

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Abeleda & Anor v Brisbane City Council & Anor* [2019]  
QPEC 58

PARTIES: **PATRICIA ABELEDA**  
(first appellant)

**and**

**HERSTON DEVELOPMENT COMPANY PTY LTD**  
**(ACN 617 139 009)**  
(second appellant)

**v**

**BRISBANE CITY COUNCIL**  
**(ACN 077 382 453)**  
(respondent)

**and**

**SILVERSTONE DEVELOPMENTS PTY LTD**  
(co-respondent)

FILE NO/S: 3718/2018

DIVISION: Planning and Environment Court of Queensland

PROCEEDING: Hearing of an Appeal

ORIGINATING COURT: Planning and Environment Court of Queensland, at Brisbane

DELIVERED ON: 20 November 2019

DELIVERED AT: Brisbane

HEARING DATES: **7, 8, 9 and 10 May and 16, 17, 18 and 20 September 2019**

JUDGE: RS Jones DCJ

ORDERS: **1. The appeal is dismissed.**  
**2. I will hear from the parties, if necessary, as to any consequential orders.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where the co-respondent submitted a development application for a multi-storey car park – where the respondent Council approved that development application – where the appellant has appealed against that approval – where the appellant contends the proposed development is non-compliant with the planning scheme – whether proposed development is non-compliant with planning scheme – whether development

complies with relevant assessment benchmarks – whether the respondent Council has correctly interpreted the planning scheme in approving the development application – whether in the exercise of discretion the co-respondent’s proposed development ought be approved

FLOODING AND WATER QUALITY – where the subject site is affected by local flooding events – whether development would cause unacceptable water quality and flooding impacts – whether development adequately addresses associated risks of flooding – where risk of flash flooding with little or no warning – whether risk of flooding warrants refusal

TRAFFIC – whether development has unacceptable impacts on the local road network – whether development would result in unacceptable traffic impacts on the local road network so as to warrant refusal

DESIGN AND AMENITY – whether height of development is non-compliant with the planning scheme – whether development is appropriately designed – whether development would have an unacceptable impact on the visual amenity of the locality – whether there is community need and economic need for the development to allow for the non-compliance

NEED – where the subject land is located proximate to the Royal Brisbane & Women’s Hospital – where development likely to be used by people attending the hospital – whether there is a community need and economic need for an additional multi-storey carpark in the locality

LAND USE – where the development is non-industrial use in the Low Impact Industry Zone – whether proposed land use is non-compliant with the planning scheme – whether there is a departure from intention of the planning scheme so as to warrant refusal

ONUS OF PROOF – where co-respondent developer still bore onus of proof despite being respondent to appeal – Section 45(2) *Planning and Environment Court Act 2016*

### **Legislation**

*Planning Act 2016 (Qld)*

*Planning and Environment Court Act 2016 (Qld)*

*Sustainable Planning Act 2009 (Qld)*

### **Cases**

*Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16

*Australian Capital Holdings Pty Ltd v Mackay Regional Council* [2008] QCA 157

*Bell v Brisbane City Council & Anor* [2018] 230 LGERA 374

*Brookside Estates Pty Ltd v Brisbane City Council & Anor* [2019] QPEC 33

*Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132

*Moncrieff v Townsville City Council* [2011] QPEC 100

*Neilsens Quality Gravels Pty Ltd v Brisbane City Council & Ors* [2016] QPEC 39

*Singh v Commonwealth* (2004) 222 CLR 322

*SZTAL & SZTGM v Minister for Immigration & Border Protection* [2017] HCA 34

*William McEwans Pty Ltd v Brisbane City Council* [1981] QPLR 33

- COUNSEL: Mr D Gore QC with Mr M Batty for the first and second appellants  
Mr C Hughes QC with Ms H Stephanos for the co-respondent  
Mr J Lyons for the respondent
- SOLICITORS: Thynne & McCartney Solicitors for the co-respondent  
Hicksons Lawyers for the appellants  
City Legal for the respondent

[1] This proceeding is concerned with the determination of an appeal by Ms Abeleda and Herston Development Company Pty Ltd (the appellants) against the decision of the respondent (The Council) to approve a development application for a development permit for a material change of use and a development permit for a reconfiguration of a lot made by the co-respondent (Silverstone). The intended development is for a multi-storey public car park facility. For the reasons set out below the orders of the Court are:

1. The appeal is dismissed.
2. I will hear from the parties, if necessary, as to any consequential orders.

### **The issues for determination**

[2] The grounds of appeal<sup>1</sup> assert that the appeal ought be allowed for a number of reasons. Leaving aside the particulars included in the matters of appeal, those grounds could be summarised as being:

- (a) The proposed development is an inappropriate use for the subject land.

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<sup>1</sup> Exhibit 8, V1, tab 1.

- (b) The proposed development will result in unacceptable traffic engineering impacts.
  - (c) The proposed development is of an unacceptable height, bulk and scale having regard to, in particular, site cover and plot ratio.
  - (d) The proposed development would result in unacceptable flooding and water quality impacts.
  - (e) The proposed development would be inconsistent with the infrastructure assumptions for the land.
  - (f) The proposed development would frustrate the planning intent for the nearby priority development area.
- [3] It is also alleged that there are no discretionary or relevant matters for the purposes of the *Planning Act* 2016 (The Planning Act) that would warrant the approval of the development application notwithstanding the non-compliance alleged on behalf of the appellants.
- [4] During the course of the opening, Mr Hughes QC tendered what was said to be an agreed list of issues in dispute.<sup>2</sup> In response Mr Gore QC, tendered what was said to be the appellant's agreed list of issues.<sup>3</sup>
- [5] Again, without descending into identifying at this stage each and every provision of the planning instruments about which compliance or non-compliance is alleged, by reference to both lists of issues, the real issues in the dispute centred around:<sup>4</sup>
- (a) The appropriateness of the proposed use having regard to the physical features of the subject land.
  - (b) Traffic engineering issues.
  - (c) Flooding and hydraulics.
  - (d) The visual amenity of the proposed development having regard to, in particular, its height, built form and character.
  - (e) Demands on infrastructure.
  - (f) Its compatibility with the existing and intended uses for the nearby priority development area; and
  - (g) The community need for the proposed development.

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<sup>2</sup> Exhibit 9.

<sup>3</sup> Exhibit 9A.

<sup>4</sup> Exhibit 9A, [1].

- [6] There is of course, as is usually the case, a degree of overlap between a number of those issues. In particular flooding, hydraulics and traffic. Insofar as the first matter is concerned, the primary issues were flooding and to a lesser extent traffic. Insofar as demands on infrastructure are concerned, the primary issues were traffic and to a lesser extent flooding.
- [7] Not surprisingly, the parties addressed my attention as to how the discretion of the Court ought be exercised in the event that there was substantial non-compliance with the relevant provisions of the planning scheme and other relevant documents.
- [8] On the final day of evidence, Mr Gore tendered a final list of issues on behalf of the appellants:<sup>5</sup>

- “1. Whether, in the exercise of the Court’s discretion, the proposed development should be approved or refused having regard to issues relating to:
  - (a) land use;
  - (b) traffic engineering;
  - (c) height, built form, character and visual amenity;
  - (d) flooding and hydraulics;
  - (e) need; and
  - (f) the planning intent for the nearby priority development area.
2. Whether, in the exercise of the Court’s discretion, the proposed development should be approved or refused having regard to compliance or non-compliance with the following focal provisions of *CityPlan 2014*:
  - (a) Strategic Framework: Table 3.3.3.1: SO8; Table 3.3.4.1: SO7 and L7; Table 3.4.4.1: SO1;
  - (b) Low Impact Industry Zone Code: OO2, (c), (f);
  - (c) Ithaca District Neighbourhood Plan Code: OO3, (m), OO4(d), PO1(b), AO1, and AO6.3;
  - (d) Road Hierarchy Overlay Code: PO2.
  - (e) TAPS Code OO(2)(c), PO3, PO9, PO15, PO18;
  - (f) Flood Overlay Code: OO2(a), (b), PO3(b), PO5(a), and PO11; and
  - (g) Stormwater Code: OO2(a).
3. How the discretion conferred upon the Court to approve or refuse the proposed development should be exercised taking into account:
  - (a) whether there is a need for the proposed development;
  - (b) whether the height, built form, character and visual amenity of the proposal is acceptable;
  - (c) the extent to which the development will impact either positively or negatively, on the amenity and character of the local area;
  - (d) whether non-compliances with the applicable planning instruments can be remedied by the imposition of lawful conditions of approval;

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<sup>5</sup> Exhibit 9D.

- (e) whether the proposed development would unacceptably frustrate the planning intent for the nearby priority development area; and
- (f) sections 3 and 5 of the Planning Act 2016.”

[9] Sections 3 and 5 of the *Planning Act* are concerned with the purpose and the advancement of the purposes of that Act respectively. Issues concerning land scale were, by the end of the hearing, limited to concerns about height.

