brisbane City Council* [2011] QPEC 55; [2011] QPELR 609, [34].

149 Exhibit 9.

[206] The landscaped and spacious character of Attewell Street is not overborne by:

(a) the existence of two three-storey buildings - one at 12 Attewell Street and one at 20-22 Attewell Street behind a pre-1947 house;[150] nor

(b) the existence of a small handful of lots with poor landscaping outcomes.[151]

[207] As one ambles along Attewell Street looking around and taking in both sides of the street,[152] there would be no point, or virtually no point, at which the ambler would not have large shade trees within view. As noted by Ms Morrissy, one would also notice a strong emergence of residential infill development exhibiting a pattern of development that retains the existing traditional character dwelling at the front of the site and locates a new two-storey multiple dwelling behind it.[153]

[208] The proposed development will retain the character values of the existing pre-1947 house on the subject site. As was observed by Mr Ovenden, this will, in part, mask the units proposed at the rear of the subject site.[154] Despite this partial masking, in my view, the combined bulk and scale of the proposed three-storey building is not consistent with the intended form and character of the local area or sympathetic to the established streetscape.

[209] As is acknowledged by Mr Ovenden, site cover, bulk, scale and roof form are important when determining the impact on character and amenity of the street.[155]

[210] The proposed development has a site cover of 508 square metres (56.4 per cent).[156] This is in conflict with acceptable outcome AO14 of the Multiple dwelling code, which states that maximum site cover is 45 per cent.[157] This, of itself, would not necessarily be of concern if the proposed proportion of buildings to open space and

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150 See Book of Plans – Exhibit 2 pp 26 and 33; Town Planning Joint Expert Report – Exhibit 7 p 23; Visual Amenity Joint Expert Report p 13 figure 12, p 19 figure 23, p 25 figure 35.

151 See, for example, Visual Amenity Joint Expert Report p 13 figure 12, p 14 figure 13, p 18 figures 21 and 22, and p 19 figure 23. See also T2-14/L39 – T2-16/L25 (King).

152 This is the test applied in *Kanesamoorthy v Brisbane City Council* [2016] QPEC 42; [2016] QPELR 784, 794 [31]; [2016] QPEC 42, citing *Lonie v Brisbane City Council* [1998] QPELR 209. The test was cited for the purpose of assessing streetscape character and whether a street has traditional character. I consider it an equally appropriate test when assessing streetscape character more broadly.

153 Town Planning Joint Expert Report – Exhibit 7 p 13 [7.19(ix)(c)].

154 Town Planning Joint Expert Report – Exhibit 7 p 13 [6.7(i)].

155 Town Planning Joint Expert Report – Exhibit 7 p 31 [8.23].

156 Report of Ms Morrissy – Exhibit 12 p 3 [3.0.4(a)].

157 Planning Scheme Extracts – Exhibit 3 p 132.

landscaping were appropriate. I do not consider the proportion of buildings to open space to be appropriate, for the reasons detailed further below.

[211] In my view, figure 1 of the Report of Mr McGowan illustrates the proposed development's inconsistency with the streetscape. That figure shows how the three storey built form of the proposed development crowds the adjacent single storey dwelling house in a streetscape where other multiple dwellings do not so crowd their adjoining dwellings of lower scale built form.[158]

Setbacks and separations

[212] Acceptable outcomes in the Multiple dwelling code provide a useful starting point for considering the adequacy of setbacks, separation and transition. They provide a metric that is deemed acceptable.

[213] The proposed development achieves the relevant acceptable outcomes for side boundary setbacks.[159]

[214] With respect to front boundary setback, to achieve the proposed reconfiguration the existing residence is to be repositioned such that the front setback is reduced to 3.1 metres to the front stairs, landing and balcony, and 4.2 metres to the building wall. Were the house properly regarded as part of the multiple dwelling, the setback would conflict with AO5 of the Multiple dwelling code, which requires a front setback of four metres to a balcony and six metres to a wall.[160] The house is intended to be located on a separate title and, as such, is not intended to form part of the multiple dwelling complex. There is no allegation that the front setback of the house conflicts with AO5 of the Multiple dwelling code. The proposed development is setback within 20 per cent of the average setback of development along Attewell Street.[161]

[215] Acceptable outcomes AO5 and AO10 of the Multiple dwelling code and the associated Table 9.3.13.3.C – Boundary setbacks for a multiple dwelling.[162] The proposed rear boundary setback is 4.382 metres. There is no dispute that this does

158 Report of Mr McGowan – Exhibit 10 p 9 figure 1.
159 Visual Amenity Joint Expert Report – Exhibit 9 p 61 [111(c)].
160 Planning Scheme Extracts – Exhibit 3 pp 127 and 158.
161 Town Planning Joint Expert Report – Exhibit 7 p 28 [8.6].
162 Planning Scheme Extracts – Exhibit 3 pp 158-9.

not comply with acceptable outcome AO5 or acceptable outcome AO10 of the Multiple dwelling code.

[216] In terms of building separation, acceptable outcomes AO5 and AO8.1(a) of the Multiple dwelling code call for building placement and design that complies with Table 9.3.14.3.F, which specifies minimum building separation distances.

[217] Notes underneath the table record that:

(a) separation distances are intended to protect amenity and provide for private open space on upper levels that do not require screening for privacy; and

(b) considered site planning and design and strategies such as offsetting balconies, the location of private open space, selective screening and other design elements can reduce building separation requirements.

