

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Trowbridge & Anor v Noosa Shire Council & Ors* [2019]  
QPEC 54

PARTIES: **PETER SYDNEY JAMES TROWBRIDGE AND CRAIG  
CLIFFORD STRUDWICK**  
(Appellants)

v

**NOOSA SHIRE COUNCIL**  
(Respondent)

AND

**DARRYL VAUGHAN**  
(Third Co-Respondent by Election)

**PETER MCAVOY**  
(Fifth Co-Respondent by Election)

**GEOFFREY BROOKES**  
(Sixth Co-Respondent by Election)

**PHILLP MACK**  
(Seventh Co-Respondent by Election)

**NEILL KELLY**  
(Eighth Co-Respondent by Election)

**ROBYN RYLANDS**  
(Ninth Co-Respondent by Election)

**SUSAN VOLLERT**  
(Tenth Co-Respondent by Election)

FILE NO/S: MD59 of 2017

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING  
COURT: Planning and Environment Court, Maroochydore

DELIVERED ON: 1 November 2019

DELIVERED AT: Brisbane

HEARING DATE: 29 – 31 July 2019 and 1 August 2019

JUDGE: Kefford DCJ

ORDER: **The appeal is dismissed.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where the  
Appellants seek a development approval to use 12 of the 48

houses within the Beach Road Holiday Homes development for visitor accommodation or permanent residential living or a combination of both from time to time – where a condition of the current planning approvals restricts the use of the houses to short-term visitor accommodation – where the Council refused the development application – whether a decision to approve the development application would conflict with the planning scheme – whether there are sufficient grounds to warrant approval despite the conflict

- LEGISLATION: *Planning Act 2016* (Qld), s 311
- Sustainable Planning Act 2009* (Qld), s 314, s 326, s 493, s 495
- CASES: *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16, cited
- Fitzgibbons Hotel Pty Ltd v Logan City Council* [1997] QPELR 208, approved
- Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132, applied
- Lockyer Valley Regional Council v Westlink Pty Ltd* [2011] QCA 358; (2011) 185 LGERA 63, 72 [16]; [2012] QPELR 354, applied
- Lockyer Valley Regional Council v Westlink Pty Ltd* [2012] QCA 370; [2013] QdR 302, applied
- Martin Dillon & Associates v Townsville City Council* (1981) 2 APA 134, cited
- Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46, cited
- Parmac Investments Pty Ltd v Brisbane City Council & Anor* [2018] QPEC 32; [2018] QPELR 1026, cited
- Stappen Pty Ltd v Brisbane City Council & Ors* [2005] QPEC 3; [2005] QPELR 466, approved
- William McEwans Pty Ltd v Brisbane City Council* [1981] QPLR 33, cited
- Woolworths Ltd v Maryborough City Council (No. 2)* [2005] QCA 262; [2006] 1 Qd R 273, applied
- COUNSEL: B D Job QC for the Appellants  
C L Hughes QC and M Batty for the Respondent
- SOLICITORS: P&E Law for the Appellants  
Wakefield Sykes Solicitor for the Respondent  
D Vaughan for the Third and Fifth to Tenth Co-Respondents by Election

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### Introduction

- [1] The Appellants own land at 90 Beach Road, Noosa North Shore. Their land is part of an existing development known as the Beach Road Holiday Homes. That development comprises 48 houses, a central facility area, a manager’s residence, and other infrastructure. Each of the houses in the development is on its own lot and is subject to a community management scheme. A condition in the current planning approvals restricts use of the houses to short-term visitor accommodation only and precludes their use for permanent accommodation.
- [2] The Appellants want the flexibility to use 12 of the 48 houses within the Beach Road Holiday Homes development for visitor accommodation or permanent residential living, or a combination of both uses from time to time. They made a development

application to Noosa Shire Council (“*the Council*”) for the necessary approval to facilitate that outcome. The Council refused the Appellants’ development application.

- [3] The Co-Respondents by Election also own houses in the Beach Road Holiday Homes. They support the Council’s position.
- [4] The issues for me to decide are whether the use for permanent residential accommodation conflicts with the planning for the area and, if so, whether there are sufficient grounds to warrant approval anyway.

### **The decision framework**

- [5] The issues must be decided within the statutory framework in the *Sustainable Planning Act 2009* (Qld).<sup>1</sup>
- [6] The appeal proceeds by way of hearing anew.<sup>2</sup> The Appellants bear the onus of establishing that the appeal should be allowed, and the development application approved.<sup>3</sup>
- [7] The development application is to be assessed against the Noosa Plan (Amendment No 5, which includes amendments up to 16 September 2013). That was the version of the planning scheme that was in place when the Appellants made their development application on 29 June 2016.<sup>4</sup>
- [8] If the development application conflicts with the Noosa Plan, it cannot be approved unless there are sufficient matters of public interest to justify approval despite the conflict.<sup>5</sup>
- [9] Conflict means “*at variance or disagree with*”.<sup>6</sup> Any conflict must be “*plainly identified*” having regard to the planning scheme as a whole.<sup>7</sup>
- [10] The task for the Court involves an evaluative exercise. In determining whether there are grounds sufficient to justify approving the application notwithstanding any conflict, the Court is required to examine the nature and extent of the conflict.<sup>8</sup> To undertake this task, it is necessary to consider each of the conflicts alleged by the Council, as well as those grounds relied on by the Appellants. Exhibit 4 lists the agreed issues for determination.

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<sup>1</sup> The *Sustainable Planning Act 2009* was in force when the Appellants made their development application and filed this appeal. By operation of s 311(2) of the *Planning Act 2016* (Qld), the *Sustainable Planning Act 2009* continues to apply.

<sup>2</sup> *Sustainable Planning Act 2009*, s 495.

<sup>3</sup> *Sustainable Planning Act 2009*, s 493.

<sup>4</sup> *Sustainable Planning Act 2009*, s 314.

<sup>5</sup> *Sustainable Planning Act 2009*, s 326 and the definition of “*grounds*” in Schedule 3.

<sup>6</sup> *Woolworths Ltd v Maryborough City Council (No. 2)* [2005] QCA 262; [2006] 1 Qd R 273, 286 [23]; *Lockyer Valley Regional Council v Westlink Pty Ltd* [2011] QCA 358; (2011) 185 LGERA 63, 72 [16]; [2012] QPELR 354.

<sup>7</sup> *Fitzgibbons Hotel Pty Ltd v Logan City Council* [1997] QPELR 208.

<sup>8</sup> *Lockyer Valley Regional Council v Westlink Pty Ltd* [2012] QCA 370; [2013] Qd R 302, 322-3 [18]-[21].

### **Would approval of the proposed development conflict with the Noosa Plan?**

[11] At the commencement of the hearing, Exhibit 4 identified the conflicts alleged by the Council as follows:

“1. Whether approval of the proposed development is in conflict with the following provisions of the planning scheme because:

- (i) it is an inconsistent use of the land in circumstances where an inconsistent use is strongly inappropriate in the relevant zone;
  - (ii) it is for a use neither supported nor contemplated on the land;
  - (iii) it is contrary to the strategies in the scheme that, in general, visitor accommodation and permanent residential housing be kept separate and that the former be retained to sustain the tourist industry;
- (a) Division 14, Table 10.10 of the Noosa North Shore Locality Plan (p 10-26) because it is an inconsistent use in the zone;
  - (b) Desired Environmental Outcome 3.1.3(i) RESIDENTIAL USES i, vi and vii (p 3-7) in that the land is not convenient to community services, infrastructure with services appropriate for permanent residential accommodation;
  - (c) Desired Environmental Outcome 3.1.3(j) TOURISM (p 3-9) in that the range of visitor accommodation will not be retained, but lost to permanent residential housing;
  - (d) Division 11 of the Noosa North Shore Locality Code, s.10.8.2 OO (b), (e) and (x) (p 10-17) in that the land is not within the Priority Infrastructure area for permanent residential use, but planned for visitor accommodation;
  - (e) The strategy throughout the planning scheme whereby in general, visitor accommodation is kept separate from permanent residential housing, as is evidenced by the provisions in (a) above and the provisions in Attachment “A”; and
  - (f) Strategic Framework, s.1.7.8(c) (p1-5), but only to the extent that it provides context only – see 1.3.2 (p 1-1).”

[12] In their written submissions, the Appellants say some of the provisions with which the Council alleges conflict do not apply, namely the provisions of localities referred to in subparagraph (e) and identified in Attachment A and the provisions of the Strategic Framework referred to in subparagraph (f).

[13] Although the numbering format adopted may have the potential to create doubt, the contents of subparagraphs (e) and (f) indicate that the Council only relies on the provisions therein for context. Mr Hughes QC helpfully confirmed this in his closing submissions. He clarified that the only conflicts relied on by the Council are those identified in subparagraphs (a), (b) and (c) and that the provisions referred to in subparagraphs (d), (e) and (f) are relied on to inform the proper construction of the Noosa Plan and the nature and extent of the conflict. It seems from the Appellants’ opening address that the Appellants appreciated that to be the case.

Would approval of the proposed development conflict with specific outcome O22 for the Visitor Mixed Use Zone in the Noosa North Shore Locality Code?

- [14] During their opening address, the Appellants acknowledged that a decision to approve their development application would conflict with specific outcome O22 of the Noosa North Shore Locality Code. The concession is appropriate. Specific outcome O22 states that a defined use of “*Detached house*” is an inconsistent use and is not to be located in the Visitor Mixed Use Zone. The land the subject of the application is in the Visitor Mixed Use Zone and the Noosa North Shore Locality under the Noosa Plan. The proposed use of the land for permanent accommodation would involve use for a “*Detached house*” as defined.

Would approval of the proposed development conflict with the desired environmental outcome about residential uses?

- [15] Desired environmental outcome 3.1.3 i) RESIDENTIAL USES is a Shire-wide objective. It relates to “*residential uses*”. It states:

“i) RESIDENTIAL USES

Urban and rural settlement for residential use is developed to be consistent with–

i the planned capacity for roads, community services and infrastructure for the particular locality;

...

vi convenience and accessibility to urban services; and

vii suitable separation from incompatible land uses.”