[10] On the day of final addresses Mr Hughes tendered another list of issues in dispute.<sup>6</sup> It is unnecessary to set out that document in full. However, insofar as the planning scheme was concerned, the issues to be considered were:

- “1. Whether the proposed use of the land is acceptable when assessed against the following provisions of the scheme and the public interest:
  - (a) Low Impact Industry Zone Code: OO(2)(a), (c) and (f);
  - (b) Ithaca District Neighbourhood Plan Code: OO(4)(d); and
  - (c) Strategic Framework: Table 3.3.3.1 SO8; Table 3.3.4.1 SO7 & L7.
2. Whether the proposed development will result in unacceptable traffic engineering impacts that cannot be resolved by the imposition of lawful conditions of approval, when assessed against the following provisions and the public interest:
  - (a) Road Hierarchy Overlay Code: PO2
  - (b) TAPS Code: OO(2)(c), PO3, PO9, PO15 and PO18.
3. Whether the proposed development is of an acceptable height, bulk, setbacks, site cover, plot ratio and scale, when assessed against the following provisions and the public interest in developing the subject land to the extent proposed:
  - (a) Ithaca District Neighbourhood Plan Code: OO(3)(m), PO1(b) & AO1, and AO6.3.
4. Whether the proposed development will result in unacceptable flooding and water quality impacts that cannot be resolved by the imposition of lawful conditions of approval, when assessed against the following provisions and the public interest:
  - (a) Strategic Framework: Table 3.4.4.1 SO1 & L1;
  - (b) Flood Overlay Code: OO2(a), (b), PO3(b), PO5(a) and PO11; and
  - (c) Stormwater Code: OO(2)(a).
5. Whether the proposed development will result in unacceptable amenity impacts, when assessed against the following provisions and the public interest:
  - (a) Ithaca District Neighbourhood Plan Code: OO(4)(d), PO1.”

[11] It is uncontroversial that, pursuant to s 45(2) of the *Planning and Environment Court Act 2016* (PECA), it is for Silverstone to satisfy me that the appeal should be dismissed.

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<sup>6</sup> Exhibit 9F.

## The proposed development

- [12] The Development Application (DA) as lodged sought a development permit for a material change of use for a parking station and the reconfiguration of a lot into two lots and land dedication. In the joint expert report (JER) of the town planners, the proposed development was described as follows:<sup>7</sup>

“The application that was approved by the Respondent was for only the Development Permit for a Material Change of Use, and the Preliminary Approval for Building Works components.

The proposed development involves the construction of a new building to be utilised for the purposes of a Parking Station. The parking station will involve five storeys....comprising a total of 354 parking spaces and eight disabled parking spaces.

As per the Brisbane City Plan, a Parking station means ‘*the use of premises for parking vehicles, other than parking that is ancillary to another use*’.

The proposed parking station will be three storeys in height at the Butterfield Street frontage and will step to five storeys.

In addition to the car park, the application included a proposed Reconfiguration of 1 (one) Lot into 2 (two) new lots to facilitate the dedication of the rear portion of the site to Council. The purpose of the rear lot was to form part of a trunk district corridor link park and bikeway, in accordance with the Local Government Infrastructure Plan and the Ithaca District Neighbourhood Plan.”

- [13] In respect of town planning, the appellants relied on Mr Buckley, the Council, Mr Ovenden and Silverstone, Mr Schomburgk. While more will be said about this below, at this stage it is convenient to note that it was Mr Buckley’s opinion that in reality the proposed development has six rather than five definable and discreet levels. I agree with Mr Buckley’s assessment of the number of levels or storeys. Because of the risk of serious flooding, apart from a lobby/entry area, the ground floor will be otherwise vacant to allow floodwaters to rise and fall without placing at risk vehicles parked on the upper levels. Accordingly, parking spaces are provided on levels one, two, three, four and five. Ingress will be via an entry point fronting Butterfield Street and egress via an exit ramp which exits onto an existing access easement. Thereafter vehicles leaving the parking station will turn either left or right into Butterfield Street. More will be said about this when dealing with the evidence of the traffic engineers.<sup>8</sup>

<sup>7</sup> Exhibit 8, V5, tab 30, at paras 36-40.

<sup>8</sup> See generally Exhibit 1, pp 8-13.

- [14] While more will be said about the issue of height when dealing with the issue of visual amenity, it could be fairly said that Silverstone has gone to considerable trouble to ensure that the final structure will present in a far more attractive manner than is the case insofar as many multi-level car parks are concerned.<sup>9</sup>

### **The subject location**

- [15] The subject land is located at 43 Butterfield Street, Herston and more properly described as Lot 2 on RP230041. The site is generally of a rectangular shape having 32m of frontage to Butterfield Street to the south. The site then runs to the north where it abuts Enoggera Creek. Of some significance from a traffic engineering perspective is that where the site fronts Butterfield Street, it is almost immediately adjacent to a roundabout intersection of Butterfield Street and Garrick Terrace.<sup>10</sup>

- [16] The site is located in an area which is notorious for being flooded from time to time. It is for that reason that the site is subject to two zonings. In this context, the town planners report:<sup>11</sup>

“It is located partially within the Low Impact Industry Zone and partially within the Open Space Zone under the Brisbane City Plan 2014.... The aforementioned juxtaposition of the site to the mangrove-lined Breakfast Creek, acknowledge for its propensity to flood, is expected to explain part of the reason for the Open Space zoning.”

- [17] The site is located in an intensely developed area. The “*surrounding locality*” was described by the town planners in the following terms:<sup>12</sup>

“14. The subject site is located across Butterfield St from the northern edge of the Royal Brisbane and Women’s Hospital (“the Hospital”). It sits in a pocket of low impact industry zoned land on the northern side of Butterfield Street. Generally there is a mix of service industrial and mixed commercial uses in that strip. To the east a multi-level Queensland Health-badged building, and bus way infrastructure, dominate; to the west both sides of Butterfield Street, character housing and newer units are a contrasting land use to the strip within which the site sits; Breakfast Creek (and open space including car parking) dominates land use to the north).

15. Adjacent land to the east and west of the site has land use and improvements similar to that which currently exists on the subject site. These adjoining sites contain low rise commercial or industrial buildings. The building to the immediate west is a mixed use

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<sup>9</sup> Exhibit 1, pp 14-16.

<sup>10</sup> See generally Exhibit 1, p 7.

<sup>11</sup> Exhibit 8, V5 tab 30, p 1086, at para 10.

<sup>12</sup> Exhibit 8, V5 tab 30, pp 1087-1089.



- medical and offices complex with some light/service industry uses as well. To the east is an older warehouse/industrial building.
16. The land immediately across Breakfast Creek is heavily vegetated along the banks of the creek, beyond which is surface-level Council carparking facilities for the general public, staff and visitors to the hospital, the busway station adjoining the hospital, and for visitors to the Downey Park regional netball facility located nearby to the west.
  17. The land across Butterfield St to the south is zoned Community Facilities (Major Health Care) and contains the overwhelmingly major land use for the locality – the Hospital. It is a facility of State significance. It contains a range of buildings of different eras, some of which are over 10 storeys in height. Directly opposite the Butterfield Street light industrial strip is a multi-level car park, and further into the hospital site, the main general medical and surgical wards building. The high speed busway stop at the Hospital is of significance. In terms of topography, the hospital site is generally elevated above Butterfield Street and the subject land.
  18. Across Butterfield Street and towards the south-west are houses and units within the Character Residential Zone (Infill Housing).
  19. The western extent of Butterfield Street (beyond the site and adjacent industrial and commercial sheds) is comprised of high-set 1-2 storey character residential dwellings. This residential development transitions abruptly into 2-3 storey commercial and industrial buildings (refer to *Figure 3* – Butterfield Street character).
  20. **Approximately 50m to the east of the subject site is land zoned Mixed Use and improved with industrial sheds and a recently completed 4 storey commercial development. This land is part of a wider precinct designated as the “Herston Quarter Priority Development Area”, an area under the planning control of the State Government (*Economic Development Act 2012*). A development scheme for that area came into effect 22 December 2017. The proposed timeline for Herston Quarter redevelopment involves 7 stages to be completed over approximately 10 years.**
  21. Beyond that to the east is the northern busway infrastructure and Lutwyche Road. The subject site enjoys good access to the arterial road network and busway.
  22. The more-recently constructed commercial developments in the area include:
    - a 4-storey building containing office and restaurant uses at 15 Butterfield Street,
    - 5-storey Ronald McDonald House across Butterfield Street to the southwest and,
    - A 7-storey Parking Station located across Butterfield Street to the south-east (refer to *Figure 4* – Building height survey).

- 35 Butterfield is indicated on the map, however has since been removed.” (Emphasis added)”

[18] I agree with that description of the town planners. The level of surrounding development and the intense transport infrastructure is shown in a number of plans and aerial photographs.<sup>13</sup>

[19] The emphasised passage from the JER of the town planners is in reference to the major development project known as the Herston Quarter Priority Development Area (HQPDA), and referred to in the JER in the following terms:<sup>14</sup>

“It is understood there are plans to develop a new car parking station within the Herston Quarter PDA as part of a major redevelopment of the precinct. A publication from the Queensland Government regarding the ‘*Metro North Hospital and Health Service*’ and specifically the Herston Quarter – Last updated 15 October 2018 – the Herston Quarter masterplan involves:

- The \$1.1 Billion redevelopment of a five-hectare site within the Herston Health Precinct March 2017.
- Three new commercial and public car parking stations including
  - i. New Northern Car park (1150)
  - ii. Surgical, Treatment and Rehabilitation services (STARS) (450 spaces)
  - iii. New private hospital (450 spaces)
- An additional 347 parking spaces will be provided alongside the new aged care retirement living development which includes parking for the residents and visitors.
- The residential building proposed on the corner of Herston Road and Bramston Terrace will provided parking for residents and visitors.”