[218] Acceptable outcome AO8.1(b) and (c) provide for an alternative design solution, which relies on the offsetting of balconies and habitable rooms so that they are positioned outside the cone of vision of existing or approved habitable rooms or outdoor spaces.

[219] The proposed three-storey multiple dwelling provides a separation of 10.4 metres between the balcony for proposed unit 2 and a habitable area at 53 Hedley Avenue.[163] Jakel Pty Ltd proposes to address this lack of separation by providing an "*acoustic and opaque glass balustrade*" to the unit 2 balcony.[164] This does not comply with acceptable outcome AO5 or AO8.1 of the Multiple dwelling code, either in terms of the distance or in terms of an offset design.

[220] The building separation between the relocated dwelling house on the subject site and the three-storey multiple dwelling building is 1.25 metres at ground level, 2.55 metres at the first floor and between 2.55 metres and 3.05 metres at the second floor.[165] This also does not accord with the acceptable outcomes.

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163 Book of Plans – Exhibit 2 p 9 and building outline on p 27; Appeal Book – Exhibit 6 pp 163-5.

164 It is not clear what an "*acoustic*" balustrade entails or might achieve in terms of acoustic privacy. Jakel Pty Ltd did not lead any evidence of an acoustic engineer.

165 Book of Plans – Exhibit 2 pp 7 and 8.

[221] The provisions of City Plan that relate to setbacks, separation and transition[166] seek to ensure that development:

(a) protects the amenity of residents, both within and adjoining the site, in terms of access to natural light, sunlight and breeze;

(b) provides privacy without the need for fixed screening;

(c) achieves a form and character intent that is consistent with the local area; and

(d) maximises the opportunity to establish large subtropical shade trees.

[222] The landscaping issue is considered in paragraphs [248] to [261] below.

[223] There was no dispute between the town planners that the proposed development is unlikely to have adverse impacts on adjoining developments along the side boundary in respect of access to sunlight, breezes and overshadowing.[167]

[224] As for the impacts between the proposed development and the development at 53 Hedley Avenue, Mr Ovenden observes:[168]

> "The established building comprises two units at the rear with courtyards adjoining the common boundary. Unit 4 specifically is located at the ground floor in the south-western corner of the development, and will have a direct line of sight to the deck of Unit 1 and the boundary fence. There have been negotiations undertaken between the Appellant and the First Co-Respondent by Election, and agreement has been reached to ameliorate potential amenity issues such as visual intrusion, sightlines and noise.
>
> At the upper level, the south-western unit (FFL 15.0m) will not have a direct view into any unit, due to the level of proposed Unit 2 being RL 17.2m. A view up to the balcony of proposed Units 2 and 5 will be obscured by a 1.2m high solid, non-transparent and acoustic balustrading (as agreed by Mediation dated 9 October 2017)."

[225] I do not consider the fact that the existing unit owners have resolved their dispute with Jakel Pty Ltd to be demonstrative of an absence of unacceptable impact. City Plan seeks to ensure appropriate amenity for current and future residents of both sites.

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166 i.e. overall outcomes (5)(d) and (7)(d) of the Low-medium density residential zone code, and overall outcomes (2)(i), (l) and (q) and performance outcomes PO5, PO6, PO8 and PO10 of the Multiple dwelling code.

167 Town Planning Joint Expert Report – Exhibit 7 p 31 [8.24] and p 33 [8.28(iv)].

168 Town Planning Joint Expert Report – Exhibit 7 pp 30-1 [8.20].

[226] However, Ms Morrissy accepts that, with the introduction of the proposed screening, there are no concerns with respect to overlooking, breezes and privacy along the rear elevation of the proposed three-storey building.[169] As such, although the proposed development's reliance on screening to address privacy and overlooking issues is contrary to performance outcomes PO8 and PO10 of the Multiple dwelling code, I do not regard the conflict occasioned by inadequate rear separation, by itself, to be significant.

[227] Jakel Pty Ltd submits that there are not any unacceptable or inappropriate impacts on neighbouring development.[170] It submits that because the proposed development as a whole is a multiple dwelling, the orthodox setback provisions between built forms do not apply.[171] This ignores that the proposed development involves a reconfiguration and that, as such, it is necessary to consider the impact of the proposed three-storey development on the adjoining dwelling house that is to be retained on the subject site (but on its own lot).

[228] There is no eastern elevation provided for the house to identify the design or location of windows along the common boundaries of the dwelling house lot and the rear lot (if any).[172] The western elevation and plans for the three-storey building shows there are windows proposed along the common boundary with the dwelling house.[173] During cross-examination, Mr Ovenden indicated that he understood there were not any proposed windows along the rear of the dwelling house.[174] This is confirmed in the written submissions from Jakel Pty Ltd.[175]

[229] Ms Morrissy opines that the lack of separation between the proposed dwelling house[176] and the three-storey multiple dwelling will result in poor amenity for the residents of the dwelling house.[177] I agree.