- [16] The Council alleges a decision to approve the proposed development would conflict with this desired environmental outcome because “*the land is not convenient to community services and infrastructure, with services appropriate for permanent residential accommodation*”. It submits that the land does not meet the requirements of desired environmental outcome 3.1.3 i) as the land is outside the priority infrastructure area and does not have convenient accessibility to urban services. The Council’s submissions did not refer to the evidence it relied on. In oral submissions, the Council seemed reluctant to abandon the allegation of conflict – no doubt because of its position that the provision is important to understanding the Council’s planning strategy. That issue was addressed in detail in the Council’s written submissions. I consider it later when dealing with the nature and extent of the conflict.

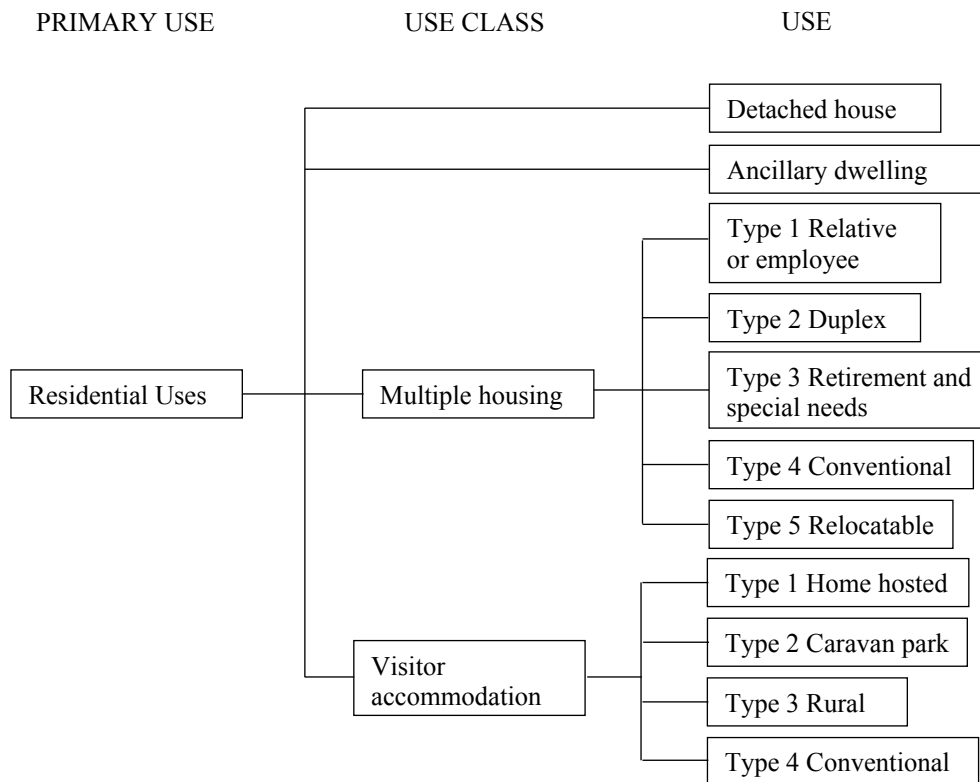
- [17] I do not accept that a decision to approve the proposed development would conflict with subparagraphs i and vi of desired environmental outcome 3.1.3 i) for four reasons.

- [18] First, the houses are already approved for a use that would be a residential use under the Noosa Plan, namely visitor accommodation. They already exist. They are connected to a sewerage treatment plant. Tanks provide water to the houses. Each house is serviced by roads, electricity and contract waste disposal vehicles. As such, the change of use does not require access to infrastructure that is not already available for the houses.

- [19] Second, although the level of service is lower than that afforded to other parts of the local government area, that does not demonstrate that the level of service is inappropriate for a permanent residential use of those existing lots.
- [20] The overall outcomes of the Noosa North Shore Locality Code detail the planned capacity for roads, community services and infrastructure, and the planned level of convenience and accessibility to urban services for the visitors and residents of the Noosa North Shore Locality. Overall outcome f) records a planning intention that the remote setting and undeveloped character of the locality is to be maintained by, amongst other things, providing ferry access, limiting the standard of access across the locality and avoiding the construction of a vehicular bridge across to the Noosa North Shore. Overall outcomes q), r), s) and v) confirm the intended “*limited standard of access*”, by outlining the intention to maintain unsealed access roads other than a sealed road linking the ferry crossing point to the beach. Overall outcome k) states that the demand for increased levels of community services is to be balanced with the environmental sensitivity of the locality. Overall outcome n) confirms that reticulated water supply and sewerage are not intended to be provided to the locality as part of any Council programme. Overall outcome f) also reveals a planning policy that there be no increased demand on existing services. It states that development areas are to be limited to “*existing pattern, with no increase in the number of privately owned lots*”.
- [21] This level of service is different to that provided in other parts of the Noosa local government area. However, those who choose to occupy detached houses in the Noosa North Shore Locality must reasonably expect that they will be afforded the limited extent of infrastructure and services outlined in these overall outcomes in the Noosa North Shore Locality Code.
- [22] Third, despite the lower level of service planned for the locality, the Noosa Plan contemplates some level of permanent residential occupation of the Noosa North Shore. This is apparent from specific outcomes O13 and O34 of the Noosa North Shore Locality Code, which identify that permanent accommodation in the form of detached houses, community residences and multiple housing type 1 are consistent uses and can be located in the Detached Housing Zone and the Rural Settlement Zone in the Noosa North Shore Locality. Further, overall outcomes h) and j) of the Noosa North Shore Locality Code refer to residential development and visitor accommodation in a manner that makes it apparent that both uses are contemplated in the locality.
- [23] Fourth, to the extent that the desired environmental outcome evinces a planning strategy for permanent accommodation to be consistent with the planned capacity for roads, community services and infrastructure for the particular locality, and have convenient accessibility to urban services and suitable separation from incompatible land uses, it requires the same for visitor accommodation. This is apparent from s 2.11 of the Noosa Plan.
- [24] Section 2.11 of the Noosa Plan explains that the planning scheme employs a nesting of land uses so that:
- (a) a primary use includes use classes;
  - (b) a use class in turn is defined and includes uses based on performance and potential level of impact;

- (c) a use in turn is defined; and
- (d) a diagram for each primary use is included to assist explanation of the nesting construction.

[25] The diagram for the residential uses and use classes is as follows:



- [26] The diagram is consistent with the definition of residential uses.
- [27] It is clear from the nesting table and the definition of “*residential uses*” that desired environmental outcome 3.1.3 i) RESIDENTIAL USES applies to both permanent accommodation and visitor accommodation. As such, the proposed change of use from visitor accommodation to permanent accommodation does not demonstrate conflict with this provision.
- [28] For the reasons outlined above, there is no clearly identifiable conflict between a decision to approve the proposed development and subparagraphs i and vi of desired environmental outcome 3.1.3 i) of the Noosa Plan.
- [29] The Council also alleges conflict with subparagraph vii of desired environmental outcome 3.1.3 i) of the Noosa Plan. Exhibit 4 does not identify a proper foundation for the allegation. In Exhibit 4, the Council does not allege an absence of suitable separation from incompatible land uses. The Council’s written submissions say that, if approved, the proposed development would potentially result in conflict between permanent and short-term accommodation land users. Their submissions do not refer to any evidence founding the allegation of potential conflict. There is no apparent case the Appellants need answer with respect to this provision.



Would approval of the proposed development conflict with the desired environmental outcome about tourism?

[30] Desired Environmental Outcome 3.1.3 (j) TOURISM states:

“TOURISM

A tourism industry is development (sic) and sustained which–

- i is based on Noosa’s natural assets including the subtropical climate, the beaches, watercourses and foreshores, and the National Parks and bushland;
- ii fosters an appreciation and understanding of heritage;
- iii focuses on the coastal localities of Noosa Heads, Noosaville, Sunshine Beach and Peregian Beach, but provides complementary rural visitor accommodation;
- iv offers visitors a range of experiences and accommodation types;
- v contributes to the economic wellbeing of Noosa; and
- vi achieves ecological, economic and social sustainability.”

[31] The Council alleges a decision to approve the proposed development would conflict with this desired environmental outcome because “*the range of visitor accommodation will not be retained, but lost to permanent residential housing*”.

[32] The following four features of the evidence tell against a finding of clear conflict with this statement of broad principle that applies to the Shire as a whole.

[33] First, the definition of Detached house does not preclude use for visitor accommodation. It states:

“**Detached house** means the use of premises for a single *dwelling unit* which comprises the whole of the building on one lot. The term includes uses and works incidental to and associated with the detached house. The term includes the temporary use as a *display home* or removal home. The use is not divided further.”

[34] The town planners agree that the proposed development will not prevent the subject houses from being used for either permanent occupation or visitor accommodation or a combination of both. As such, visitor accommodation will not inevitably be “*lost*”. Instead, there will be flexibility that will permit the existing houses to be used for permanent occupation as an alternative to visitor accommodation.

[35] Second, the houses the subject of the application are part of the Beach Road Holiday Homes resort. Even if the application is approved, the Beach Road Holiday Homes will continue to be used for the purpose of a resort containing visitor accommodation. The application does not change the built form of the resort, involve any new works, or change the intensity of the potential use of the site or the potential population density.

[36] Third, the resort currently operates under development permits granted by decision notices dated 23 March 2006, as amended on 15 September 2010, and 19 April 2007, as amended on 28 January 2009 and 15 September 2009. Neither those development permits, nor the Noosa Plan, require the existing houses to be within a letting pool for visitor accommodation. There is no restriction on the owners maintaining the houses for their own private use, provided the occupation is not permanent.