[20] The HQPDA involves a number of precincts and, in particular, the three proposed car parks referred to by the town planners.<sup>15</sup>

[21] Not surprisingly, given the level of commercial development but, far more significantly the Royal Brisbane and Women’s Hospital, car parking is at a premium. The town planners made specific reference to this issue. They reported:<sup>16</sup>

“In relation to the parking facilities marked on this map, the following has been identified:

- (i) South of the subject site and on the southern side of Butterfield Street is a 7-storey parking station comprising 1400 spaces and located on the RBWH land and managed by Metro Parking Management;
- (ii) South of the subject site and on the western side of a service road is an uncovered parking area for the Hospital;
- (iii) On the northern side of Breakfast Creek and east of the Downey Park is a Brisbane City Council regulated parking area;

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<sup>13</sup> Exhibit 1, pp 1-5.

<sup>14</sup> Exhibit 8, V5, tab 30, p 1092, at paras 30-31; Exhibit 11.

<sup>15</sup> Exhibit 11, p 14; Exhibit 27.

<sup>16</sup> Exhibit 8 V5, pp 1090-1091, at para 26.

- (iv) South of the Hospital and north of the Inner Northern Busway is a 7-storey parking station comprising 700 spaces and identified as Cornerstone Parking – RBWH Herston Road; and
- (v) On the south-western corner of the hospital is a 7-storey parking station comprising 600 spaces and identified as the Bramston Terrance Metro Park.”

[22] The extent of the existing and proposed car parking, and, in particular, that intended to be developed by the appellants, was a particularly controversial matter and is dealt with below as a separate issue.

### **Visual amenity**

[23] As I have already mentioned, Silverstone has gone to considerable trouble to ensure that the building presents in an architecturally attractive way to both Butterfield Street and to the east and west. In respect of architectural matters, Silverstone relied on the evidence of Mr Peabody, an experienced registered architect. In his court report,<sup>17</sup> under the heading ‘conclusion’, he reported as follows:

“In my opinion, the proposed scheme shall:

- (i) Present a building envelope that shall contribute positively to the surrounding context through the careful design consideration of the build form, including the stepping down to the Butterfield Street and Breakfast Creek frontages, and the high quality articulation and attention to detail of the building facades;
- (ii) Offer a significantly improved interface with the Butterfield Street and Breakfast Creek frontages through the proposed setbacks and introduction of landscape areas;
- (iii) Provide a design solution which shall not adversely impact the adjoining properties;
- (iv) Sit comfortably in its built form context including the height and scale of other developments in the locality.

From an architectural perspective, the proposed scheme is a well-considered, aesthetically pleasing and carefully resolved design outcome which, in my experience and observations, is not often achieved to such a high design standard for functional buildings typologies such as car parking facilities.

In my opinion, not only does the proposed scheme address the requirements in the planning scheme provisions seeking to ensure appropriate built form in the locality, but it does so with a building of considerable architectural merit, particularly when one considers its function. In my opinion, there are few, if any, other multi-storey car parks in the area which seek to, and ultimately achieve, such architectural merit.”

[24] There was no counterpart called to contradict the evidence of Mr Peabody and, insofar as his evidence is limited to architectural matters, I accept his evidence.

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<sup>17</sup> Exhibit 2, pp 6-7, at paras 30-32.

[25] Silverstone also relied on the evidence of Mr Powell to deal with matters of visual amenity and landscaping. Mr Powell has a Bachelor of Built Environment: Landscape Architecture from the Department of Planning and Landscape and Architecture of the Queensland University of Technology. In his report<sup>18</sup> Mr Powell concluded as follows:

“From the above discussion:

- (i) The proposed built form will contribute to a high standard of amenity for the streetscape, surrounding uses and nearby open space zone, and will provide significant opportunities for landscaping in the front and rear setbacks, as discussed and illustrated....
- (i) The proposal will not unreasonably impact upon views and vistas and will be consistent with the character of surrounding industrial and large institutional buildings within the relatively confined visual catchment of the subject land...

The building is to function as a multi-level carpark. It is attractively designed and capable of significant landscaping. In my opinion it will involve a considerable visual improvement to the existing amenity of the area. Accordingly, I consider the proposal for the subject land to be appropriate in visual amenity and landscape terms, subject to detailed design and the imposition of relevant and reasonable conditions.”

[26] No counterpart was called to contradict the evidence of Mr Powell and I am satisfied on his evidence that insofar as visual amenity per se and landscaping issues are concerned, they would not, of themselves or indeed in combination with any of the other alleged issues of non-compliance, warrant refusal of the proposed development.

[27] Indeed, insofar as the intended design of the building is concerned, as the appellant acknowledged,<sup>19</sup> the only real issues were those concerned with the number of storeys and its height.

### **Traffic**

[28] It was submitted on behalf of the appellants’ that the proposed development should be refused on traffic grounds for three reasons. First, the impact of additional traffic on the Butterfield Street round-about and intersection of Bowen Bridge Road and Butterfield Street.<sup>20</sup> Second, inappropriate use of the SIDRA traffic modelling.<sup>21</sup>

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<sup>18</sup> Exhibit 3, p3, at paras 21-22.

<sup>19</sup> Appellant’s written submissions (AWS), at para 55.

<sup>20</sup> AWS, at paras 72 and 77.

<sup>21</sup> AWS, at paras 78-79.

Third, impact on the amenity of neighbouring properties arising out of the egress arrangements.<sup>22</sup> For the reasons that follow, I disagree.

[29] Three traffic engineers were called. Mr Trevilyan for the appellants, Mr Holland for the Council and Mr Pekol for Silverstone. After their first JER, the following issues remained to be considered:<sup>23</sup>

- “(a) Inadequate on-site service vehicle arrangements;
- (b) too many small car spaces;
- (c) inadequate vehicle manoeuvring space within the parking aisles at the ends of each floor;
- (d) internal gradients inconsistent with local planning scheme requirements;
- (e) inadequate on-site queuing for a boom gate controlled entry;
- (f) the potential traffic impact of the proposed Herston Quarter project and related issues associated with the proposal;
- (g) the design and operation of the site egress;
- (h) potential adverse traffic impacts on the local road network.”

[30] Following the receipt of further advice, both Mr Holland and Mr Pekol were of the opinion that, subject to the imposition of appropriate conditions on development, refusal on traffic grounds would not be warranted. Insofar as Mr Trevilyan was concerned, his conclusion was that refusal was still warranted on traffic grounds but solely on the basis that the proposed development would result in unacceptable traffic consequences which would lead to the unsatisfactory operation of the Butterfield Street round-about.<sup>24</sup>

[31] As to the first of the matters raised by the appellants, it was contended that the traffic generated from the proposed development would have “*unacceptable impacts*” on the road network “*in terms of both the Butterfield Street roundabout and the intersection at the corner of Bowen Bridge Road and Butterfield Street.*”<sup>25</sup>

[32] On this issue, the first of Mr Trevilyan’s concerns was for the potential delays causing unacceptable queuing on entry to the car park during peak hour events both AM and PM. However, during cross-examination by Mr Hughes, he accepted that if entry was governed by an automatic number plate recognition system (ANPR) that operated without a boom gate, his concerns about AM peak hour events would

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<sup>22</sup> AWS, at paras 80-85.

<sup>23</sup> Exhibit 8, V5, tab 33, p 1.

<sup>24</sup> Exhibit 12, p 8, at para 38; T7-57 ll 33-44.

<sup>25</sup> AWS, at para 72.

be alleviated.<sup>26</sup> Both of those matters would be capable of being addressed by the imposition of appropriate conditions.

[33] The next substantive matter of concern was that both Mr Holland and Mr Pekol relied on what Mr Trevilyan called the standard SIDRA traffic modelling. In his opinion, it was inappropriate to use that modelling when a busy round-about was involved. Both Mr Holland and Mr Pekol disagreed.

[34] As I understood his evidence, Mr Trevilyan's concerns were based on his conclusions about queuing at the Butterfield Street round-about. According to him, the SIDRA modelling was only appropriate when concerned with free flowing traffic movements. In respect of this issue, I prefer the evidence of Mr Pekol and Mr Holland in particular to that of Mr Trevilyan. It appeared to me that given the low speed environment of Butterfield Street, he had materially overstated the queuing problems at that round-about.<sup>27</sup>

[35] It was submitted that Mr Pekol made a telling concession against the use of the SIDRA analysis.<sup>28</sup> The transcript reference given, in my view, while strictly accurate insofar as it goes, fails to give sufficient regard to the totality of his evidence about peak PM queuing at the round-about<sup>29</sup> and his evidence that notwithstanding the criticism made of the analysis, he still considered SIDRA to be "*the appropriate tool to use*".<sup>30</sup> His evidence on this topic is consistent with that of Mr Holland.

[36] That said, as is the case with any modelling, the results as modelled depend on the use of accurate and reliable inputs. In this context, Mr Trevilyan's "*two remaining key issues related to the trip generation rate of the facility and --- the background growth rate.*"<sup>31</sup> According to him, the rates adopted by Mr Pekol and Mr Holland "*appeared to be on the low side*" and, as a consequence, he undertook a sensitivity analysis.<sup>32</sup>

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<sup>26</sup> T7-56 ll 15-40.

<sup>27</sup> This disposes of the second issue raised by the appellants.

<sup>28</sup> AWS, at para 79.

<sup>29</sup> T4-22 – T4-23 ll 1-23.

<sup>30</sup> T4-23 ll 20-23.

<sup>31</sup> T7-31 ll 37-47.

<sup>32</sup> T7-32 ll 1-8.