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169 T2-88/L20-41 (Morrissy).
170 Outline of Argument for the Appellants – Court Doc 18 p 27 [56].
171 Outline of Argument for the Appellants – Court Doc 18 p 37 [75].
172 Town Planning Joint Expert Report – Exhibit 7 p 34 [8.29].
173 Book of Plans – Exhibit 2 pp 8-9.
174 T2-62/L23-25 (Ovenden).
175 Outline of Argument for the Appellants – Court Doc 18 p 37 [75].
176 This house is described on the plans as unit 7 but is proposed to be located on a separate title with no proposed connection between the two lots. As such, unlike the owner of a unit, who has the benefit of body corporate rules that typically address amenity considerations that arise when people live in close confines, the residents of the dwelling house will not enjoy such extra protection to their amenity.
177 Town Planning Joint Expert Report – Exhibit 7 p 34-5 [8.29]; Report of Ms Morrissy – Exhibit 12 p 9 [6.0.13(a)].

[230] The canyon-like space that will be created between the two buildings is apparent on the proposed north elevation and the proposed south elevation.[178] I do not regard the design of the multiple dwelling as one that provides a sensitive transition to the retained (but relocated) dwelling house, nor to be consistent with the form and character intent for the local area.

[231] Proposed lot 1 is intended to have an area of only 241 square metres. That is less than the minimum lot size of 260 square metres for even a "*small lot*" envisaged by acceptable outcome AO1.2 and Table 9.4.10.3.B of the Subdivision code.[179] It will also have a front and rear setback significantly less that that provided for in the Dwelling houses (small lot) code.[180] As such, I do not consider that proposed lot 1 is suitable for its intended use. It conflicts with performance outcome PO1 and overall outcomes (2)(a) and (b) of the Subdivision code.

[232] The poor amenity outcome for the dwelling house produced by inadequate setbacks, separation and transition to the proposed three-storey multiple dwelling are exacerbated by the fact that, as it is proposed to be located on a separate title, the dwelling house will not have access to the communal open space area or the common property on the rear lot.

Building façade and room form elements

[233] The three-storey building that forms part of the proposed development is intended to have a "*modern pitched skillion roof*"[181] with a roof pitch of about 5 per cent.[182]

[234] Mr McGowan accepts that the shallow roof profile is not consistent with the roof forms of the character houses in the area.[183] He acknowledges that the roof form is "*obviously*" not of a traditional roof form.[184]

[235] Performance outcome PO7 of the Traditional building character (design) overlay code requires a roof form that "*complements*" the traditional roof styles in pitch and proportion. Overall outcome (2)(a) of the Traditional building character (design)

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178 Book of Plans – Exhibit 2 pp 10 and 11.
179 Planning Scheme Extracts – Exhibit 3 pp 181 and 199-200. T2-63/L6-15 (Ovenden).
180 Town Planning Joint Expert Report – Exhibit 7 p 35 [8.30].
181 Town Planning Joint Expert Report – Exhibit 7 p 32 [8.24].
182 Report of Mr McGowan – Exhibit 10 p 8 [16].
183 Visual Amenity Joint Expert Report – Exhibit 9 p 60 [105].
184 Visual Amenity Joint Expert Report – Exhibit 9 p 66 [126].

overlay code seeks development that will reflect or strengthen traditional building character through "*compatible*" form.

[236] With respect to compatibility, Mr McGowan opined that adopting a strict traditional roof form for the proposed unit building (with hips and gables of similar pitch and proportion to houses in the street) would not be a better outcome in this instance. He expressed concern that such a roof design could appear overly bulky, and could detract from the traditional character of the retained house. He considers that the roof form proposed for the unit building is subtle and relatively inconspicuous, with a modest pitch (approximately 5 per cent) that makes it compatible with both the traditional roof forms, and the roof forms of 20-22 and 24 Attewell Street.[185]

[237] In forming his opinion, Mr McGowan also noted that the form and pitch of the roof of the proposed multiple dwelling would appear more complementary to traditional roof forms in the street than the roof forms of the unit buildings at 20-22 and 24 Attewell Street.[186]

[238] Mr McGowan also opined that the most important contribution to traditional building character made by the proposed development is the retention and enhancement of the traditional house at the front of the subject site. He considers that proposing a non-traditional roof form for the rear building does not diminish the contribution that is made by the retained dwelling house and, because the rear building is not prominent in the streetscape, the roof form would not erode the overall traditional building character that exists in the area.[187]

[239] Mr Ovenden regards the inconsistent roof form as one that does not compromise the character of the locality, and considers the inconsistent roof form to be beneficial as it reduces the amount of the roof form that can be seen from a distance.[188]

[240] I am not satisfied that the proposed development complies with overall outcome (2)(a) and performance outcome PO7 of the Traditional building character (design) overlay code. In my view, the roof form, particularly its shallow pitch, does not complement the traditional roof styles or enhance the traditional building character of the street.

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185 Report of Mr McGowan – Exhibit 10 p 8 [16].
186 Report of Mr McGowan – Exhibit 10 p 8 [17].
187 Report of Mr McGowan – Exhibit 10 pp 8-9 [18].
188 Town Planning Joint Expert Report – Exhibit 7 p 26 [7.21].

[241] I accept that the proposed roof form is better than that of the unit buildings at 20-22 and 24 Attewell Street.[189] However, this does not demonstrate that the roof form of the proposed development is acceptable. The proposed development will add yet another building with a roof form that detracts from the traditional building character of the area.

[242] In my view, the incompatible roof form exists as a consequence of the attempt to accommodate a third storey in a location where a third storey is not encouraged. It appears to have been adopted to achieve a building height that is not excessive when compared to other building heights in Attewell Street. Even with the unacceptably shallow roof pitch, the proposed development exceeds 9.5 metres in height.