- [37] Originally, condition 6 of the development permits stated:
- “The eco cabins shall be for visitor accommodation only, with no person permitted to occupy the eco cabins for more than 12 weeks in any one year in accordance with the Noosa North Shore Eco-Tourism Portal Development Code.”
- [38] The change made to each development permit deleted the reference to the 12-week stay in any one year. The condition now states:
- “The Eco-Cabins shall be for short term visitor accommodation only, with no person permitted to occupy the Eco-Cabins for the purposes of permanent accommodation in accordance with the Noosa North Shore Eco-Tourism Portal Development Code.”
- [39] In the Joint Report – Economic Need and Impact, Mr Leyshon and Mr Duane, the economists retained by the Appellants and the Council respectively, confirm that not all of the 48 houses that form part of the Beach Road Holiday Homes are available on a regular basis for visitor accommodation. An unknown number of them are used solely as holiday homes by their owners, some are occupied part-time and rented at peak holiday times and others are rented out as visitor accommodation on a regular basis.
- [40] Fourth, the economic experts agree that the 12 houses represent a very small percentage of the visitor accommodation available in the Noosa local government area – about one per cent (excluding houses available at Teewah and on the river of the Noosa North Shore and properties listed on websites such as Airbnb and Stayz). In light of the small contribution the houses make to the available visitor accommodation, Mr Leyshon opines that there will be a lack of perceptible impact on the tourism sector were the proposed development to be approved. I accept that the impact is not sufficient to found a clearly identifiable conflict with this desired environmental outcome.

### **What is the nature and extent of the conflict?**

- [41] The approach of this court in assessing the nature and extent of any conflict is well documented in previous decisions of this court, as well as the Court of Appeal.<sup>9</sup> The conflict should be considered in the broader context of the Noosa Plan to ascertain the nature of any planning policy reflected in the provision and the degree of importance the planning scheme attaches to compliance with that policy.<sup>10</sup>
- [42] The conflict associated with approval of the proposed development is confined. There is no clearly identifiable conflict with specific outcomes that apply generally to the Noosa North Shore Locality or with any outcomes associated with the effects of the proposed use or built form or any other tangible impact. No conflict is identified with any codes that regulate particular uses and works, nor any associated with particular overlays, such as the Biodiversity Overlay.

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<sup>9</sup> *Weightman v Gold Coast City Council & Anor* [2002] QCA 234; [2003] 2 Qd R 441; *Woolworths Limited v Maryborough City Council (No 2)* [2005] QCA 262; [2006] 1 Qd R 273, 286; *Gillion v Scenic Rim Regional Council & Ors* [2013] QPEC 15; [2013] QPELR 711 and *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* [2014] QCA 147; (2014) 201 LGERA 82.

<sup>10</sup> *Stappen Pty Ltd v Brisbane City Council & Ors* [2005] QPEC 3; [2005] QPELR 466, 473 [31].

- [43] There is conflict with a single provision of the Noosa Plan, namely specific outcome O22 for the Visitor Mixed Use Zone in the Noosa North Shore Locality Code. It states:

**O22** The following defined uses and use classes are inconsistent uses and are not located in the Visitor Mixed Use Zone—

- a) All **Agricultural Uses**;
- b) **Commercial business**;
- c) **Entertainment and dining Types 2 or 3**;
- d) **Home-based business Type 3**;
- e) **Industrial business**;
- f) **Retail business**;
- g) **Education**;
- h) **Emergency service**;
- i) **Wellbeing**;
- j) All **Infrastructure Uses**;
- k) **Detached house**;
- l) **Community residence**;
- m) **Ancillary dwelling unit**;
- n) **Multiple housing**; and
- o) **Visitor accommodation Types 1 or 4.**”

(emphasis added)

- [44] The Appellants submit that the conflict with this provision does not actually exist or is reduced to the point of being wholly insignificant. They say specific outcome O22 reflects a planning policy to avoid co-location of incompatible uses and the proposed development does not offend that policy. The Council submits that the nature and extent of conflict is significant. It accepts that specific outcome O22 reflects a planning policy to avoid co-location of incompatible uses but says the provision also reflects a policy to ensure the listed uses do not displace the opportunity for consistent uses. It says the proposed development offends both of those planning policies.

Is the proposed use incompatible with uses generally expected in the zone?

- [45] Noosa Plan contains an administrative definition of “*inconsistent use*”. It states:
- “**inconsistent use** means the use is strongly inappropriate in the relevant zones because it is incompatible with other uses generally expected in that zone”.
- [46] The Appellants contend that a “*Detached house*” use is not incompatible with the uses generally expected in the Visitor Mixed Use Zone in the Noosa North Shore Locality. In effect, the Appellants suggest that the Noosa Plan is not soundly based in so identifying a “*Detached house*”. It says that is apparent from consideration of other provisions of the Noosa Plan.
- [47] The Assessment Table for the Visitor Mixed Use Zone and specific outcome O21 in the Noosa North Shore Locality Code inform what uses are generally expected in the

Visitor Mixed Use Zone in the Noosa North Shore Locality. Specific outcome O21 states:

“**O21** The following defined uses and use classes are consistent uses and are located in the Visitor Mixed Use Zone—

- a) **Entertainment and dining Type 1;**
- b) **Home-based business Type 1 or 2;**
- c) **Open Space;** and
- d) **Visitor accommodation Type 2 or 3.”**

(emphasis added)

- [48] The Assessment Table for the Visitor Mixed Use Zone in the Noosa North Shore Locality is to the same effect.
- [49] Entertainment and dining Type 1 and Home-based business Type 1 and 2 are both categorised by the Noosa Plan as business uses. They are defined as follows:

<b>Entertainment and dining business</b> means the conduct of a business activity, where entertainment, amusement, recreation or meals are afforded. The term includes the following types:	
<b>Type 1 Food and beverages</b>	The use of premises involving the sale of food and beverages for consumption on the premises. The use class includes a function room or restaurant or café with dining facilities for 10 or more people.
<b>Home-based business</b> means the conduct of a business from a <i>dwelling unit</i> where residents operate from the business and the use is secondary to the residential use of the premise. The term includes the following types:	
<b>Type 1 Limited visibility</b>	The business is carried out in or below the <i>dwelling unit</i> or any associated <i>building</i> ; There is limited visible evidence of the business by way of advertising devices, traffic generation and off-street parking provision; The business does not include noise generating activities; Only residents of the dwelling unit operate the business, without employees; and Customers or clients may attend the site.
<b>Type 2 Evident</b>	The business is carried out in or below the <i>dwelling unit</i> or any associated <i>building</i> ; There is visible evidence of the business by way of advertising devices, traffic generation and off-street parking provision; The business does not include noise generating activities; In addition to residents, not more than two employees operate or are engaged in the business; and The use class includes a business similar to <b>Home-based business Type 1</b> , however the scale and potential impact of the business is greater due to the presence of employees.

- [50] Two types of open space uses are encouraged. They are defined as follows:

<b>Open space</b> means any use of private or public land left predominantly undeveloped by buildings or structures. The term includes the following types:	
<b>Type 1 Sport &amp;</b>	The use of premises for sports or <i>active recreation</i> in a

<b>recreation</b>	formal outdoor setting, accessible by the public. The use does not include indoor sports or indoor recreation but may include a clubhouse with storage and amenities provided the use of the clubhouse does not include entertainment or dining uses. The use includes a public swimming pool, sportsground and a tennis court.
<b>Type 2 Camp ground</b>	The use of premises for pitching a tent for the purpose of providing overnight accommodation to the travelling public. It may include toilet and shower facilities for the convenience of visitors. It may include the ancillary use of parking a <i>caravan</i> overnight. It does not include <b>Visitor Accommodation</b> or <b>Multiple Housing Type 5 Relocatable</b> as separately defined.

- [51] The two types of residential uses generally expected in the zone are Visitor accommodation Type 2 and 3. They are defined as follows:

<b>Visitor accommodation</b> means accommodation that is designed and predominantly used for visitors to the Shire and where social, recreational and dining services may be provided for visitors by owners or staff. The term includes the following types:	
<b>Type 2 Caravan park</b>	The use of premises for the parking of <i>caravans</i> for the purpose of providing accommodation. The use includes communal facilities for the exclusive use of occupants of the caravan park. The use includes the use of camping areas and <i>cabins</i> for short-term accommodation where they are <i>ancillary</i> to the provision of caravan sites. The use also includes a <i>caretaker's residence</i> and office, any amenity buildings and any recreation and entertainment facilities that cater exclusively for the occupants of the caravan park.
<b>Type 3 Rural</b>	The use of premises for short-term accommodation where accommodation has direct connection with the rural production, environmental or scenic values of the premises. The use includes a <i>cabin</i> park, <i>guesthouse</i> or retreat located in a rural setting and host farm offering rural experiences.

- [52] The Appellants submit that four of the uses identified as consistent uses contemplate permanent residential occupation, namely Home-based business Type 1 and 2, Visitor Accommodation Type 2 Caravan Park and Visitor Accommodation Type 3 Rural. They say that by designating those uses as consistent in the zone, the drafters of the Noosa Plan plainly acknowledge that there are, and will be, houses within the Visitor Mixed Use Zone that are permanently occupied. The Appellants submit it therefore cannot be the case that detached houses are not “*generally expected in the Zone*”. At first glance, this submission appears attractive. However, it does not withstand closer scrutiny.
- [53] A Home-based business is, by definition, one “*where residents operate the business and the use is secondary to the residential use of the premise*”. Mr Adamson opines it would be reasonably expected a Home-based business would operate from a detached house, rather than from visitor accommodation. Mr Schomburgk’s evidence was to similar effect, but he says it could only apply to a circumstance where there is an existing permanently occupied dwelling house. The Appellants submit that Mr Schomburgk’s approach is flawed given the absence of an express proviso to that

effect. In support, the Appellants point to the definition of Multiple housing Type 1 Relative or employee, which specifically refers to a dwelling unit attached to an “existing” Detached house on the premises.