- [37] Mr Pekol adopted a trip generation rate of 0.35Vph based on a mix of casual but predominantly staff users. Mr Holland, based on the car park being used entirely by staff members, adopted a rate of 0.5Vph. Mr Trevilyan, on the other hand, adopted a much higher rate of 0.8Vph based on what he considered would be a higher turnover rate of car parking.<sup>33</sup>
- [38] It is unnecessary in my view to resolve the dispute concerning projected future traffic growth rates in order to reject Mr Trevilyan's sensitivity analysis. It can be readily seen that the conclusion reached by Mr Trevilyan about likely traffic generation consequences was dependant on his sensitivity analysis which led him to conclude that the likely occupancy rate for the proposal would be between 95% and 100%.<sup>34</sup>
- [39] Before being even cross-examined, in his evidence in chief Mr Trevilyan was inclined to abandon his rate of 0.8 and with his "*hand on his heart*" he seemed to concede that a rate of 0.6 might "*actually occur*".<sup>35</sup>
- [40] A further difficulty for Mr Trevilyan is that it is clear that his conclusions about occupancy rates were based on a misinterpretation of his "*literature review*". A fair reading of that material reveals that optimal car parking occupancy rates would usually be expected to be in the order of 85%. That is of significance as that rate accords with the rates adopted by Mr Pekol and Mr Holland which, in turn, were based on actual figures that were provided by the second appellant, an experienced car park operator.<sup>36</sup> More will be said about optimum occupancy rates when dealing with the issue of need.
- [41] For the purposes of his sensitivity analysis, Mr Trevilyan's occupancy rate was clearly grounded on a paper prepared by a Mr Todd Litman. Mr Trevilyan quotes from Mr Litman's work as follows. "*Parking facilities considered full if it has 85-90% occupancy, which may be justified for facilities with high turnover so motorists can easily find and unoccupied space; however, those serving longer-term users, such as employees and residents can generally be sized for 95-100% occupancy*".<sup>37</sup>

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<sup>33</sup> T7-35 ll 3-37.

<sup>34</sup> Exhibit 8, V5, tab 33, pp 1222-1224 (see also at p 1204, at para 3.41).

<sup>35</sup> T7-36 ll 13-20.

<sup>36</sup> Exhibit 8, V5, tab 33, p 1200, at para 3.9 (**refer also to Exhibits**).

<sup>37</sup> Exhibit 38.

[42] During cross-examination, the relevant extract from Mr Litman's paper was tendered by Mr Hughes.<sup>38</sup> When that document is read in its entirety it is tolerably clear that the adoption of occupancy rates for residents and employees is entirely inappropriate when dealing with a large commercial public car parking facility.

[43] Perhaps in anticipation of being cross-examined about Mr Litman's paper in more detail, in his evidence in chief, Mr Trevilyan stated that the actual rate of trip generation was a "*moot point*". He said:<sup>39</sup>

"Because, don't forget, the queuing was – sorry – the trip rate was relevant in two respects. Firstly, with respect to the ingress queue in the morning, and secondly with respect to round-about operation in the evening. Now roundabout operation in the evening is almost a moot point with respect to the trip rate assumed because the whole thing's congested and blocked up anyway. So it really doesn't matter what we add. If it's a tangible amount, it matters a lot and we shouldn't do it. There's nothing – there are no ameliorative works proposed as a part of this development, and accordingly, I – I – there's just problems that, appear to me, to be unsolved in the material provided. In the morning, it becomes more important because the length of queue that manifests. ..."

[44] As already addressed above, provided an ANPR system is provided at entry without the need for a boom gate, Mr Trevilyan's concerns about AM congestion can be put aside. Insofar as the PM congestion is concerned, again, as already set out above, I consider that Mr Trevilyan has materially overstated the level of congestion at the Butterfield Street round-about.

[45] Given the difficulties associated with Mr Trevilyan's evidence, I have little difficulty in accepting the conclusions reached by Mr Holland and Mr Pekol that the additional traffic generated by the proposed development would not significantly increase the critical degree of saturation at the Butterfield Street intersection and, accordingly, subject to appropriate conditions being imposed on development, there would be no basis for refusal on traffic grounds.

[46] As to the remaining issues raised on behalf of the appellants concerning traffic, the submission concerning congestion at the Bowen Bridge Road intersection fails to have regard to Mr Trevilyan's own evidence that any additional impact on traffic operations is likely to be minimal.<sup>40</sup>

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<sup>38</sup> Ibid.

<sup>39</sup> T7-36 ll 20-30.

<sup>40</sup> Exhibit 8, V5, tab 33, at para 3.79.



- [47] As to the impact on amenity on adjoining owners at the point of egress, I consider this to be, in the overall scheme of things, quite a minor issue. Also, as Mr Trevilyan made clear in his court report, on traffic grounds the only reason for refusal might be the impact on congestion at the round-about.<sup>41</sup> In the more general sense, the adverse impacts that might be caused to neighbours as a result of passing existing traffic was clearly not a matter of much concern to the town planners. The height of the proposal was clearly Mr Buckley's, the town planner relied on by the appellants, real concern.
- [48] For the reasons given, subject to there being a condition that the ANPR system at the entry point be operated without a boom gate, there are no reasons why the proposed development ought to be refused on traffic grounds.
- [49] Before moving on to the next topic, I would note that there is evidence that the existing Butterfield Street car park almost directly opposite the proposed development is operating at or about 100% occupancy. That does not affect the conclusions I have reached in respect of traffic. However, it is a matter that has some relevance when dealing with the evidence concerning the demand for more car parking space addressed in particular, by the economists, Mr Duane who was relied on by Silverstone and Mr Brown by the appellant.

### **Flooding**

- [50] The subject land is situated in an area of Brisbane notoriously known for being effected by flooding. Not surprisingly then, the proposed development would be flood effected. In recognition of this, it is subject to a number of conditions directed towards minimising flooding impacts. In particular, conditions 32 and 33.<sup>42</sup> The first of those conditions is primarily concerned with minimising the risks to life and property. In this context, no parking of vehicles will be permitted on the ground floor. All parking will take place on the upper five levels.<sup>43</sup> The first level of parking is at about 5.7m AHD.
- [51] Condition 33 requires, in particular, a flood risk management plan and the implementation and maintaining of the flood management plan prepared by

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<sup>41</sup> Exhibit 12, para 38.

<sup>42</sup> Exhibit 8, V4, pp 891-892.

<sup>43</sup> See Exhibit 1, pp 8-13.

consultants retained by Silverstone. The court will generally act on the assumption that lawful conditions will be complied with.<sup>44</sup> I can see no sensible reason why I ought not proceed on that basis for the purpose of disposing of this proceeding.

[52] Unlike the Metro car park operated, in effect by the first appellant, which also fronts Butterfield Street on the opposite corner of the roundabout, the proposed development will not have ingress and egress access points above flood level. Unlike the proposal, the Metro car park has access points at the third and fifth levels.

[53] In the appellants' written submissions it is said:<sup>45</sup>

- “87. The Appellants contend that the proposed development ought to be refused due to unacceptable flooding impacts. In making that submission, the Appellants rely upon the proposed development's non-compliance with seven provisions of the Strategic Framework, the Flood Overlay Code and the Stormwater Code.
88. The relevant Strategic Framework provision is SO1 of Table 3.4.4.1 which seeks for Brisbane's people and properties not to be exposed to unacceptable risks as a result of, amongst other things, flood hazard.
89. The relevant Flood Overlay Code provisions are:
- (a) OO2(a) – which seeks for development to minimise exposure of people and property to unacceptable flood risk from flood hazard in all flood events;
  - (b) OO2(b) – which seeks for development to mitigate flood risk through location, siting, design, construction and operation whilst maintaining amenity;
  - (c) PO3(b) – which seeks for development to minimise the risk to people from flood hazard;
  - (d) PO5(a) – which seeks for development to be located and designed to minimise the risk to people from flood hazard on site; and
  - (e) PO11 – which states “*Development has access which, having regard to hydraulic hazard, provides for safe vehicular and pedestrian movement and emergency service access to adjoining roads*”.
90. The relevant Stormwater Code provision is OO2(a) which provides that “*Development achieves acceptable levels of stormwater runoff quality and quantity by applying water sensitive urban design principles as part of an integrated stormwater management framework*”.
- ...
94. Ultimately, the above planning scheme provisions require Silverstone to demonstrate that the proposed development:
- (a) acceptably minimises exposure of people and property to unacceptable flood risk through location – Flood Overlay Code – OO2(b) and PO5(a);

<sup>44</sup> *Neilsens Quality Gravels Pty Ltd v Brisbane City Council & Ors* [2016] QPEC 39.

<sup>45</sup> AWS, at paras 87-90 and 94.

- (b) provides access for safe vehicular and pedestrian movement – Flood Overlay Code – PO11;
- (c) acceptably minimises exposure of people and property to unacceptable flood risk – Flood Overlay Code – OO2(a) and PO3(b) and Strategic Framework SO1 of Table 3.4.4.1; and
- (d) achieves acceptable levels of stormwater runoff quality – Stormwater Code – OO2(a).”

[54] Relying primarily on the evidence of Dr Johnson, the engineer relied on by the appellants, but also on concessions made by Mr Clarke, also an engineer retained by Silverstone, it is then submitted that “*the proposed development fails on each of these matters*”.<sup>46</sup>

[55] According to the appellants, the reasons why it fails is that:<sup>47</sup> first, the proposed development does not acceptably minimise exposure of people and property to unacceptable flood risk through location. According to the appellants, put simply, the land is a “*terrible*” site for a car park having regard to hydraulic considerations. Second, the proposed development departs clearly from the relevant criteria of the planning scheme that seek safe vehicular and pedestrian movement. Third, water quality issues remain unresolved and, in particular, the placement of appropriate stormwater quality management systems. And, finally, any attempt by Silverstone and/or the Council to draw a comparison between the proposed development and the Metro site is a fruitless exercise.