[243] Otherwise, in terms of building design, overall outcome (2)(k) of the Multiple dwelling code seeks highly articulated building facades and varied roof form elements.

[244] Jakel Pty Ltd submits that, when considering this outcome, it must be borne in mind that the proposed development will be shielded from the street by the existing detached dwelling house. Even taking a static view of the proposed development from directly in front of it, the dwelling house will only partly shield the three-storey multiple dwelling: a significant proportion of the rear building will still be apparent.[190]

[245] Further, while ambling along Attewell Street and looking around, the rear building will come into view as one approaches the subject site. As one moves north along Attewell Street, a good part of the southern façade and the upper part of the three-storey building will be visible. Similarly, as one moves south along Attewell Street, the building will become visible above the adjoining single storey house to the north and along the driveway. It will be even more prominent than the three-storey development at 24-26 Attewell Street, given it will be at a higher ground level due to the intent to site it on a bed of fill.[191]

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189 Report of Mr McGowan – Exhibit 10 p 9 figure 1.
190 Report of Mr McGowan – Exhibit 10 p 9 figure 1.
191 T1-53/L31 – T1-56/L9 (McGowan).

[246] In the Visual Amenity Joint Expert Report, Mr McGowan acknowledged that the articulation of the building "*is not dramatic*".[192] During re-examination, Mr McGowan provided a description of the articulation.[193] He described how the proposed development uses recessed balconies, decorative screening, banding and render to achieve depth in the façade shown on the western elevation.[194] He also described the articulation on the rear façade. He did not, however, suggest that there was a highly articulated façade apparent on either the northern or southern elevation.

[247] Having regard to the elevations and the floor plans, particularly for levels 1 and 2 (i.e. the second and third storeys), I am of the view that there will be a reasonable level of articulation presented to the streetscape as one views the north-west corner of the proposed three-storey building along the driveway. However, I am not satisfied that as one moves along the street and considers the overall presentation to the streetscape, particularly the southern façade, that the proposed three-storey building presents "*highly articulated building facades*" that positively contribute to the streetscape. Further, the "*height perspective drawing*"[195] and the elevations demonstrate that the roof form has little in the way of variation. Overall, I am not persuaded that the proposed development satisfies overall outcome (2)(k) of the Multiple dwelling code.

Open space and landscaping

[248] Council alleges that the proposed development is materially deficient in its provision of landscaping, including deep planting.

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192 Visual Amenity Joint Expert Report – Exhibit 9 p 59 [103].
193 T1-75/L35 – T1-76/L11 (McGowan).
194 Book of Plans - Exhibit 2 p 9.
195 Book of Plans – Exhibit 2 p 2.

[249] Jakel Pty Ltd submits that the development meets the minimum quantitative standards for open space.[196] The proposed development provides communal outdoor space that provides the minimum area of 45 square metres as required in acceptable outcome AO27.1 of the Multiple dwelling code.[197] The area is also a minimum of 50 per cent open to the sky and a minimum of 25 per cent shaded by the trees within five years, as required by acceptable outcome AO27.5 of the Multiple dwelling code. Council no longer contests this.[198]

[250] Jakel Pty Ltd also submits that the proposed development meets the minimum quantitative standard for deep planting and landscaping.[199] It submits that the proposed development provides areas totalling 150 square metres for "*traditional deep planting*", and additional areas totalling 62 square metres for "*narrow deep planting*".

[251] Council does not accept that all of the areas nominated by Jakel Pty Ltd are properly characterised as areas for deep planting. Council also submits that, in any event, the proposed development does not satisfy the requirement to provide large subtropical shade trees.

[252] With respect to issues of quality, Jakel Pty Ltd submits that "*the quality of the landscaping to be applied to the development should be consistent with its surrounds*". I disagree. This does not reflect the desired planning objective sought in City Plan. The provisions relied on by Council clearly seek the establishment of a subtropical landscape setting, as well as landscaping that softens the scale of the built form. These desired planning outcome are not qualified by reference to the adequacy, or otherwise, of the existing landscaping in the area.

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196 Outline of Argument for the Appellants – Court Doc 18 pp 28-30 [58]-[60].
197 See Planning Scheme Extracts – Exhibit 3 p 140 and Book of Plans – Exhibit 2 p 7. See also Report of Mr Ovenden – Exhibit 8 pp 7-8 [3.17]-[3.18].
198 Submissions on behalf of the Respondent – Court Doc 16 p 26 [93].
199 Outline of Argument for the Appellants – Court Doc 18 p 31 [62].