- [54] Although there cannot be a Home-based business without a residential use, the Noosa Plan does not seek to confine location of a Home-based business to operation from a Detached house only. It may well be typical for a Home-based business to be conducted from a detached house, as Mr Adamson opines, but one could readily anticipate that a resident of a multiple dwelling may also seek to operate a Home-based business. Similarly, a resident manager or caretaker may seek to operate a Home-based business from a premise approved as Visitor accommodation. The definition contemplates that a Home-based business could operate as a secondary use from any residential use premises.
- [55] Further, if there is not an existing lawful residential use (as defined to include the Visitor accommodation uses), a Home-based business could only lawfully be established in the Visitor Mixed Use Zone of the Noosa North Shore Locality upon the grant of a development permit for both a residential use and a Home-based business. This is because the definition does not include the separate residential use of the premises. It includes only the business use component of any such composite use. That is apparent from three features of the Noosa Plan.
- [56] First, the Home-based business use class is a land use that is nested in the business use category, not the residential use category.
- [57] Second, overall outcome 10.8.2 x) of the Noosa North Shore Locality Code provides that in the Visitor Mixed Use Zone, Visitor accommodation with associated Business Uses can serve visitors to the locality provided, amongst other things:
- (a) they are located within the existing allotment developed for Visitor accommodation and Business uses with no further subdivision;
  - (b) they continue to provide the same level of accommodation and business services as existing;
  - (c) the commercial attractions established at the sites are related to recreational experiences offered in the locality.
- [58] When this provision is read in conjunction with specific outcome O21, it is apparent that it is anticipated that a Home-based business could co-locate with Visitor Accommodation.
- [59] Third, if the definition was construed as including both the residential use and the business use, residential uses that are an inconsistent use in a particular zone and locality could be approved as a consistent use by establishing a Home-based business. This would defeat the Council’s deliberate planning strategy to characterise uses as either consistent or inconsistent.
- [60] The Council’s planning strategy to characterise all uses as either consistent or inconsistent uses in each zone and locality is evident when one reads the Noosa Plan as a whole. The Noosa Plan divides the local government area into nine geographic localities. Each locality is divided into zones, which reflect more precisely the preferred use patterns. Within each locality code, the Noosa Plan contains specific

outcomes identifying those uses that are consistent uses and those that are inconsistent uses for each zone within the locality. Although many of the zones appear in a number of different localities, the list of uses identified as consistent or inconsistent varies from zone to zone and locality to locality. For example, the Visitor Mixed Use Zone appears in the Eastern Beach Locality, the Noosa Heads Locality, the Noosa North Shore Locality and the Noosaville Locality. A “*Detached house*” is a consistent use in the Visitor Mixed Use Zone in the Noosaville Locality, but is an inconsistent use in the Visitor Mixed Use Zone in the Eastern Beaches Locality, the Noosa North Shore Locality and the Noosa Heads Locality.

- [61] With respect to Visitor accommodation Type 2 Caravan park, the Appellants seek to derive support from the absence of a reference to a temporal limitation on the accommodation in caravans as compared to that for camping areas and “*cabins*”. The Appellants also note that there is no temporal restriction in the administrative definition of the term “*caravan*”. They say that may be contrasted with the definition of Open space Type 2 Camp ground, which is a use that involves the pitching of a tent for the purpose of providing overnight accommodation to the travelling public and the parking of a caravan overnight. In relation to Visitor Accommodation Type 3 Rural, the Appellants note that the definition includes a “*guest house*” which, by definition, involves “*a single building which is also the home of the host(s)*”.
- [62] Again, there is some attraction to the Appellants’ submission that there is a degree of permanent residential occupation contemplated by these definitions. However, when the “*Type*” definitions are read in the context of the overarching definition of Visitor accommodation, it is apparent that they only contemplate permanent residential occupation to facilitate on-site management of the Visitor accommodation.
- [63] For the reasons provided above, I do not accept the Appellants’ submission that the identification of a Detached house as an inconsistent use in the Visitor Mixed Use Zone in the Noosa North Shore Locality is incorrect.
- [64] The Appellants also contend that there is no reasonable basis to suggest that there is any incompatibility in a first principles sense. They submit a comparison between a Detached house and either a Home-based business or a guest house does not identify any material difference in terms of use, appearance, impacts or demands upon infrastructure and hence no relevant difference from any town planning perspective. They also seek to derive support from the absence of an alleged conflict with a provision of the Noosa Plan that regulates tangible impacts and the absence of a provision that explicitly points to incompatibility, such as overall outcome 11.8.2(y) in the Noosaville Locality Code. It provides that land in the Industry Zone is to be protected for industrial functions “*to the exclusion of incompatible uses including residential uses, community uses, commercial business and most sport and recreation uses and retail business uses*”. Another example provided is specific outcome O91 for the Rural Zone of the Tewantin and Doonan Locality Code. It requires that new dwelling units are to provide for a sufficient buffer area between the premises and existing Industrial business uses on other premises to avoid any potential adverse amenity impacts on residents. In addition, the Appellants submit that there is no demonstrable incompatibility between permanently occupied Detached houses and short term accommodation for visitors. The Appellants say this is demonstrated by the increased popularity of online platforms such as Airbnb and Stayz, which facilitate use of Detached houses for visitor accommodation. Teewah is a localised example of where that occurs. Finally, the Appellants rely on the fact that the

definition of “*Detached house*” does not preclude the use of the houses for either permanent residential living or visitor accommodation, or a combination of both uses. For example, a “*Detached house*” could be used for a use that also meets the definition of “*Visitor accommodation Type 1 Home hosted*”.

- [65] I do not accept that there is no reasonable basis to suggest that there is any incompatibility in a first principles sense. The Appellants’ submissions do not pay proper regard to the following five matters.
- [66] First, as is apparent from desired environmental outcome 3.1.3 j), the Noosa Plan contains a clear planning policy directed at developing and sustaining a tourism industry. It is to offer visitors a range of experiences and accommodation types and contribute to the economic wellbeing of Noosa.
- [67] The Council’s policy about sustaining the tourism industry in Noosa informs the incompatibility of a “*Detached house*” use with the other uses generally expected in the zone. The incompatibility does not necessarily stem from tangible amenity impacts. Rather, it stems from the ability of a Detached house to reduce the extent of available visitor accommodation by displacing it completely. If approved, the availability of the houses for visitors to this location will become less certain, and may end completely. Provisions requiring the employment of buffer areas cannot redress this incompatibility.
- [68] Second, there is a material town planning difference between a Detached house and a Home-based business. One is a residential use that does not necessarily further or sustain Noosa’s tourism economy, whereas the other is a form of business use that is encouraged in the Visitor Mixed Use Zone of the Noosa North Shore Locality for that purpose. As much is apparent from overall outcome 10.8.2 x) of the Noosa North Shore Locality Code as noted in paragraph [57] above.
- [69] Third, a guest house helps sustain the tourism economy of Noosa whereas a Detached house used for permanent occupation will not.
- [70] Fourth, while permanent residential occupation may comfortably coexist with visitor accommodation in areas zoned for Detached Housing, such as at Teewah, there is potential for incompatibility between the uses when they are co-located within a resort. The evidence of Mr Kennedy demonstrates this.
- [71] Mr Kennedy is the part owner and general manager of Stay Noosa Pty Ltd. It is the parent company to four resorts in the Noosa Region, namely Noosa Blue Resort, Noosa Lakes Resort, Culgoa Point Beach Resort and Beach Road Holiday Homes. He has 16 years’ experience working in resorts. Throughout his time in the industry, he has worked in resorts that have a mixture of holiday letting and permanent letting and live in owners. Over his career, Mr Kennedy has observed the following difficulties with the co-location of permanent residential occupation and visitor accommodation within a single resort:
- “(a) Conflicts with different use expectations. Owners tend to want to enjoy quiet and peaceful surrounds. They often retire early in the evenings and some get up early to go to work. Holiday makers often families want to frolic in the pool, play and make noise. They often want to get up late because they are “on holiday” and go to bed late.



- (b) Loss of holiday accommodation. Permanents take away beds from potential paying guests that would also be spending money with other operators in the region. This filters a lot of money out of the local economy. If the trend was to continue, less accommodation would see higher tariffs due to demand. This in turn could mean tourist spending less money in the retail and food and beverage sectors.
- (c) Live in's and permanents<sup>11</sup> take over resorts and erode the ambiance all resorts should have. This takes away from the guest experience and in turn can decrease return cliental and cause a deterioration in the resorts reputation.
- (d) Live in's and permanents can cause friction with paying guests. Some feel as though they own the resort and that holiday guests inconvenience them. This has been a very real issue at most resorts ...
- (e) Line in's and permanents are known to ignore body corporate bylaws such as the appearance of the lots, noise, carparking, authority of the onsite management and use of common areas. This in turn damages not only the aesthetics and feel of the property but guests can follow suit if they feel that is how things are.
- (f) Sales. Stay Noosa has a Real Estate sales agency. Some investors can be turned away from purchasing in a resort if they see it trending towards permanents.
- (g) Deterioration of units. Permanents living in a unit all year round will significantly wear down a unit more rapidly than a holiday unit that is maintained and cleaned at least twice a week.
- (h) Similarly as with having outside agents manage units, the control onsite management have over situations such as anti-social behaviour, renovation noise, carparking, smoking etc is reduced.
- (i) The growing number of resorts with increasing numbers of permanents and live in's poses a strong risk of losing quality onsite managers and Management Rights ownership due to the lack of income in management rights through loss of holiday units."

[72] The prospect of incompatibility is reduced on the subject site due to the separation between the houses, but it still exists.

[73] Fifth, a Detached house could be used for a use similar to that which meets the definition of Visitor accommodation Type 1 Home hosted, namely:

"The use of premises for short term accommodation hosted by the resident family within a *detached house* where there is no more than 6 guests accommodated in no more than three rooms. At least one bedroom within the detached house is excluded from use by guests. Meals may be provided by the hosts, as guest cooking facilities are not available. The use includes bed and breakfast."