[56] I accept what the appellants have to say about the Metro site. That car park clearly has alternate access points which would be capable of accommodating flood events. As to the third matter, insofar as there may be an issue or issues associated with stormwater quality management, that would not be a basis of itself for refusing the application. As Dr Johnson made clear, it is almost certain that an engineering solution exists and would be implemented.<sup>48</sup>

[57] Before proceeding further, it is obvious that any development that would be undertaken on the subject land or indeed on any other land on the northern side of Butterfield Street in the vicinity of the subject land would be subject to inundation to varying extents. It is also clear, as Dr Johnson acknowledged, that given the proximity of the land to the Brisbane CBD and, perhaps more particularly the

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<sup>46</sup> AWS, at para 95.

<sup>47</sup> AWS, at paras 96-106.

<sup>48</sup> T3-12 ll 1-19.

hospital, there are a number of sites in the vicinity of the subject site which are likely to be redeveloped at some time in the future. It is for that reason that the relevant provisions of the planning scheme are intended to minimise the risk of damage to life and property. They are not intended to eliminate any such risks. That is clear by reference to language such as “*minimising exposure*” and by avoiding “*unacceptable flood risk*”.

- [58] The evidence of Dr Johnson and Mr Clarke make the following facts tolerably clear. The land is effected by flooding from both Breakfast Creek and the Brisbane River. The Q100 flood design level for the land is 5.2m AHD and possibly as high as 5.7m AHD,<sup>49</sup> whereas the ground level of Butterfield Street adjacent to the subject land is approximately 2.3m AHD and, accordingly, in a Q100 Breakfast Creek flood event Butterfield Street could be under water to a depth in the order of 3m. Perhaps more relevantly, inundation at street level could be as high as 1.4m in a five year flood event and inundation might also occur at the ground floor level in a two year flood event. I also accept Dr Johnson’s evidence that the greatest risk posed to human safety was in the event of flash flooding that could occur with little or no warning. According to Dr Johnson:<sup>50</sup>

“The critical storm duration for Breakfast Creek at this location is only a few hours at most. It is entirely possible that a person leaving their vehicle at the facility will be confronted by flooding upon their return. In that respect, the facility increases flood risk for members of the public.”

Dr Johnson went on to say:<sup>51</sup>

“This site floods on average, once every one to two years, and it’s clear that even at a five-year level of flooding, the depth of water in Butterfield Street at the peak of that event is approximately 1.4 metres. So it’s not as though this risk will occur very infrequently. In fact, the opposite. It will occur quite frequently, and it will potentially expose those users of the facility, who have not been warned about flooding, to an unacceptable flood risk, in my opinion, and a risk that Council has... traditionally sought to address...”

There will be no warning, in my opinion, for a Breakfast Creek flood. The best warning that anyone could hope for would be a general warning from the Bureau of Meteorology that a line of thunderstorms has formed west of Brisbane and will dump heavy rain and potential hail on the Brisbane CBD some time in the next hour or whenever the timing might be. There will be no real indication in that except that the Bureau will add a warning saying ‘Flash flooding may occur’. So it would be entirely possible, in my contention, for a user of this facility to leave a facility, to be inside the hospital, without any idea that a storm had occurred outside because the

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<sup>49</sup> T3-2 ll 40-45.

<sup>50</sup> Exhibit 8, V5, tab 31, p 1153, at para 1(a).

<sup>51</sup> T2-59 ll 30-37 and T2-60 ll 11-24.

storm could obviously arise and flood within a period of three or four hours, exit the car park perhaps late at night and find suddenly, that Butterfield Street is under more than a metre depth of water.”

[59] In this context, it is of significance that when full, cars parked in the facility could include up to 500 persons.

[60] In the appellants’ written submissions<sup>52</sup> it was said that the subject land could be inundated at least once every two years if not at least once annually. To support that proposition, reliance is placed on the cross-examination of Mr Clarke.<sup>53</sup> That evidence, in my view, does not support the proposition that this site would flood “*at least once annually*”. The best evidence on this topic is that given by Dr Johnson to the effect that the subject land would flood on average once every one to two years. It also seems tolerably clear that Dr Johnson’s concerns were with the two and five year flood events.<sup>54</sup>

[61] During his evidence, Dr Johnson identified three “*principle areas*” where the opinions of he and Mr Clarke parted company. Before going on to identify those three matters I should point out that unsurprisingly, both Dr Johnson and Mr Clarke were more concerned with risk to life and limb rather than to property. Dr Johnson in particular was concerned about the risks to young children and to the elderly.

[62] Turning then to the three areas identified by Dr Johnson. The first was whether there had been sufficient management measures instigated to mitigate against flood risk. The second issue was Dr Johnson’s concern about the regularity of flood events that could affect the subject land, and the third was the appropriateness of a car park being located on the subject land. In this context, Dr Johnson’s evidence was that “*I think this is a poor site for a car park on this site. I think that it’s much more appropriate for car parks to be located where pedestrians would not be exposed to regular, frequent and severe flood risks potentially in the future*”.<sup>55</sup> It is obvious that there is a degree of overlap involved in respect of each of those three matters. I will deal with each of those three matters but not necessarily in the order just expressed.

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<sup>52</sup> AWS, at para 93(h).

<sup>53</sup> T2-48 ll 40-45.

<sup>54</sup> T2-60 ll 23-29.

<sup>55</sup> T2-60 ll 33-40.

- [63] The three concerns expressed by Dr Johnson form the basis for the appellants' first two reasons as to why the proposed development ought to be refused as identified above.<sup>56</sup>
- [64] On the balance, while I have no doubt that Dr Johnson's concerns are genuinely held, I am persuaded that he has adopted an unrealistically conservative approach.
- [65] That in the opinion of both Dr Johnson and Mr Clarke the subject land and Butterfield Street are subject to regular inundation, has to be seen in the context of that occurring to a sufficient depth to be of concern once every two years, or in the very worst case scenario, once a year. According to Dr Johnson, "*somewhere between one and two years*"<sup>57</sup> to a depth to be of concern.
- [66] Also in respect of children, it is unlikely that, insofar as there might be a temptation to get to their motor vehicle in a flood event, in most instances they would be accompanied by at least one adult. I can also accept Dr Johnson's evidence to the effect that some visitors to the hospital might be in a very emotional and distressed state and, accordingly, may not act as rationally as they might otherwise. While there is no evidence on this point, I do not consider that it necessarily follows that those people would act in an entirely irrational manner when a relevant flood event occurred.
- [67] Also, as Dr Johnson himself recognised, this site is not so flood affected as to render it unsuitable for development as a car park, at least not from an engineering perspective. The issue is whether appropriate steps have been taken to adequately address the issues so as to avoid "*unacceptable consequences*". As Dr Johnson expressed it:<sup>58</sup>
- "So, to me, it's a risk issue that needs to be satisfactorily ameliorated, and it's my view that the measures put forward do not satisfactorily mitigate that risk to the point where it should be acceptable."
- [68] The author of the flood risk management plan is an engineer well known and respected by Dr Johnson.<sup>59</sup> That plan, together with a number of additions thereto, provide a comprehensive suite of steps to address the risks associated with a flood

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<sup>56</sup> At paras [55]-[57].

<sup>57</sup> T3-4 ll 17-27 (note major flood events such as Q100 events are not an issue of concern in respect of this topic).

<sup>58</sup> T2-60 ll 27-30.

<sup>59</sup> T2-75 ll 30-47.

event.<sup>60</sup> It is a condition of approval that the plan be implemented and maintained during the operation of a parking station.

[69] It is unnecessary to go through that risk management plan in detail as it is clear that Dr Johnson's primary concerns were for those people who have left the car park and before returning, a flood event occurs with very little or no warning. In his opinion, the risk management plan adequately addresses the risk it might pose to those persons in the car park at the time of the flood.

[70] Dr Johnson's evidence was, which I also accept, that the most likely cause of problematic flooding would be most likely caused by the flooding of Breakfast Creek rather than the Brisbane River. The flow of any flood waters would be of a low level.<sup>61</sup>

[71] During the course of this proceeding it became apparent that a number of Dr Johnson's concerns would be materially lessened with the introduction of additional flood mitigation measures, including an automatic number plate recognition system and, of more significance, an appropriately trained and qualified onsite manager between 6.30am and 11.30pm seven days a week.<sup>62</sup> While it may not be a 24 hour management arrangement, it would still in my view, remain a significant improvement on the existing management plan in that it would provide a substantially better chance of users of the car park being warned about an imminent flood event.<sup>63</sup>

[72] During cross-examination by Mr Hughes, it became apparent that Dr Johnson's concerns, bearing in mind the proposed additional steps to reduce risks associated with flooding, were greatly reduced. In this context his evidence was:<sup>64</sup>

"I will stress though, that the problem I've got with the management measures is simply the fact that you can't force a mandatory requirement for all persons to provide their telephone numbers. If it was a mandatory requirement, then that would be, perhaps an acceptable method for notifying people of the flood risk, and that type of system or visual signals have been used in other developments to notify residents, for example, in residential areas that it's unsafe to leave the site in those circumstances..."

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<sup>60</sup> Exhibit 8, V4, tab 27, p 910; See also Exhibit 30.

<sup>61</sup> T2-69 ll 27-33; T3-13 ll 38-47.

<sup>62</sup> See Exhibit 30.

<sup>63</sup> Refer to evidence of Dr Johnson at T2-72 ll 1-4; T3-17 ll 1-5.

<sup>64</sup> T3-15 ll 5-25.