[253] The proposed landscape plan identifies five areas for "*traditional deep planting*" and three areas for "*narrow deep planting*".[200] Mr McGowan was cross-examined about each of the eight identified areas. The cross-examination established the following:

(a) Areas 1 and 2 are narrow areas and no trees are proposed;[201]

(b) for Area 3, whilst the plan suggests it comprises an area of 20.6 metres, that is not correct.[202] In terms of the northern of the two trees in that area, pruning is inevitable. Consequently the tree will not achieve the acceptable outcome requirement of a canopy diameter of five metres, or a height of five metres within five years of planting;[203]

(c) the tree depicted in Area 4 is identified as a "*small, native flowering tree*".[204] Even accommodating the fact that half of the diameter of that tree extends over the neighbouring property,[205] the depicted canopy is only 2.5 metres in diameter;[206]

(d) Area 5 comprises an area of 3.3 metres by 3.3 metres. It is immediately adjacent to the dwelling house's laundry and provides the only external area for clothes drying. It is also outside what seems to be the only window to bedroom 2 of the dwelling house. Mr McGowan therefore agreed that, at best, the area could only accommodate a small tree, which what the plans contemplate;[207]

(e) Area 6 has dimensions of 3 metres by 4.5 metres. It will have building walls on its northern and eastern side, a retaining wall on its western side, and 1.8 metre fencing on that side and the southern side. The nominated tree for planting in that area is a "*small tree*".[208] Given that the area is a small, fully-enclosed space, Mr McGowan expected the tree to be small to medium in

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200 Book of Plans – Exhibit 2 p 15.
201 T1-36/L44-46 (McGowan).
202 T1-37/L13 – T1-39/L9 (McGowan).
203 T1-39/L17-27 (McGowan).
204 T1-40/L6-11 (McGowan). See also Book of Plans - Exhibit 2 p 14.
205 Book of Plans – Exhibit 2 p 16.
206 T1-40/L18-37 (McGowan).
207 T1-40/L47 – T1-41/L33 (McGowan).
208 Book of Plans – Exhibit 2 p 14.

size.[209] Further, whilst the area is identified as "*private open space*", Mr McGowan acknowledged that because of its walled-in nature, no-one could gain access to it;[210]

(f) in Area 7, the tree identified for the north-east corner is identified as a "*small tree*".[211] In addition, its location, and the linear east-west extension of the area, is proposed to contain underground stormwater drainage infrastructure and, accordingly, could not accommodate large shade trees.[212] If that area were excluded from the calculation of "*deep planting*", there would be a reduction of 13.5 square metres.[213] The balance of Area 7 also could not be used for deep planting as it is identified as private open space. In addition, in accordance with Mr McGowan's concerns about overlooking and privacy,[214] screening vegetation in the form of shrubs was proposed along the eastern boundary of Area 7. In cross-examination, Mr McGowan agreed that they would need to be well over two metres in height to provide any screening at all.[215] Mr King, in his evidence in chief, did not accept that the sort of height Mr McGowan suggested could actually be achieved within the three year period. Mr King also expressed the opinion that for shrubs to achieve the height required, they would need to have a width of at least 1.2 metres and they would require constant pruning. If the space includes shrubs with a width of 1.2 metres, and taking account of the proposed stairs and the deck, only very limited private open space would be provided in Area 7;[216] and

(g) Area 8 also contains a narrow east-west dimension that would not accommodate large trees.[217] That strip had dimensions about 1.5 metres by 11 metres.[218] The balance is the only identified communal open space. Two trees are proposed within it. More than one-third of the space directly abuts the main bedroom in the adjoining Unit 1.[219]

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209 T1-41/L35 – T1-42/L10 (McGowan).
210 T1-42/L12-17 (McGowan).
211 Book of Plans – Exhibit 2 p 14.
212 T1-42/L19 – T1-44/L7 (McGowan) and Exhibit 19.
213 T1-44/L9-15 (McGowan).
214 Visual Amenity Joint Expert Report – Exhibit 9 p 61 [111(f)].
215 T1-46/L7-24 (McGowan).
216 T2-7/L19 – T2-8/L8 (King).
217 T1-46/L44 – T1-47/L1 (McGowan).
218 T1-47/L18-19 (McGowan).
219 T1-47/L21-32 (McGowan).

[254] Further, whilst in his individual report Mr McGowan referred to dimensions that the proposed trees "*can achieve*", he acknowledged in the accompanying footnote, and during his cross-examination, that the dimensions he provided were indicative and that often trees in confined spaces were pruned to be smaller.[220] He also agreed with Mr King that it would be common practice to prune trees planted in the type of areas that are proposed here.[221]

[255] Despite these concessions, Mr McGowan maintained that the proposed development would provide quality landscaping[222] that contributes to modulation of the built form.[223]

[256] Mr King opines the the proposed landscaping design would not achieve the outcomes depicted on the landscaping drawings. His opinion is based on the inadequate dimensions of the landscaping beds and the lack of space for canopy, including as a consequence of the proposed structure and overhangs.[224] Mr King expresses the view that the proposed trees, and some of the groundcover planting, would not achieve any longevity.[225]

[257] Mr King also considers that the limited areas of deep planting at the front of the development are not suited for the establishment of shade and screening trees or large shrubs. He opines that the limited areas of deep planting, together with the large area of hardstand, will not contribute to the establishment of a high quality subtropical streetscape.[226]

[258] I accept the evidence of Mr King. The points he makes are valid.

[259] With respect to the ability for the proposed development to achieve the desired visual outcomes, in terms of landscaping character and impact on the built form and streetscape, I prefer the evidence of Mr King to that of Mr McGowan. Mr King has considerable horticultural qualifications and experience.[227] In light of his evidence, I am not persuaded that the landscaping proposed by Jakel Pty Ltd will achieve the outcomes expected by Mr McGowan and, more importantly, those sought by City Plan.