[74] However, a decision to approve the proposed Detached house use of the 12 houses does not guarantee use for that type of Visitor accommodation or any other form of visitor accommodation. It would not preclude use of the 12 houses entirely for permanent residential occupation. As such, if the proposed development is approved, the availability of the houses for visitors to this location will become less certain, and may end completely.

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<sup>11</sup> Mr Kennedy explained during cross-examination that he describes owners as "*live in's*" and tenants as "*permanents*".

- [75] For the reasons provided above, I am not persuaded that the conflict with specific outcome O22 of the Noosa North Shore Locality Code is wholly insignificant. A decision to approve the proposed development is at variance with a clearly expressed planning policy.

Does specific outcome O22 reflect a planning strategy to avoid displacement of consistent uses?

- [76] As I have noted in paragraph [44] above, the Council submits that specific outcome O22 reflects a planning policy to avoid co-location of incompatible uses and to ensure the listed uses do not displace the opportunity for consistent uses.
- [77] I do not accept, as contended by the Appellants, that the underlying planning rationale for O22 is limited to a desire to ensure that incompatible land uses do not co-locate. Specific outcome O22 does not only say that the use defined as a “*Detached house*” is an “*inconsistent use*”<sup>12</sup> in the Visitor Mixed Use Zone for the Noosa North Shore Locality. It also says that such a use is not to locate in the Zone. The planning purpose for the additional words is apparent when specific outcome O22 is considered in its broader context. The additional requirement that the identified uses “*are not located*” in the Zone reflects a planning policy to avoid the establishment of those uses in order to preserve the opportunity for establishment of uses that are encouraged (as consistent) in the Zone.
- [78] As is stipulated in s 10.7 of the Noosa Plan, development will comply with the Noosa North Shore Locality Code if it fulfils the specific outcomes for the locality in Division 12; and is a consistent use and fulfils the specific outcomes for the relevant zones (Divisions 13 to 18). This provision supports a planning policy directed at discouraging incompatible uses and ensuring those uses that establish in the locality are consistent uses.
- [79] That dual planning policy is supported by consideration of the structure of the Noosa North Shore Locality Code. The overall outcomes record the purpose of the Code.<sup>13</sup> Overall outcomes 10.8.2 w), x), y), z), aa) and bb) relate to each of the zones in the locality. They specify the outcomes sought for that zone, including by identifying the nature of the uses that are to be established in the zone. Specific outcomes O13, O14, O21, O22, O28, O29, O34, O35, O39, O40, O43 and O44 facilitate achievement of that purpose by stipulating those uses that are “*consistent uses and are located*”<sup>14</sup> in the applicable zone and by, correspondingly, stipulating the uses that are “*inconsistent uses and are not located*” in the applicable zone. A comparison of the overall outcome for each zone with the specific outcomes for the zone confirm the deliberate nature of the identification of uses as either consistent or inconsistent and the deliberate articulation of those uses that are to be located in the zone, as compared to those that are not.<sup>15</sup> The deliberate nature of this planning decision is also evident from the matters referred to in paragraph [60] above.
- [80] A similar approach to the delineation between encouraged uses and those sought to be excluded is adopted in other localities throughout the local government area. In

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<sup>12</sup> That is, one defined as a use that is strongly inappropriate in the relevant zone because it is incompatible with other uses generally expected in the zone.

<sup>13</sup> See s 10.8.1 of the Noosa Plan.

<sup>14</sup> Emphasis added.

<sup>15</sup> See also the matter

some localities, the Noosa Plan adopts an even greater level of particularity. It identifies particular sites for protection for a particular use. For example, overall outcome 9.2.8 m) of the Noosa Heads Locality Code indicates that substantial key sites are to be protected for resort development. Specific outcomes O40(k), O41 and O55 of the Noosa Heads Locality Code implement that strategy by requiring the maintenance of land identified by real lot descriptions for a particular form of Visitor accommodation and associated business uses. Similar site-specific provisions appear in the Eastern Beaches Locality Code,<sup>16</sup> the Noosaville Locality Code,<sup>17</sup> and the Tewantin and Doonan Locality Code.<sup>18</sup>

- [81] In this case, the proposed development is discordant with the planning policy directed at ensuring the land the subject of the application is used for an identified consistent use. The absence of a provision exclusively reserving the Beach Road Holiday Homes resort for visitor accommodation of a particular type does not detract from the serious conflict occasioned by approving use of part of the resort for a use that is not a consistent use. Rather, it reflects a planning strategy to permit a greater degree of flexibility in that the land within that resort can be used for any of the consistent uses, not just one particular consistent use.

#### Conclusion regarding conflict

- [82] Here, not only is the proposed development in conflict with specific outcome O22, it does not comply with the Noosa North Shore Locality Code as it is not a consistent use. While there is no directly engaged conflict with s 10.8.2 x), the proposed use is discordant with that overall outcome sought for the Visitor Mixed Use Zone in the Noosa North Shore Locality and, as such, with the purpose of the code. Overall outcome 10.8.2 x) is directed at encouraging use of the zone for Visitor accommodation and associated business uses to serve visitors to the locality. The importance of that outcome to the local government area overall is highlighted by desired environmental outcome 3.1.3 j) referred to in paragraph [66] above.

#### **Are there sufficient grounds to warrant approval despite the conflict?**

- [83] As I have already noted in paragraph [8] above, the decision about the development application must not conflict with the Noosa Plan unless there are sufficient grounds to justify the decision despite the conflict.<sup>19</sup>
- [84] Grounds are matters of public interest.<sup>20</sup> The range of matters that may potentially be included within the scope of “*matters of public interest*” is very wide.<sup>21</sup> They do not include the personal circumstances of an applicant, owner, or interested party.<sup>22</sup>

<sup>16</sup> See specific outcome O24 for the Detached Housing Zone, which requires Lot 163 be used as Visitor Accommodation (Type 4) exclusively for a visitor hostel and specific outcomes O29(k) and O31 to similar effect in the Semi-Attached Housing Zone.

<sup>17</sup> See overall outcome 11.8.2 g) which stipulates that “*substantial sites are protected for resort developments*” and specific outcome O45 for the Attached Housing Zone.

<sup>18</sup> See overall outcome 12.8.2 g) which stipulates that “*Visitor accommodation is focused on the locality’s caravan parks and small-scale accommodation in rural settings, as well as the Royal Mail Hotel in central Tewantin and Australis Lakes Resort on Lake Doonella*” and specific outcome O38 for the Attached Housing Zone, which gives effect to the strategy about the Australis Lakes Resort. *Sustainable Planning Act 2009*, s 326.

<sup>19</sup> *Sustainable Planning Act 2009*, s 6 and definition of “*grounds*” in Schedule 3.

<sup>21</sup> *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132, [37] citing *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; (2012) 246 CLR 379, 400-1 [42].

<sup>22</sup> *Sustainable Planning Act 2009*, s 6 and definition of “*grounds*” in Schedule 3.

- [85] Whether there are sufficient matters of public interest that warrant approval of the proposed development involves a discretionary value judgement. It is to be made by reference to factual matters confined only by the subject matter, the scope, and the purpose of the *Sustainable Planning Act 2009*.<sup>23</sup> The decision should not be made capriciously. It should assume that it is in the public interest to maintain the terms of the Noosa Plan unless the contrary is demonstrated.<sup>24</sup> After all, a planning scheme seeks to strike the balance between ecological protection, economic development, and the maintenance of the cultural, economic, physical and social wellbeing of people and communities in a manner that expresses the will of the community.<sup>25</sup>
- [86] A Ministerial guideline published under s 759 of the *Sustainable Planning Act 2009* provides a list of matters that may be taken into account. They are:
- (a) the relevant instrument is out of date due to its age or changing circumstances in the area and the proposal reflects or responds to these changed circumstances;
  - (b) the relevant instrument is incorrect in terms of its substance or underlying assumptions for the circumstances of the particular proposal. For example, a planning scheme drafted on low growth or no growth assumptions is now experiencing unforeseen development pressure as a result of a new major economic development project in the area, or constraint mapping in the planning scheme does not reflect the physical site circumstances;
  - (c) the type of development proposed is not adequately addressed by the relevant instrument;
  - (d) the relevant instrument does not anticipate specific or particular development. For example, the type of development proposed may be of international, national, state or regional significance and may not have been anticipated by the relevant instrument;
  - (e) there is an exceptional or urgent need for the proposal to occur.
- [87] The matters listed are not mandatory. They are not exhaustive. However, the listed matters reflect three factors that inform why these matters are, by their nature, capable of overriding the intent of a planning scheme. First, it is not possible for a local government, as drafter of a planning scheme, to forecast the will of the community, in land use terms, with scientific precision.<sup>26</sup> Second, planning schemes are often drafted without the benefit of site-specific studies detailing the attributes of each separate allotment in the local government area.<sup>27</sup> Third, the needs of a community are not static and immutable.<sup>28</sup>

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<sup>23</sup> *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132, [37] citing *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216.

<sup>24</sup> *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132, [42] citing *Bell v Brisbane City Council* [2018] QCA 84, 70.

<sup>25</sup> *William McEwans Pty Ltd v Brisbane City Council* [1981] QPLR 33, 35.

<sup>26</sup> *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16, [59].

<sup>27</sup> *Parmac Investments Pty Ltd v Brisbane City Council & Anor* [2018] QPEC 32; [2018] QPELR 1026, 1033 [26]; *Murphy v Moreton Bay Regional Council & Anor*; *Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46, [20].

<sup>28</sup> *Martin Dillon & Associates v Townsville City Council* (1981) 2 APA 134, 139.