There would be other measures that you could adopt, which would be more rigorous than the ones which are proposed, and I don't have a problem per se with the measures that Martin Giles has proposed, other than to say compliance, I think, will be an issue, potentially, in relation to the telephone number aspect."

- [73] On balance, while it may not be possible to fully address Dr Johnson's concerns, particularly those about obtaining telephone numbers, I am sufficiently satisfied that the design of the building together with the flood risk management plan as to be improved on will be adequate to provide for safe motor vehicle and pedestrian access,<sup>65</sup> and to acceptably minimise exposure to unacceptable flood risk.<sup>66</sup> In other words, I am sufficiently satisfied that the proposed development subject only to the imposition of appropriate conditions, ought not be refused because of those risks associated with flooding.

### Need

- [74] According to the appellants, when both the qualitative and quantitative aspects of need are addressed, the introduction of the additional car parking proposed is not warranted.
- [75] Adopting the approach of the appellants, I will deal with the qualitative aspects first. Relying on the evidence of Mr Brown, an economist, together with the evidence of Mr McLachlan<sup>67</sup> and Mr Hartley,<sup>68</sup> the primary qualitative aspects were identified as being:<sup>69</sup>
- (a) prejudicing and discouraging investment in the Herston Quarter PDA;
  - (b) prejudicing the revenue return to the RBWH Foundation;
  - (c) prejudicing the significant public investment in transport infrastructure relevant to the hospital; and
  - (d) the provision by Silverstone of an inferior parking station which does not offer the CSO benefits.<sup>70</sup>

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<sup>65</sup> Flood Overlay Code PO11.

<sup>66</sup> Flood Overlay Code OO2(a) and (b); PO3(b) and PO5(a).

<sup>67</sup> Exhibit 15.

<sup>68</sup> Exhibit 16.

<sup>69</sup> AWS, at para 109.

<sup>70</sup> Community service obligations provided by the Metro car parking stations, or the same level of benefit in the areas of safety and surveillance.



- [76] As to the first of the qualitative aspects, there is no probative evidence that the proposed development would prejudice and discourage investment in the Priority Development Area (PDA) of the hospital. At no stage does either Mr Hartley or Mr McLachlan say any such thing. It was Mr McLachlan's opinion that "*the major long term contractual and financial commitments made by (the appellant's) should not be threatened by the commercial interests of a third party who is not involved in the planning of the...PDA. The development proposed for 43 Butterfield Street will derogate from the orderly development of the ...PDA, resulting in a less satisfactory form of development for the community and the state.*"<sup>71</sup>
- [77] Mr McLachlan does not expand on what the threat to the long-term contractual and financial commitments might be. On the evidence before me, the only "*threat*" in this context would be the impact on the existing and future parking stations effectively operated by the first appellant and the consequential impacts on contributions to the Royal Brisbane Women's Hospital (RBWH).<sup>72</sup> No basis is provided for the opinion that the proposed development will affect the orderly development of the PDA and, in my view, whether it results in a less than satisfactory form of development for the community and the state is a matter for others.
- [78] It was Mr Duane's opinion, the economist relied on by Silverstone, that the proposed development would have no impact on the viability of the PDA.<sup>73</sup> Mr Brown does not say otherwise. It is quite clear that his concerns were that if it went ahead, what was proposed might "*ultimately discourage investment in such facilities subject to a CSO. In this context it is important to ensure that there is certainty in investment and that planning decisions do not unduly prejudice such investment.*"<sup>74</sup>
- [79] That it was not the viability of the development of the subject PDA that was of concern to Mr Brown is reinforced by his individual statement.<sup>75</sup> In that statement he relevantly said:

"The proposed development would target non-staff parking as its core market segment. To do this it would need to set pricing on terms lower than that in the hospital precinct car parks for there to be any community benefit. **Militating against that benefit is the disincentive to future**

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<sup>71</sup> Exhibit 15, at para 32.

<sup>72</sup> Exhibit 16, paras 15, 19 and 20.

<sup>73</sup> Exhibit 8, V5, tab 32, p 1191, at para 117(h).

<sup>74</sup> Ibid, at para 118(b).

<sup>75</sup> Exhibit 13, p 4, at para 26.

**provision of a community service obligation** in relation to staff parking and disincentivising public and active transport.” (Emphasis added)(footnotes omitted)

- [80] To the extent that the approval of this development might in some way act as a disincentive to developers entering into developments of state significance involving CSO’s is, at best, a possible outcome that will depend very much upon the facts, matters and circumstances surrounding any such development. At the end of the day, it is an opinion expressed by Mr Brown without any meaningful attempt to justify it by reference to data or examples. To the extent that such a risk or disincentive might be created is, on the evidence before me, no more than a possibility and one too vague and remote to militate against approving the proposed development.
- [81] Turning then to the financial contributions made to the RBWH Foundation, it was submitted on behalf of the appellants that those contributions might be “*obliterated altogether*”.<sup>76</sup> On this aspect, Mr Hartley’s evidence was:<sup>77</sup>
- “The profit sharing arrangement contributed \$1.3m to the Foundation in the last financial year, which amounts to about 20% of the Foundation’s revenue. The forecast share available for the RBWH Foundation for 2018-2028 is set out in the following table.”
- [82] That table shows that the predicted contribution would rise from \$1.3m in 2018 to approximately \$2.2m in the 2028 financial year. Mr Hartley then goes on to say that, based on a report prepared by consultants, were the proposed development to proceed, occupancy rates from those parking stations effectively operated by the first appellant would reduce from 80% to 75% and that:<sup>78</sup> “*clearly, this will have adverse commercial impacts on IPG. However, it will also result in a detriment to the public. This is so because returns to the RBWH Foundation under the profit share arrangement described above will be delayed and reduced or potentially negated.*” Pursuant to a financial “arrangement”, that foundation currently receives “*50% share of profits of the car park...*”. The source of this funding was referred to by the appellant’s as the “Metro car parks”.<sup>79</sup>
- [83] Mr Hartley does not say, and I do not accept, that based on the relevant figures the financial contribution to the foundation would be obliterated. That there is the

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<sup>76</sup> AWS, at para 118(a).

<sup>77</sup> Exhibit 16, at para 15.

<sup>78</sup> Exhibit 16, at para 20.

<sup>79</sup> AWS, at para 118.

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

[84] The other comment I would make about this evidence is that while Mr Hartley says that the proposed development would have a negative commercial impact on the first appellant's business, he does not say that it would jeopardise its viability.

[85] The next qualitative aspect addressed by the appellants is the potential for prejudice on transport infrastructure. The introduction of more car parking spaces might well have some negative flow on effects in encouraging the use of private rather than public transport. That, however, has to be seen in context. What is proposed would represent about 10% of the car parking capacity controlled by the first appellant and about 5% of the total number of car parks in the general vicinity of the hospital. As Mr Buckley fairly put it, the proposal might have some cumulative negative impacts in regard to public transport infrastructure but, to use his words, it would not be "*the straw that would break the camel's back.*"<sup>80</sup> To the extent that there might be some negative impacts insofar as public transport infrastructure is concerned, those impacts would not be sufficient to operate against the proposed development. The burden of proof of course lays with Silverstone to satisfy me that the appeal ought be dismissed, but I would observe that no attempt was made by Mr Brown or indeed any witness, to quantify what the impact might be. On the evidence before me it seems more likely than not that the impact would tend to be marginal.

[86] The last qualitative aspect is that the proposed development is inferior and does not provide the same public services as those car parks operated and to be operated by the first appellant. It can be accepted that the proposed development will not provide guaranteed and discounted staff parking for the hospital. However, I do not consider that to be a particularly relevant consideration. As both Mr Duane and Mr Brown identified, it will be targeting casual parking.

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<sup>80</sup> T6-51 ll 20-33.

- [87] As to the alleged inferiority of the proposed development, insofar as design is concerned, it could not reasonably be described as being an inferior car parking station. However, not being within the hospital precinct it will not have the ability to provide direct access to the hospital which would be capable of being under surveillance at all times. That again of course has to be seen in context in that any users of the proposed car parking development would only have to cross Butterfield Street to be very close to the entry point to the hospital. Also, insofar as safety within the proposed development is concerned, Silverstone now intends to incorporate an intercom system on every level that provides a direct line to the manager between 6.30AM and 11.30PM seven days a week. Also, Silverstone proposes emergency call buttons on every level to provide direct access to alert the management firm's security personell for immediate response at any time and CCTV surveillance that will operate on a 24 hours seven day a week basis.
- [88] The proposed development will not be as convenient as most if not all of the "Metro" car parks within the PDA nor provide for as much security for users, particularly staff. While the proposed development will be inferior in that regard, at no time was it suggested that it was either an unsuitable site as far as location was concerned or that it would result in an unsafe parking environment.
- [89] Having regard to the above, the only thing I would add in respect of the appellants analogous out of centre argument and the reference to *Australian Capital Holdings v Mackay City Council*<sup>81</sup> and other cases, is to repeat that I am satisfied that what is proposed will not put at risk to any material extent the viability of the development in the PDA.
- [90] As to the issue of "expectations" ,<sup>82</sup> I will address that when dealing with the evidence of the town planners.
- [91] While some of the qualitative aspects raised by the appellants are genuine, I am satisfied on the whole of the evidence that either separately or together they would not militate against approving the proposed development.
- [92] Turning then to the quantitative aspects of the need debate, they are said by the appellant to involve two primary points. First, the determination of the appropriate

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<sup>81</sup> [2008] QCA 157.