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220 Report of Mr McGowan – Exhibit 10 p 5 [9(c)] and footnote 3; T1-51/L25-37 (McGowan).
221 T1-31/L31-36 (McGowan).
222 T1-57/L35-6 (McGowan).
223 T1-59/L20-43 (McGowan).
224 See, for example, Visual Amenity Joint Expert Report – Exhibit 9 pp 53-4 [72]-[82].
225 Visual Amenity Joint Expert Report – Exhibit 9 p 54 [77].
226 Visual Amenity Joint Expert Report – Exhibit 9 p 54 [78].
227 Visual Amenity Joint Expert Report – Exhibit 9 pp 77-88.

[260] Council submits that the identified deficiencies in relation to landscaping are material.[228] I agree. As was accepted by Mr McGowan during cross-examination, the height, bulk and scale of the proposed development is at "*the upper part of the spectrum*", and accordingly it is all the more important to ensure that compliance is achieved with City Plan's objectives in relation to landscaping and open space provision. As Mr McGowan observed, with greater height comes greater possibility for adverse impacts, and there is a requirement for a good landscape outcome.[229] Further, as I have already identified in paragraph [245] above, the scale of the proposed development will be readily apparent in the streetscape. It will be "*plainly visible*" for about an 80 metre stretch of Attewell Street, as illustrated in Figure 6 of the Visual Amenity Joint Expert Report, and there will also be glimpses of it (between buildings) from Hedley Avenue.[230]

[261] The deficiencies in the provisions of landscaping, including deep planting, results in conflict with numerous provisions of City Plan, including:

(a) Theme 5, s 3.7.6 specific outcome SO4 and land use strategies L4.2 and L4.3 of the Strategic framework;

(b) overall outcomes (2)(e), and (5)(d) and (e) of the Low-medium density residential zone code; and

(c) overall outcomes (2)(i), (l), (n) and (o), and performance outcomes PO10, PO14, PO25 (and acceptable outcome AO25.2) and PO30 (and acceptable outcomes AO30.1 to AO30.4) of the Multiple dwelling code.

Access and servicing arrangements

[262] Ms Rolfe alleges that the access and servicing arrangements are unacceptable.

[263] PO19 of the Transport, access, parking and servicing code and its related acceptable outcomes state:[231]

Performance outcomes	**Acceptable outcomes**
PO19 Development layout provides for services	**AO19.1** Development ensures that a service bay

228 Submissions on behalf of the Respondent – Court Doc 16 p 23 [88].
229 T1-27/L3-11 (McGowan).
230 Visual Amenity Joint Expert Report – Exhibit 9 p 38 [33].
231 Planning Scheme Extracts - Exhibit 3 pp 213-4.

which: (a) are wholly within the site, other than service vehicle manoeuvring areas which may overhang the verge on a minor road where use of the footpath is not adversely affected; (b) are clearly defined, safe and easily accessible; (c) **are designed to contain potential adverse impacts of servicing within the site**; (d) do not detract from the aesthetics or amenity of the surrounding area.	provided on site: (a) is provided and designed to comply with the design vehicle table and service area design standards in the Transport, access, parking and servicing planning scheme policy; (b) is located away from street frontages and screened from adjoining premises.
	AO19.2 Development provides on-site servicing facilities and associated on-site vehicle manoeuvring areas which are designed in compliance with the service area design standards in the Transport, access, parking and servicing planning scheme policy.
	AO19.3 **Development provides service areas for refuse collection in compliance with the standards in the Refuse planning scheme policy**, Transport, access, parking and servicing planning scheme policy and the Infrastructure design planning scheme policy.

(emphasis added)

[264] Section 4(1) of the Refuse planning scheme policy, as it was at the time the application was made, states:[232]

> "(1) The number and type of mobile garbage bins at residential properties is provided in accordance with the following:
>
> (a) if kerbside collection along a dedicated road frontage is feasible, each dwelling or multiple dwelling (detached or attached) is provided with:
>
> (i) 1 general refuse mobile garbage bin and one recyclable mobile garbage bin;
>
> (ii) if requested by the owner, 1 green waste mobile garbage bin which will be collected the alternative week to recycling."

[265] Section 6.1(1) of the Refuse planning scheme policy states:[233]

> "The number of mobile garbage bins presented for collection outside any property is to be limited to (including all general refuse, recyclables and green waste), the adequate length of kerbside available. The length of kerbside is the length of the footpath frontage in which bins can be presented assuming each mobile garbage bin requires 1m (bin width plus operational clearance)."

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232 Planning Scheme Extracts - Exhibit 3 p 221.

233 Planning Scheme Extracts – Exhibit 3 p 223.

[266] Section 4(1) of the current Refuse planning scheme policy requires residential development to provide sufficient capacity for 240 litres of refuse and 240 or 340 litres of recycling per dwelling, allowing for one collection per week.[234]

[267] Pursuant to s 4(2) of the current Refuse planning scheme policy, kerbside collection is to be utilised where a kerbside collection point can be accommodated in accordance with s 4.1. However, on-site collection is to be provided if the development cannot accommodate kerbside collection.[235]

[268] Section 4.1(3) of the current Refuse planning scheme policy states:[236]

> "Kerbside collection points for lots with road frontage are to be accommodated on the footpath frontage of the subject site. Each dwelling's collection point is to comprise of a minimum of 2 areas, each with a minimum area of 0.81m^2 (i.e. 0.9m x 0.9m) to accommodate mobile garbage bins. These areas can be located together or separately."