[88] The Appellants point to eight factors that they submit warrant approval of the proposed development notwithstanding the conflict. They are:

- (a) although the approval sought is identified as an inconsistent use in the Visitor Mixed Use Zone in the Noosa North Shore Locality:
  - (i) residential development and permanently occupied dwellings are contemplated both in the relevant Visitor Mixed Use Zone and elsewhere in the Noosa North Shore Locality;
  - (ii) the proposed use of the existing houses would not involve incompatibility with the existing development on the subject land or with other uses generally expected in the Visitor Mixed Use Zone;
  - (iii) the subject land has not been developed as intended by previous approvals and is not used for the purpose for which it was originally approved;
  - (iv) the existing use of the subject houses (as Visitor accommodation Type 4 Conventional) is an inconsistent use in the zone;
- (b) the approval sought relates to only 12 of the 48 existing houses, and will result in the provision of housing choice in the form of an option for those houses to be used for permanent occupation or visitor accommodation. It does not involve the conversion of those houses from Visitor accommodation to detached dwellings for permanent occupation;
- (c) the Beach Road Holiday Homes development has low occupancy rates and is not well located for higher-end Visitor accommodation of the type offered by the existing houses. This is a consequence of its lack of proximity to Noosa commercial centres, facilities such as restaurants or coffee shops, an absence of transport facilities, and cost and time restrictions associated with the vehicular ferry;
- (d) the houses the subject of the development application are not all let for short-term accommodation and those that are so let are underutilised. Any reduction in supply of short-term accommodation as a consequence of the approval sought is likely to be met by, and benefit, those houses which remain available for short-term accommodation by increasing occupancy levels of those dwellings;
- (e) the approval sought would facilitate the increased use of the houses on the subject land resulting in a more efficient use of existing infrastructure;
- (f) the approval sought involves the use of existing development and would not result in any perceptible impacts upon amenity;
- (g) the approval sought would not result in any perceptible impacts upon the tourism industry of the Noosa North Shore or the local government area; and
- (h) the potential addition of permanent residents in the subject houses would have a positive effect on local spending.

[89] These grounds are considered below.

The “inconsistent” use

- [90] The Appellants accept that planning schemes, and compliance with them, represent the public interest. They also accept that it is a matter of public interest that a proposed use or activity is a type of development that is contemplated on the land, and in the surrounding locality, by the planning scheme, or is compatible with such development. However, they submit that it is apparent that residential development and permanently occupied dwellings are contemplated in the relevant Visitor Mixed Use Zone and on other zoned land nearby in the Noosa North Shore Locality. In the Zone, they say it includes the Home-based business use and the rural “*guesthouse*”. Permanent residential occupation is also a consistent use in both the Detached Housing Zone and the Rural Settlement Zone. There is also the “*blending*” of the concepts of permanent residential occupation and visitor occupation in some of the overall outcomes for the Locality in that they set out objectives applicable to both forms of development. The Appellants further submit that in the absence of any conflict with the Noosa Plan in respect of any tangible impact, or indication of incompatibility, the proposed use of the existing dwellings would not involve incompatibility with existing development on the subject land, nor with other uses generally expected (as consistent uses) in the Visitor Mixed Zone of this Locality. As such, they say the Noosa Plan’s identification of this use in this Zone is incorrect.
- [91] I do not accept these submissions for the reasons explained in paragraphs [45] to [82] above.

The land has not been developed as intended and the existing use is identified as inconsistent

- [92] The Appellants submit that the existing use of the land is a relevant consideration. I accept that it is relevant to an assessment of a development application.<sup>29</sup> I have already had regard to it in the assessment in paragraph [18] above.
- [93] The Appellants make two additional observations about the existing use, which they say informs the court’s discretion to approve the proposed development despite conflict.
- [94] First, the existing development does not conform to the uses planned for the land under the Noosa Plan. The Appellants submit that, applying the provisions of the Noosa Plan, the existing use would be properly characterised as Visitor accommodation Type 4 Conventional and, as such, would be an inconsistent use in the Visitor Mixed Use Zone in the Noosa North Shore Locality.
- [95] Visitor accommodation Type 4 Conventional is defined as:
- “Two or more *dwelling units* or *accommodation units*, for the purpose of providing short-term visitor accommodation. The use may include common recreation or dining facilities and includes an ancillary dwelling unit for onsite manager. The use includes a *guesthouse*, *visitor hostel*, *motel*, resort and serviced rooms, but does not include **Visitor accommodation Type 1 Home hosted** or **Type 3 Rural** as separately defined.”
- [96] The Appellants dispute the Council’s position that the existing use would be characterised as a consistent use under the Noosa Plan, being Visitor accommodation

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<sup>29</sup> *Sustainable Planning Act 2009*, s 314(3).

Type 3 Rural. The Appellants say that although the Beach Road Holiday Homes are in a bushland setting, they do not have a “*direct connection*” with the environmental or scenic values of the premises.

- [97] I accept that the existing use could be characterised under the Noosa Plan as Visitor accommodation Type 4 Conventional.
- [98] Second, although the current use is authorised by the development approvals referred to in paragraph [36] above, much of what was intended for the land and the locality, as identified in the Noosa North Shore Eco-Tourism Portal Development Code, has not been developed. As such, the overarching objective or intent for the approved development has not been realised. This is not disputed.
- [99] The Appellants say that it follows from these two factors that maintenance of the status quo would involve maintaining an existing inconsistent (or non-conforming) use that did not deliver the anticipated planning benefits. They contend that the prospect of approval of an inconsistent use must be greater where it would replace another inconsistent use rather than a consistent use, particularly where it does not give rise to orthodox planning considerations associated with impacts on amenity and the like. No authority was cited for the proposition.
- [100] In *Cross & Anor v Redcliffe City Council*,<sup>30</sup> His Honour Judge Quirk considered the prospect of replacement of an existing non-conforming use with another non-conforming use. He observed at 109:

“As the Respondent contends (and as has been held on many occasions by courts exercising planning jurisdiction e.g. this court in *Fowler v Mackay City Council* 36 LGRA 376 *Lamb v Maryborough City Council* (1980) QPLR 187) the general planning theory with respect to nonconforming uses tends towards their being gradually phased out rather than perpetuated. It therefore follows that good town planning would not favour the replacement of one non-conforming use by another which might be expected to endure for a substantially longer time than would the use whose place it took. Thus to replace a nonconforming use, the viability of which is plainly exhausted, with another which is likely to prosper for an indefinite period, would lead to “entrenchment” of the kind of use which, by its very nature, conflicts with the expressed planning strategy of the scheme. Even if the latter use could be demonstrated to be less injurious to the amenity of the locality, such a substitution could well amount to bad town planning.

There could, of course, be cases where, on balance, a change from one existing nonconforming use to another would be of benefit in a planning context. Clause 11 enables such a substitution, which would otherwise be unlawful, provided it can be demonstrated that the substituted use will be less injurious to the amenity of the locality in question.”

- [101] More recently, in *Zanow v Ipswich City Council & Anor*,<sup>31</sup> His Honour Judge Robin QC observed:

“These “old” cases are instructive in demonstrating that an established and confirmed planning intent pursued by the planning authority is not lightly overridden, even where a proposal appears to have no adverse effects and may exhibit some positive grounds for assessing it as a good idea that might represent a better use of the subject site. ...”

<sup>30</sup> [1984] QPLR 106. See also *KC Drew Pty Ltd v Brisbane City Council* [1990] QPLR 232, 236.

<sup>31</sup> [2010] QPEC 50; [2010] QPELR 721, 747 [45].

- [102] While there was never an inflexible rule that a lawful non-conforming use could not be entrenched by its substitution with another non-conforming use, an evident planning strategy in a relevant planning instrument should not lightly be put aside.<sup>32</sup>
- [103] I am not persuaded that the proposed replacement of an inconsistent form of Visitor accommodation with use for a Detached house is a matter that is supportive of approval of the proposed development in this case for two reasons. First, the Noosa Plan does not contain a clause that indicates an accepted planning strategy to permit the replacement of an existing inconsistent use with another. Second, having regard to the evidence of Mr Kennedy about the difficulties occasioned when residents permanently occupy resorts, and the focus on provision of visitor accommodation in the Visitor Mixed Use Zone as evident from overall outcome 10.8.2 x), I am not persuaded that the substituted use will be a better planning outcome than maintaining the status quo.

#### Provision of housing choice

- [104] The approval, which relates to only 12 of the 48 existing houses, will result in the provision of housing choice in the form of an option for those dwellings to be used for either permanent accommodation or visitor accommodation.
- [105] Mr Adamson considered that it was a matter of public interest that the proposed development would provide for more housing choice on the Noosa North Shore, in circumstances where the existing occupancy of the houses is low. Mr Schomburgk accepted that the approval would provide more housing choice.
- [106] I accept that the provision of housing choice is a matter of public interest. However, it is of limited weight in this case for two reasons.
- [107] First, there is no evidence of a latent unsatisfied demand for permanent residential living in this location or a need for greater housing choice in the area. Mr Leyshon acknowledged that permanent dwellings are able to be purchased on the Noosa North Shore.
- [108] Second, to the extent that the houses are used for permanent residential accommodation, their potential use by visitors will be displaced and the choice available to visitors will be diminished. As Mr Leyshon accepted during cross-examination, the Beach Road Holiday Homes resort is the highest quality product on the Noosa North Shore. The other accommodation types are of an entirely different standard, catering to the budget end of the market. Approval of the proposed development has the potential to reduce the availability of this product by up to 25 per cent. The potential displacement of visitor accommodation is contrary to the Council's clear planning strategy in this Zone, as evidenced by overall outcome 10.8.2 x) and specific outcomes O21 and O22 of the Noosa North Shore Locality Code. Further, the displacement of the opportunity for visitor accommodation and the diminution in choice available to visitors does not accord with the planning strategy to develop and sustain a tourism industry that offers visitors a range of experiences and accommodation types.<sup>33</sup>

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<sup>32</sup> *T Wrafter & Sons Pty Ltd v Brisbane City Council* [1999] QPELR 440, 454; *Hymix Asustralia Pty Ltd v Brisbane City Council* [2014] QPEC 35, [2014] QPELR 645, 654 [22].