<sup>82</sup> AWS, at para 117.

supply and demand occupancy rate scenarios for the with and without the proposed development scenarios. Second, the determination of what the correct effective capacity occupancy rate is (80% to 90% or 95% to 100%).

- [93] Before going on to deal with those two primary and other relevant matters, this is not a case about whether there is demand for more parking. Clearly there is. The issue to be resolved is, if having regard to existing and proposed parking facilities,<sup>83</sup> is there a need for an additional parking facility of the type proposed?
- [94] Turning to the two “*Primary Points*”, I will deal with the matter of occupancy rates first. As already addressed when dealing with the issue of traffic, I have reached the conclusion that Mr Trevilyan’s literature review on sensitivity analysis did not support his adoption of an occupancy rate of 95% or even higher.
- [95] While Mr Brown recognised that the optimal occupancy rate would be less than 100%, his evidence was, at least as I understood it, that it would be higher than 85% and perhaps up to 95%.<sup>84</sup> However, his opinion about this was based on his views and Mr Trevilyan’s sensitivity analysis.<sup>85</sup> I do not need to say anything more about that sensitivity analysis.
- [96] Both Mr Trevilyan and Mr Brown have the expertise to give evidence about this topic but that does not mean it is the best evidence. It is my view that the best evidence on this topic would come from those with more intimate knowledge and experience with the planning operation and management of large car parking facilities.
- [97] Mr Hartley clearly falls into that category.<sup>86</sup> The references to present occupancy rates (80%) and that if the proposed development went ahead (75%), is taken directly from a report prepared by consultants retained by the appellants (PTC).<sup>87</sup>
- [98] In another document signed by Mr McLachlan, the development director for the Herston Quarter Australian Unity Property Project, it was said:<sup>88</sup>

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<sup>83</sup> The evidence of Mr Hartley is that in the order 2000 further car parks will be provided within the PDA between 2020 and 2024, see Exhibit 16, at para 10.

<sup>84</sup> Exhibit 13, at paras 35-37.

<sup>85</sup> T5-63 ll 7-47; T5-64 ll 1-17.

<sup>86</sup> Refer to Exhibit 16, paras 1-3.

<sup>87</sup> Exhibit 8, V4, tab 18, pp 791-792.

<sup>88</sup> Exhibit 8, V4, tab 19, p 798 (See also at table 18).

**“As the ptc report shows, the car parking utilisation is currently approximately 80%. As commercial operators, IPG can advise that the peak efficiency carpar (sic) is about 85% capacity. Any more above that and patrons find it difficult to locate spaces easily, so traffic flows inside the car park increase and the parking regime becomes less efficient. Anything less than about 80% represents an inefficiency and underutilisation of space.**

**The ptc report shows that the erection of the proposed Butterfield Street car park will reduce the utilisation rates of car parks within the Herston Quarter PDA to about 75%. This is a direct and adverse impact upon the efficient operation of the traffic and parking needs of the Health Precinct, as it results in suboptimal and unplanned utilisation rates within the Precinct, directly contrary to the planned functioning of the health facilities within the PDA. It is therefore contrary to good urban planning.”**  
(Emphasis added)

- [99] That both Mr McLachlan and Mr Hartley were prepared to adopt and rely on that data provided by PTC is not surprising given the numerous studies those consultants had carried out to assess demand for the Herston Quarter.<sup>89</sup>
- [100] During final submissions, Mr Gore submitted that little weight should be given to Mr McLachlan’s evidence about optimal occupancy rates on the basis of it not being part of the true evidence of the case.<sup>90</sup> I am unable to accept that submission for three reasons. First, it is evidence from those in the best position to know the real situation. Second, the reasons those figures were produced were very serious. It could hardly be expected that the appellants would adopt a frivolous approach concerning such matters in such circumstances. Third, the evidence is consistent with the evidence that those intimately involved with the operations of the first appellant intended this court to have regard to and action.<sup>91</sup>
- [101] For the reasons given, I am satisfied that the most accurate estimate of the appropriate occupancy rate is in the range of 85% to 90%.
- [102] I will turn then to the issue as to what the appropriate growth assumptions for non-residential parking would be. Mr Duane and Mr Brown put forward four possible scenarios. Mr Brown considered the second and third scenarios to be the most plausible while Mr Duane considered it to be the third and fourth scenarios.<sup>92</sup>

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<sup>89</sup> Exhibit 8, V4, tab 18, p 787.

<sup>90</sup> T8-43 ll 25-45; also AWS, p 44.

<sup>91</sup> Exhibit 16, at paras 19-20.

<sup>92</sup> Exhibit 31, at paras 25-29.

- [103] It is unnecessary to dwell on this dispute for long. Both economists consider the third scenario as plausible. None of the others are considered plausible by both. In circumstances where there are a number of assumptions that have to be made in respect of each, referred to by Mr Duane as “*the imprecise nature of the data*”,<sup>93</sup> I consider it prudent to proceed on the basis of the one scenario upon which both economists agree. As Mr Brown said, that would be a logical approach.<sup>94</sup>
- [104] In their second JER, the economists dealt with all four scenarios having regard to the supply of actual parking spaces and occupancy rates absent the proposed development and then with it.<sup>95</sup> For the reasons given, I propose only to address scenario three. The supply of spaces with the proposal in place envisages 4,932 spaces at 2019, 6,567 at 2026 and 7,727 at 2031. The occupancy rates without the proposal are 84.7% at 2019, 92.6% at 2026 and 109% at 2031. With the proposed development in place, those rates become 88.2% for 2026 and 103.8% at 2031. There is no entry for 2019.
- [105] Before turning to the analysis of those figures, I would make the following observations. First, the number of car parks used by the economists for 2019 (4,932) and 2026 (6,567) do not appear to be inconsistent with that estimate provided by PTC as at 2022, being 6,142 spaces. Second, without the proposed development, the occupancy rate of 84.7% appears to be relatively consistent with the occupancy rate of 80% as at 20 July 2019 and the “*peak occupancy*” rate of 85% as reported by Mr McLachlan.<sup>96</sup> Finally, for the year 2019, the figures provided by the economists do not refute and may even support the drop in occupancy to 75% and the excess parking capacity as expressed by Mr Hartley.<sup>97</sup> However, it is not possible to be definitive about the matter. That said, the evidence clearly establishes that demand for parking will continue to grow.
- [106] According to Mr Brown, the current supply/demand balance is appropriate for all scenarios save for scenario four.<sup>98</sup> However, that is based on an appropriate optimum occupancy rate being “*...in the order of 95% or even higher*”.<sup>99</sup> On the

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<sup>93</sup> Exhibit 31, at para 34.

<sup>94</sup> T5-65 ll 7-17.

<sup>95</sup> Exhibit 31, p 8, table 6.

<sup>96</sup> Exhibit 8, V4, tab 19, p 798.

<sup>97</sup> Exhibit 16, at para 19.

<sup>98</sup> Exhibit 31, at para 44.

<sup>99</sup> Ibid, at paras 42-43.

other hand, Mr Duane was of the opinion that in the without situation for scenario three, peak occupancy of 85% all but exists now and by 2026, the practical maximum capacity rate before the system becomes stressed (90%) will be exceeded. Accordingly, by the time of completion, there will be a demand for the proposed development to ensure parking availability close to the hospital at occupancy rates below the stressed condition.<sup>100</sup>

[107] For the reasons given, I have concluded that the best evidence concerning demand is that it would be determined based on an occupancy rate of between 80% - 90%. It follows, that the evidence of Mr Duane ought be preferred over that of Mr Brown on this topic.

[108] Before finalising this matter there are some others that I should address. First, Mr Brown relied heavily on information provided by Mr Trevilyan about occupancy rates in the preparation of the second joint report of the economists. However, based on his experience with parking in the CBD and shopping centres, in his court report he said “*I would also consider that the optimal peak utilisation rate is likely to be higher than 85%*”.<sup>101</sup> In a similar vein, in the appellant’s written submissions reference is made to the evidence of Mr Trevilyan to the effect that an 85% occupancy rate in the vicinity of the hospital is “*just nonsense*”.<sup>102</sup> The difficulty I have with this evidence is that it is not clear if Mr Brown, when referring to CBD or a main street parking environment and/or a shopping centre, is speaking of large, multi-storey car parks of the type proposed or not. In any event, probably more importantly, neither Mr Brown nor Mr Trevilyan appear to have had sufficient regard to what I consider to be the probative evidence, namely that above 85% the efficiency of a parking station is impacted upon and by 90% it is under a stressed condition. On this issue, I would also observe that in the very paper relied on by Mr Trevilyan, the author speaks of a parking facility being considered full if it has 85-90% occupancy because, at that level of occupancy, unoccupied parking spaces are not able to be readily found.<sup>103</sup>

[109] As will become apparent below, it was necessary for Silverstone to satisfy the court that there is both sufficient economic and community need. On the evidence before

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<sup>100</sup> Ibid, at paras 35-40.

<sup>101</sup> Exhibit 13, at para 35.

<sup>102</sup> AWS, at para 127; T7-30 ll 15-18.

<sup>103</sup> Exhibit 38, p 16.



me, I am satisfied there is a clear economic need to ensure that appropriate competition exists to avoid one or only a few operations dominating the market. Healthy competition typically leads to more choice options in respect of location and choice of operators but more importantly to more competitive pricing strategies by the competing operators. As to the community need, that is satisfied in that the proposed development would meet a demand for convenient and secure off-street parking. On this matter, Mr Buckley was prepared to accept at an “*abstract*” level or “*first principle*” basis that the proposed car park would provide a benefit to the community,<sup>104</sup> were “*needed for hospitals*”<sup>105</sup> and that the demand for parking spaces was likely to continue to grow.<sup>106</sup> I am also satisfied that there are no qualitative matters that would militate against approval.