[269] Both planning scheme policies indicate that the proposed six units on the rear lot should be provided with six general refuse and six recyclable refuse bins. The dwelling house would also require a general refuse bin and a recyclable refuse bin.

[270] The proposed development is to be provided with 7 x 240L general refuse bins and 4 x 360L recyclable refuse bins.[237]

[271] Jakel Pty Ltd submits that the issue of adequate waste services ought not carry weight in circumstances where:

(a) the development complies with the requirements of the current Refuse planning scheme policy, which identifies kerbside collection as appropriate for this type of development;

(b) whilst the policy recommends a kerbside collection area of 0.9 metres kerbside per bin, performance outcomes may be applied, especially in circumstances where the actual width of such bins is only 0.585 metres. Jakel Pty Ltd relies on Mr Ovenden's oral evidence,[238] which remains uncontradicted by any witness;

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234 Exhibit 16.
235 See s 4(3)(a) of the current Refuse planning scheme policy – Exhibit 16.
236 Exhibit 16.
237 Appeal Book – Exhibit 6 p 155 and Report of Mr McGowan – Exhibit 10 p 9 [20].
238 T2-78/L11-21 (Ovenden).

(c) Ms Rolfe called no evidence to support her position that placement of bins on the footpath was impracticable or inappropriate. By way of contrast:

(i) the architectural drawings identify the waste bins being located to the footpath;

(ii) Council's waste service advice, provided during the IDAS process confirms the proposed waste collection layout as appropriate.[239] There is now one less bin than was considered by Council at this time; and

(d) Jakel Pty Ltd submits the court would infer that, upon being placed on notice of this issue, Council's position in not pressing the matter would suggest the response provided by Council officers during IDAS remains correct and appropriate.

[272] In light of Council's identified position with respect to the proposed refuse arrangements, I do not consider the identified conflict to be of great significance. However, I do not accept that the issue is of no consequence, given:

(a) the rear lot (on which six units are located in the three-storey multiple dwelling) has no available kerbside collection point;

(b) the proposed kerbside collection point is in front of the dwelling house and is yet another aspect in which the amenity of that dwelling house is inappropriately affected by the multiple dwelling;

(c) the proposed number of refuse bins are less than the desired provision under both versions of the Refuse planning scheme policy and the space provided for the refuse bins is less than that stipulated in the policy;

(d) having regard to paragraphs [272](a), [272](b) and [272](c), Jakel Pty Ltd has not demonstrated that the development complies with the requirements of the current Refuse planning scheme policy; and

(e) Jakel Pty Ltd has not demonstrated that the footpath area is sufficient. Ms Rolfe is not required to call evidence to support her position and

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239 Appeal Book – Exhibit 6 pp 154-8.

Mr Ovenden has not demonstrated expertise that would allow him to express an opinion about the area required to meet the operational requirements of Council's refuse collection vehicles.

[273] Jakel Pty Ltd has not demonstrated that the proposed development is designed to contain potential adverse impacts of servicing within the site.

[274] In terms of the visual impact of the proposed refuse arrangements, it is intended that the residents of the dwelling house on proposed lot 1 would have their entire frontage of their lot filled with refuse bins extending over two days each week.[240] Although refuse collection is an expected part of everyday life, I am not persuaded that the proposed service arrangements would not detract from the aesthetics and amenity of the area, particularly for the residents of the dwelling house on proposed lot 1.

[275] Jakel Pty Ltd has not demonstrated compliance with performance outcome PO19 of the Transport, access, parking and servicing code.

[276] This non-compliance is not, of itself, of such significance to justify refusal of the proposed development. However, it is symptomatic of the over-development of the subject site.

Conclusion regarding built form, character and amenity considerations

[277] Whether the proposed development acceptably responds to the performance outcomes and overall outcomes with respect to height, bulk, scale, setbacks, transitions and separations and is acceptable in terms of its character and amenity impacts, is an evaluative judgment on which minds might differ.[241] Questions of consistency of bulk and scale with streetscape character and amenity involve judgments that are "*inherently subjective and can be nebulous*".[242]

[278] My overall impression of the proposed development is that it represents an overdevelopment of the subject site in its locational context and an unacceptable

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240 Visual Amenity Joint Expert Report – Exhibit 9 p 55 [85]; T1-68/L13-30 (McGowan).

241 *Caltibiano & Ors v Brisbane City Council* [2004] QPEC 36; [2005] QPELR 60, 64 [24]; *Quintenon Pty Ltd v Brisbane City Council* [2017] QPELR 88; [2016] QPEC 64, [62].

242 *Caltibiano & Ors v Brisbane City Council* [2004] QPEC 36; [2005] QPELR 60, 64 [24] citing *Broad v Brisbane City Council* [1986] 2 Qd R 317, 319-20 and 326; (1986) 59 LGRA 296, 299 and 305.

outcome in terms of visual impact on the streetscape and amenity of the residents of the proposed development and adjoining land.