<sup>33</sup> See desired environmental outcome 3.1.3 j).



### Underutilisation of the existing houses

- [109] Over the last few years, the occupancy rates for the Beach Road Holiday Homes development have been low. During the period 2012 to 2017, there were approximately 22 of the 48 houses in the rental pool. The occupancy rate of those houses in the rental pool was as follows:
- (a) 2012 – 14 per cent;
  - (b) 2013 – 19 per cent;
  - (c) 2014 – 24 per cent;
  - (d) 2015 – 27 per cent;
  - (e) 2016 – 30 per cent;
  - (f) 2017 – 30 per cent (year to 11 December 2017).
- [110] Those occupancy rates are low in comparison to the occupancy rates experienced during the period September 2013 to June 2015 at tourist facilities more generally throughout Queensland of between 55 per cent and 60 per cent. They are also lower than occupancy rates on the Sunshine Coast, which were 61.8 per cent at Noosa Heads, 56.2 per cent at Noosaville and 55.5 per cent on the Sunshine Coast as a total. In addition, the Beach Road Holiday Homes resort has not experienced the same degree of increase in overnight visitor activity that has been experienced in the balance of the Noosa local government area since 2014. Between 2013 and 2015, the occupancy rate of the Beach Road Holiday Homes resort was less than half the occupancy rate of other tourism areas in the Noosa local government area, with the exception of the Peregian area, and of the Sunshine Coast in general.
- [111] As was accepted by Mr Duane, the facilities available at the Beach Road Holiday Homes resort are somewhat limited in comparison to those available to guests at most resorts. The wider range of facilities that were originally intended to be provided on the subject land and in the locality, such a jetty, trails, and commercial facilities for visitors, do not exist.
- [112] The Beach Road Holiday Homes also lacks proximity to Noosa commercial centres including Noosa Heads, Noosaville and Tewantin. There is an associated lack of proximity to facilities such as restaurants or coffee shops. There is an absence of transport facilities and greater cost and time restrictions on convenient accessibility to key facilities and commercial attractions associated with the vehicular ferry providing the only connection to them.
- [113] As such, while the economists agree that tourism numbers are projected to continue to increase in Noosa, I accept that the Beach Road Holiday Homes may experience a slower rate of growth for occupancy attributable to that general growth than might other resorts at Noosa.
- [114] In the Joint Report – Town Planning, Mr Schomburgk opines that “*greater utilisation of all of the houses and thus the existing infrastructure is always a desirable town planning outcome*”. Mr Duane also accepts that as a society with a scarcity of assets, it is beneficial to make as much use of infrastructure as possible.

- [115] During cross-examination, Mr Duane accepted that there would be economic benefit if the subject 12 houses were permanently occupied and if those houses left in the Beach Road Holiday Homes resort visitor accommodation rental pool enjoyed a corresponding increase in their rental income and occupancy rates. Increased occupancy of the Beach Road Holiday Homes has the potential for increased custom for the general store. That would involve some benefit to the store. While Mr Duane accepted that an increased occupancy rate and rental income was likely for those houses left in the Beach Road Holiday Homes resort visitor accommodation rental pool, he indicated that the realisation of the potential economic benefits from greater occupancy assumes the introduction of permanent accommodation does not detrimentally affect the attractiveness of the resort.
- [116] Having regard to the evidence of Mr Kennedy referred to in paragraph [71] above, I am not persuaded that approval of the proposed development will produce increased occupancy rates or other economic benefit for the balance of the Beach Road Holiday Homes.
- [117] In *Viridian Noosa Pty Ltd (Receivers and Managers Appointed) v Sunshine Coast Regional Council*,<sup>34</sup> His Honour Judge Robin QC observed that, in some circumstances, underutilisation of visitor accommodation may be a matter of public interest because of the community's abhorrence of waste. In particular, his Honour said:
- “It is possible that grounds might exist, as Mr Shomburgk, the Council's planner, conceded, had there been evidence that the council's and planning scheme's vision for this site is not being realised and is incapable of being realised. Mr Shomburgk indicated and I agree that, if evidence had been forthcoming, that this prime accommodation, which would plainly be highly salubrious for permanent residential use, was simply going to waste because the tourism market was such that it couldn't be used then, the community's abhorrence of such waste would mean that a ground, in terms of public interest in avoiding it, might be established as opposed to matters dependent on the personal circumstances of an applicant owner or interested party.”
- [118] In this case, the evidence does not demonstrate that the tourism market will not utilise the subject 12 houses. While historical occupancy rates for the Beach Road Holiday Homes are low, they have improved in more recent times.
- [119] Prior to acquiring the management rights for the Beach Road Holiday Homes, Mr Kennedy observed that the resort was not being properly marketed. He described the previous marketing as “*pretty much non-existent*”. In the 15 months since Mr Kennedy's company took over the management of the Beach Road Holiday Homes, for the 25 houses in the letting pool, occupancy has increased from 22 per cent to “*the mid-40s*”. This was achieved by using strong marketing strategies. Mr Kennedy experienced the same issue of low occupancy rates from poor marketing when he took over the Noosa Blue Resort. That resort now has occupancy rates around 80 per cent.
- [120] Having regard to the matters referred to above, I am not persuaded that this ground is of sufficient substance to warrant approval of the proposed development.

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<sup>34</sup> [2013] QPEC 54, [40].

### Increased use of infrastructure

- [121] The subject houses and the infrastructure that services them already exists. Increased occupation of the Beach Road Holiday Homes, being both those the subject 12 houses and the balance 36, would represent a more efficient use of existing infrastructure.
- [122] Mr Adamson opines that higher occupancy would make for more efficient use of existing infrastructure. He considers this to be a desirable town planning outcome. He considers that it is a matter of public interest to allow for better use of existing infrastructure and to make the Beach Road Holiday Homes more efficient. As I have already noted, Mr Schomburgk also opines that “*greater utilisation of all of the houses and thus the existing infrastructure is always a desirable town planning outcome*”.
- [123] Mr Leyshon opines that permanent occupants would make year-round or day-round use of facilities. This would make significant use of the investment that has been put into the actual houses themselves.
- [124] During cross-examination, Mr Duane also confirmed that it was desirable that infrastructure, such as sewerage treatment infrastructure and the ferry service, be used efficiently rather than underutilised. Generally, the efficient use of infrastructure, rather than under use of it, is in the public benefit.
- [125] The prospect of increased use of infrastructure is dependent on increased occupation of the Beach Road Holiday Homes. As I have already noted above, having regard to the evidence of Mr Kennedy, I have reservations about whether that will be achieved by the introduction of permanent occupation.
- [126] Further, even assuming approval of the proposed development would increase occupancy rates in the short term, I am not persuaded that the benefit associated with the more efficient use of infrastructure is sufficient to warrant approving permanent residential use as part of the Beach Road Holiday Homes.

### No impact upon amenity

- [127] The absence of detrimental impact on amenity is a matter of public interest to be weighed with other grounds in considering their sufficiency.<sup>35</sup>
- [128] Here, there is no allegation of non-compliance with the Noosa Plan because of amenity or character impacts. The Appellants further assert that a decision to approve the proposed development would not affect amenity. They say implementation of the approval would be indiscernible.
- [129] Mr Adamson considers that there is marginal difference between use of the houses on a permanent or semi-permanent basis as proposed and their current use. He says there is likely to be little (if any) difference in amenity impacts caused by traffic or noise, nor any perceived amenity conflicts for a mix of residential uses.
- [130] In terms of the potential for conflict internally to the resort, Mr Adamson notes that many of the owners currently reside in the premises for extended periods for holiday

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<sup>35</sup> *Lockyer Valley Regional Council v Westlink Pty Ltd* [2012] QCA 370; [2013] 2 Qd R 302, 323-4 [25].

purposes. He says the existing houses are well separated from one another, and the potential for conflict is minor. Absent the proposed development, there will remain the ability for houses in the Beach Road Holiday Homes to be used either by owners or by short-term renters. As such, Mr Adamson says any potential for internal conflict already exists. Mr Kennedy confirmed that there can be conflicts between different types of visitors.

- [131] Mr Schomburgk's reference to conflict between permanent residents and visitors were faint. He identifies the uses as being potentially incompatible, and accepts that those conflicts may or may not arise, depending on the attitudes of visitors and permanent residents.
- [132] Mr Lane is an owner of a home in the Beach Road Holiday Homes. He explains that, in his experience, the combination of visitors and house owners works very well. He describes the interaction as enjoyable. He says visitors appreciate the local knowledge of owners.
- [133] I accept the evidence of Mr Adamson that the potential for conflict is ameliorated in large measure by the degree of separation between the existing houses. I also accept the evidence of Mr Lane regarding his interactions with visitors. However, I do not accept that approval of the proposed development will not increase the potential for internal conflict. I am not persuaded that there will be no impact on amenity. Those owners that currently reside in the premises for extended periods do so for holiday purposes. If the proposed development is approved, the houses could be used in the future for permanent occupation by residents who are subject to the daily pressure of work commitments and whose tolerance of holiday makers may be less than that of owners on holidays. I accept the evidence of Mr Kennedy outlined in paragraph [71] above about the impact that permanent occupation can have on the ambiance of a resort and its reputation. I also accept his oral evidence that it is more difficult for resort managers to manage issues associated with breaches of by-laws with permanent residents than it is with visitors.

#### Imperceptible impact upon the tourism sector

- [134] The Appellants submit that just as an absence of impact upon amenity is a matter of public interest, a lack of any tangible impact upon the tourism sector is a matter of public interest.
- [135] The current approvals, and the Noosa Plan, do not require the existing houses to be within a letting pool for visitor accommodation. If they wish, the owners of the houses may retain the houses for their own private holiday use, or for such use by their family and friends. Their occupation cannot be permanent.
- [136] Mr Leyshon opines that the 12 houses would represent about one per cent, at most, of the estimated stock of tourist accommodation in the Noosa local government area in October 2016. Mr Duane's evidence accords with this. This estimated supply of accommodation excludes houses available at Teewah and on the river on the Noosa North Shore. It also excludes those listed online for rental.
- [137] The Census undertaken in August 2016 identified a high number of unoccupied dwellings (71.7 per cent) on the Noosa North Shore. The experts agree this reflects the degree to which owners use their houses as second homes or holiday accommodation. As such, other houses at the Noosa North Shore contribute to the

supply of homes available for visitor accommodation. Mr Duane acknowledges that having more than 70 per cent of the houses unoccupied represents a very low rate of occupation, but also notes that the rate of occupation has to be considered in the context that the Census is taken at a time of year where visitor occupation is at its lowest.

- [138] Since 2016, there has been considerable growth in the use of online platforms such as Airbnb and Stayz. Those platforms have enabled Noosa residents to make accommodation of various forms, ranging from single rooms to whole apartments or houses, available for rent. A search by Mr Leyshon of Airbnb in November 2018 indicated that there were over 300 properties listed on the website for casual rental in the suburb of Noosa Heads alone. This indicates that the contribution to supply agreed by the experts is conservative.
- [139] During cross-examination, Mr Duane acknowledged that assuming all 12 houses were used for permanent residents, for most of the year the hypothetical visitor who wanted to stay at the Beach Road Holiday Homes would still be able to be accommodated. It would only be for about four weeks each year, during the peak periods after Christmas and at Easter, that “*they might not be able to*”.
- [140] Mr Leyshon opines that the Beach Road Holiday Homes do not operate as a resort as it was originally intended, principally because the resort does not have the facilities and services usually provided in resorts. He says the Beach Road Holiday Homes is in the wrong location having regard to its market positioning. He notes that at present, owners of the subject houses are able to reside in them for a considerable (but unspecified) period of time, provided they do not do so permanently. In addition, Mr Leyshon opines that in practical terms, if houses are removed from the rental pool and are then used by their owners as permanent residences, it may have the effect of boosting average occupancy levels for those houses remaining in the rental pool. He says the 12 houses represent a very small percentage of the estimated stock of existing tourist accommodation in the Noosa local government area. For these reasons, Mr Leyshon says the proposed development will not have significant implications either for the tourism sector in the Noosa local government area, or for the range of tourist accommodation available in the Noosa North Shore area. He opines that there is no demonstrated need or requirement of any significance for the subject houses to be retained as tourist accommodation.
- [141] I accept that the Beach Road Holiday Homes do not have the facilities and services usually provided in resorts, nor those originally planned. However, I do not accept that this demonstrates that there is no need for them. I also do not accept that the Beach Road Holiday Homes is in the wrong location. As was agreed by the economic experts, the Beach Road Holiday Homes offer a different type of visitor experience on the Noosa North Shore to that otherwise available (being high-end accommodation, rather than budget). During cross-examination, Mr Leyshon acknowledged that the Beach Road Holiday Homes also offer a different experience as compared to other short-term accommodation providers in Noosa (such as those on Hastings Street), particularly given its remote location and bushland setting.
- [142] The fact that all houses at the resort may not be let for short-term accommodation all of the time does not detract from the fact that approval of the proposed development increases the likelihood that the houses will not be available for short-term accommodation. Houses that owners may currently use for holiday accommodation

for limited periods of the year could become permanently occupied. For reasons already provided, I do not accept that it follows that this would boost average occupancy rates for those houses remaining in the holiday rental pool. As was explained by Mr Kennedy, the introduction of permanent residents can affect the attractiveness of the resort for short-term accommodation. It may also have flow on economic effects for local businesses that rely on visitors to the area, such as tour operators.

- [143] Although the impact on the tourism sector may be small (or even imperceptible), I do not accept Mr Leyshon's opinion that there is no demonstrated need or requirement of any significance for the subject houses to be retained as tourist accommodation. Having a diverse range of accommodation types on offer is consistent with the Council's planning strategies as articulated in the desired environmental outcomes in the planning scheme. Those strategies include seeking a tourism industry that is developed and sustained to offer visitors a range of experiences and accommodation types. During cross-examination, Mr Leyshon acknowledged that the provision of short-term accommodation is very important to the tourism industry. The economists also agree that the tourism sector is of considerable economic significance in the Noosa local government area. There are many people involved in the tourism industry. The tourism industry also has many flow-on benefits to other sectors of the economy. As such, the Council's strategy to sustain the tourism industry should not be lightly discarded.

#### Positive effect on local spending

- [144] During cross-examination, Mr Leyshon confirmed that he and Mr Duane had not examined whether the potential addition of permanent residents in the 12 houses would have a positive effect on local spending. During re-examination, he gave the following evidence:

"Mr Leyshon, have you got the submissions there, exhibit 4?---Yes.

Could you look again at paragraph (h) on the second page?---Yes.

My learned friend asked you questions about that. If we take the comparison, as it were, between one of these dwellings being permanently occupied, let's say by a couple, 50 weeks a year, perhaps - - -?---Yes.

- - - on the one hand, or the dwellings being used for visitor accommodation at an occupancy rate of, let's say, 50 per cent?---Yes.

In those scenarios, do you agree with the proposition contained in paragraph (h)?---Yes, I do. They'd have it. They'd have a positive effect on local spending.

And you mentioned, in the course of cross-examination, the differentiation in terms of spending, visitors on the one hand and permanents on the other. Is that part of the rationale for the opinion you just expressed?---Yes, I – I should say it's at the margin in terms of the retail economy in Noosa, obviously. But, as I said, they've got a different pattern of spending, one that would be spread across a wider range of retailers and service providers than – than the spending by tourists. So, to that extent, even – even if the numbers – even if it turned out that was exactly the same, there's some benefits in that wider spread of spending."

- [145] The Appellants submit that the evidence of the lay witnesses supports the opinions expressed by Mr Leyshon.

- [146] Mr Lane and his wife do not offer their dwelling (dwelling 2) as part of the common rental pool. They stay at Beach Road Holiday Homes for a few months at a time. When they do so, they frequent local restaurants for breakfast, lunch and dinners, are members of the Tewantin RSL and use its facilities, and use the ferry service to access Hastings Street to avoid parking difficulties in Noosa. They “*inject a big portion of their income into the Noosa economy*”.
- [147] Mr and Mrs Brown are the owners of house number 51. They have never placed it in the common rental pool. They spend about four months a year in dwelling 51. During that period, grocery shopping and other purchases are carried out in Tewantin, Noosaville and Noosa. They also regularly visit restaurants in the area, including the hotel at Noosa North Shore.
- [148] Mr Salmon and his wife have had their dwelling (number 39) for seven years. It has never been in the common rental pool or listed on any other accommodation website for use by visitors. Over the period of their ownership, they have used the house for two to three nights every few weeks throughout the year, and have recently been staying for longer stays of approximately two weeks at a time. They always stop at Tewantin to buy groceries. When they are staying for extended periods, they also shop at Noosa Civic Shopping Centre, and use the cinemas at Noosa Junction. They visit Tewantin or Noosaville every few days for lunch, dinner, and shopping, and are members of the Tewantin RSL and frequent it for meals or entertainment. On Sundays, they visit the farmers markets in Noosa to purchase fruit and vegetables. They also use the Noosa North Shore Hotel when it is open.
- [149] Mr and Mrs Trowbridge have owned dwelling 62 since July 2013. They purchased it for personal use as a holiday home. They visited it for a combined total of approximately five and a half months in 2018. The house has not been in the common rental pool, but they may look at putting it in that pool in the future. When staying at the dwelling, their shopping is normally done in Noosaville and Tewantin. When guests visit, they will often take them to restaurants and shop mainly in the Noosa Heads and Noosaville areas.
- [150] I accept that this evidence of the lay witnesses demonstrates the habits of the current owners of those four houses. It does not demonstrate that the potential addition of permanent residents in the 12 houses would have a positive effect on local spending.
- [151] I do not accept Mr Leyshon’s opinions about this issue. I find his evidence unpersuasive given he accepted during cross-examination that he had not examined the issue. Further, Mr Leyshon did not reveal the essential integers underlying the opinions that he apparently formed in the short time he was in the witness box between when he was cross-examined on the issue<sup>36</sup> and when he was asked about the issue in re-examination<sup>37</sup>.
- [152] I prefer the evidence of Mr Duane on the issue. He explained how there were many factors that could affect any analysis and that there was a lack of certainty about many of those factors. For example, the outcome would depend on how many people there was per house if it was permanently occupied as compared to the number of visitors per house if it was utilised for short-term accommodation, the extent of

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<sup>36</sup> At T2-16/L8-11.

<sup>37</sup> At T2-20/L20-41.

expenditure by each group, and the nature of expenditure by each group. In light of the complexity of such an analysis, Mr Duane could not be conclusive either way.

#### Conclusion regarding sufficiency of grounds

- [153] The houses already exist. They have access to all necessary infrastructure. No further building work is required. The separation between the houses ameliorates, to a degree, the potential impacts associated with co-location of permanent residents and visitors within the resort.<sup>38</sup> Further, the impact occasioned to the tourism sector by approval of the proposed development is likely to be small (or even imperceptible). These circumstances make the conflict with Noosa Plan less troublesome than might otherwise be the case where approval is sought to use visitor accommodation for permanent occupation.
- [154] Nevertheless, I am not persuaded that they are of sufficient weight to overcome the clear planning strategy with respect to tourism apparent in the Noosa Plan. The Council has made a deliberate planning decision to categorise detached houses as an inconsistent use on the subject land and to zone it for use for visitor accommodation and associated business uses. In this case, it is not in the public interest to diminish the land available for visitor accommodation by allowing permanent residential use given the importance the Noosa Plan places on sustaining the tourism industry.

#### **Conclusion**

- [155] The Appellants have not discharged the onus in the appeal. The appeal is dismissed.

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<sup>38</sup> Having regard to the evidence of Mr Kennedy, I am not persuaded that there will be a complete absence of impact.