[279] The observations of Jones DCJ in *BTS Properties (Qld) Pty Ltd v Brisbane City Council & Ors* [2015] QPEC 47; [2016] QPELR 943 at 961 [67] are apt:

> "In some cases it is relatively straight forward to identify and describe the negative visual impacts of a proposed development in the context of its urban setting. For example, by reference to height or a manifestly obvious difference in bulk. However, sometimes it is not so easy when the impact is a more subtle one resulting from a combination of variations in height, length, depth and setbacks. In my view, even relatively subtle variations in dimensions can still result in an overall unacceptable negative visual impact. This is such as case. …"

[280] Here, the overdevelopment is not attributable to a single dimension of the proposed development, but is evident from a combination of:

(a) the significant site cover;

(b) the unacceptably high proportion of built form as compared to landscaping and open space;

(c) the insufficient provision of quality landscaping;

(d) the inadequate setbacks between the proposed three-storey building and the dwelling house on the subject site;

(e) the lack of sensitive transition between the proposed three-storey building and the dwelling house on the subject site;

(f) the inappropriate size of proposed lot 1 and the lack of amenity achieved for residents of that dwelling house. The lack of amenity for residents of the dwelling house will result from a combination of:

    (i) side boundary setbacks of 0.2 metres and 1.35 metres, a rear boundary setback (and separation from the three-storey building to the rear) of 1.25 metres and a front boundary setback of 3.1 metres;[243] and

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243 Book of Plans – Exhibit 2 p 7.

(ii) the need for the three-storey multiple dwelling at the rear to utilise the entire street frontage of the dwelling house to accommodate its refuse bins on collection day;

(g) the inconsistent roof form, which exists as a consequence of an attempt to accommodate a third storey on the subject site while maintaining a height in metres that is consistent with the streetscape. Had a roof form of an appropriate pitch been included, this would have likely resulted in a height that was inappropriate in the streetscape;

(h) the absence of a highly articulated façade, there being effectively no room to achieve greater articulation; and

(i) the insufficient length of kerbside of the lot on which the three-storey multiple dwelling is to be located (i.e. proposed lots 2), or the combined kerbside for the dwelling house lot (i.e. proposed lot 1) and the multiple dwelling lot, to accommodate the number of mobile garage bins required for the units in accordance with the Refuse planning scheme policy.

[281] Having regard to the combined impact of all of these dimensions of the proposed development, I am not persuaded that the proposed development complies with:

(a) Theme 3, s 3.5.3 specific outcome SO2 and land use strategy L2.1 of the Strategic Framework;

(b) Theme 5, s 3.7.6 specific outcome SO4 and land use strategies L4.1 to 4.3 of the Strategic Framework;

(c) overall outcomes 3(a) and (f) of the Nundah district neighbourhood plan code;

(d) overall outcomes (2)(e), (5)(a), (b), (d) and (e), and (7)(a), (c) and (d) of the Low-medium density residential zone code;

(e) overall outcome (2)(a), performance outcome PO7 and acceptable outcome AO7.1 of the Traditional building character (design) overlay code;

(f) overall outcomes (2)(e), (i), (k), (l), (n) and (o), and performance outcomes PO5, PO6, PO8, PO10, PO14, PO25 and PO30 of the Multiple dwelling code;

(g) overall outcomes 2(a) and (b), and performance outcome PO1 and acceptable outcome AO1.1 of the Subdivision code; and

(h) PO19 of the Transport, access, parking and servicing code.

Other relevant matters

[282] Jakel Pty Ltd accepts that the grounds in support of the proposed development are modest. It relies upon the grounds described by Mr Ovenden in the Town Planning Joint Expert Report, namely:[244]

> "(i) The proposed development delivers on an infill development opportunity with a density and form of development intended by the Planning Scheme. It achieves an outcome which is sympathetic to the established streetscape, character and amenity of Attewell Street and the wider locality.
>
> (ii) The proposed development helps to achieve a balanced mix of housing densities and types in Nundah, assisting to meet the community's needs including the elderly population and emerging trend of smaller sized households.
>
> (iii) The siting of the development, in close proximity to the Toombul major centre, three public transport nodes and regular bus services within 200 metres, is rich in public transport options. It offers a high level of convenience to future residents.
>
> (iv) The proposed development assists in addressing sustainability principles around walkable catchments to major centres and public transport. It will reduce car dependency and traffic congestion by being within an easy walking distance to the Toombul Major Centre, Toombul bus station and Toombul and Nundah train stations and a nearby large park."

[283] I accept that the proposed development delivers on an infill development opportunity and may provide accommodation to people seeking smaller sized households (despite the absence of any evidence of need). However, I do not accept that those matters justify an approval of the proposed development in circumstances where, for the reasons already provided:

(a) I am not satisfied that the proposed development provides infill with a density and form of development intended by City Plan, or that the proposed

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244 Town Planning Joint Expert Report – Exhibit 7 p 42 [11.2].

development achieves an outcome that is sympathetic to the established streetscape, character and amenity of Attewell Street;

(b) I do not accept that the location of the proposed development provides a high level of convenience to future residents in terms of access to public transport; and

(c) I do not accept that the proposed development materially assists in addressing sustainability principles around walkable catchments to major centres and public transport by being within an easy walking distance to the Toombul Major Centre, Toombul bus station and Toombul and Nundah train stations and a nearby large park.

[284] To the extent that the proposed development achieves efficiencies from the provision of infill development, I am not satisfied that it does so while striking an appropriate balance in terms of other planning considerations, such as respect for the existing and planned character and amenity of Attewell Street.

Conclusion

[285] On the whole of the evidence, I find that the onus of showing that the application should be approved has not been discharged. The appeal is accordingly dismissed.