### **Land use and the planning scheme**

- [110] As has been identified, above the subject land is relevantly located within the Low Impact Industry Zone under the planning scheme. Close by and to the east is land zoned to accommodate mixed commercial uses. On the southern side of Butterfield Street is land zoned to accommodate the hospital including the Metro car park.
- [111] The height, bulk and scale of the hospital could only be described as dense and imposing. Consistent with that is the seven storey car park which is located almost directly opposite the subject land. While the industrial zoned land currently comprises of a range of uses to the east and west of the subject, it is tolerably clear that re-development will occur in the future. Already located within the mixed use zone is a four storey building accommodating Queensland Health. It is also likely that further development will occur within this zoning which could accommodate structures, potentially as high as 10 storeys. To the east of the Queensland Health building is the imposing transport infrastructure network. To the west of the industrial land on both sides of Butterfield Street is character residential “infill” housing.<sup>107</sup> Clearly the subject land is surrounded by a range of buildings of mixed heights and uses and in a locality that is dominated by the hospital and associated buildings by virtue of its size and elevation.

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<sup>104</sup> T6-35 ll 5-17. T6-59 ll 16-28.

<sup>105</sup> T6-39 ll 37-44.

<sup>106</sup> T6-57 ll 1-3.

<sup>107</sup> Exhibit 8, V5, tab 30, pp 1087-1088, at paras 14-17; see also Exhibit 1, p 3.

[112] Mr Schomburgk and Mr Ovenden, the town planners for Silverstone and the Council respectively, did not see the industrial zoning of the land to be a matter that militated against approval of what is proposed. On the other hand, Mr Buckley did.

[113] Of particular significance to Mr Buckley is that the proposed development is inconsistent with two important elements of the planning scheme. First, those intended to preserve land to accommodate industrial uses within the inner Brisbane area, which is in short supply. The second is that what is proposed is to a material extent inconsistent with what the public expectations would be for the land under the Ithaca Neighbourhood Plan Code. In particular, overall outcome (OO)(4)(d). As was identified by the appellants, the interpretation of that outcome was a central issue in the appeal. In fact, the appellants went so far as to submit that if their interpretation of OO(4)(d) is accepted, that would be decisive either on its own or in combination with other use assessment benchmarks.<sup>108</sup>

[114] That outcome relevantly provides:

- “(d) **Development** in the Butterfield Street (a) sub-precinct (Ithaca District sub-precinct Neighbourhood Plan/NPP-OO1(a):
  - (i) **supports non-residential uses that have a close nexus** with the Royal Brisbane and Women’s Hospital complex provided relevant amenity and site flooding issues are satisfactorily addressed.
- (e) **Development** in the Butterfield Street (b) sub-precinct (Ithaca District sub-precinct Neighbourhood Plan/NPP-OO1(b):
  - (i) **may comprise higher intensity mixed uses to co-exist** with hospital uses, provided relevant amenity and site flooding issues are satisfactorily addressed.” (Emphasis added)

[115] That outcome, of course, has to be read in the context of other outcomes within the neighbourhood plan code and, of particular relevance here OO3(e), which provides:

“The neighbourhood plan area will capitalise on its strategic location by developing businesses **and** low impact industrial activities that support the city centre and its fringe **or** are associated with key facilities in the area, such as the Royal Brisbane and Women’s Hospital.” (Emphasis added)

[116] Overall Outcome 3(m) relevantly provides:

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

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<sup>108</sup> AWS, at para 31.

[117] Before going further, it is convenient to identify two important issues. First, the subject land lays within precinct 1(a) for the purposes of the neighbourhood plan. Second, under the hierarchy of assessment benchmarks under the planning scheme, neighbourhood plan codes prevail over zone codes, use codes and other development codes, to the extent of any inconsistency.

[118] In the JER, Mr Buckley said:<sup>109</sup>

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

In the abstract there is a planning basis to suggest a car park supports (a) hospital, but to lose industrial land in close proximity to the CBD, (the retention of which the Strategic Framework highlights as important), to provide car parking for uses with a nexus to the hospital which one would reasonably expect would have their own parking in any event, would represent...a serious conflict with City Plan – a conflict that would cut across consistent or aligned provisions at a number of layers of that plan.”

[119] In his court report,<sup>110</sup> Mr Buckley went on to address four specific matters. Car parking demand, supply and need, flooding, Butterfield Street congestion and the loss of low impact industry zone land. It is unnecessary to comment on the first three matters as they have been dealt with when dealing with the evidence of experts in those respective fields. In respect of the industry zoned land, Mr Buckley prepared a map which showed all the land zoned in the same way as the subject site within a reasonable proximity to the CBD. By reference to that, he went on to emphasise the need to maintain the supply of low impact, industrial zoned land for uses for which there is a strong demand.

[120] While I can accept the need to preserve land zoned for such industrial uses in close proximity to the CBD, that has to be seen in perspective. First, it is not identified within the planning scheme as one of Brisbane’s major industrial areas and is also not identified as a strategic inner city industrial area. Second, and more importantly, notwithstanding its zoning, it falls within a precinct in the Ithaca neighbourhood plan that clearly contemplates other than industrial uses. As identified above, it supports non-residential uses that have a close nexus with the hospital.

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<sup>109</sup> Exhibit 8, V5, tab 30, p 1099, at paras 71-72.

<sup>110</sup> Exhibit 14.

- [121] On the evidence before me, I am sufficiently satisfied that a parking station of the type proposed would be considered to have a close nexus with the hospital. The evidence that three car parks are proposed within the PDA also tends to support this conclusion. The evidence is that the dominant majority of the users of the proposed development would be visiting the hospital either for medical treatment or visitations. The fact that the car parks intended to be developed within the PDA are required to provide, to a very significant extent, staff parking at discount prices, does not derogate from this conclusion. This point is highlighted by the fact that Mr Brown, during the course of his evidence, correctly pointed out that the site was selected in order to take advantage of the demand for parking for those intending to attend the hospital for whatever reason. As a matter of “*principle*” Mr Buckley seemed to accept that a car park located on the subject land would have a close nexus with the hospital.<sup>111</sup>
- [122] On balance, I do not consider the zoning of the land to accommodate low density industrial uses militates to any material extent against approval of the proposed development in the circumstances of this proceeding. That of course is not the end of the matter.
- [123] According to Mr Buckley, what is proposed constitutes a “*misalignment*”<sup>112</sup> with performance outcomes PO1, PO5 and PO6 because:
- The height is well in excess of reasonable community expectations and heights anticipated adjoining the creek frontage;
  - Being a car parking – only use (and subject to the findings of further joint traffic expert investigations), it is likely to have a material impact on the balance between car parking needs and potential congestion.
- [124] The issues of need and traffic congestion have already been dealt with and there is no need to say anything further about those matters. Also, having regard to the mixed use zoning to the east of the subject land but on the northern side of Butterfield Street, development of up to 10 metres can occur. On balance, I do not consider there to be any serious “*misalignment*” because of subject land adjoining the creek to the north.
- [125] Turning then to the performance outcomes referred to by Mr Buckley. PO1 is concerned with achieving an outcome where development is of a height, scale and

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<sup>111</sup> T6-5 ll 5-17; T6-39 ll 35-43; T6-40 ll 3-37.

<sup>112</sup> T6-45 ll 24-43.

form that achieves the intended outcome for the precinct, improves the amenity of the neighbourhood plan area, contributes to a cohesive streetscape and built form and is:

- (b) Aligned to community expectations about the number of storeys to be built.

[126] There is only one acceptable outcome. AO1 provides that development is to comply with the number of storeys and building heights in table 7.2.9.2.3.B. That table prescribes the “*maximum building height*”<sup>113</sup> and identifies that for development within sub-precinct 1(a) of the Ithaca neighbourhood plan, development was to be limited to three storeys at a height of 10.5m. That can be contrasted with the maximum building height prescribed for sub-precinct 1(b) which is 10 storeys with no specified building height. The proposed development, at face value, is clearly at odds with both the building height and number of storeys. In reality, it comprises of six storeys and, at its highest point, is in the order of 19.25m high. That is, it is essentially double of that prescribed both in respect of the number of storeys and in height.

[127] PO5 is concerned with parking and traffic congestion and PO6 with building set backs, and building heights relative to the creek. I do not consider it necessary to say anything more about those performance outcomes for the reasons already given.

[128] During re-examination by Mr Gore, Mr Buckley was asked to give a summary about his views on about the issue of height.<sup>114</sup> He responded:<sup>115</sup>

“Well, it is a – one relevant matter, if you like. And without wishing to step into the law, the – there are dimensions about that. One is that what the scheme says in terms of acceptability of heights and its connection to reasonable expectations. And the other is just that the fact that there are other tall buildings in the area is a factor. In my view, they are things that go into the assessment. **And when they’re all – when it’s added to some of those other issues, which are, in my view, of more material nature, the tipping point doesn’t go in favour of the development, it just tips it over the edge. Not tips it over the edge, but certainly reinforces the misalignment with the planning scheme more.** And that’s how I interpret that aspect of the planning assessment.” (Emphasis added)

[129] That evidence in my view, makes it tolerably clear that the height and/or the number of storeys involved with the proposed development are not, of themselves major

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<sup>113</sup> Exhibit 10, p 193.

<sup>114</sup> In regards to issues of bulk and scale the appellants limited their complaint to the issue of height. See AWS, at para 55.

<sup>115</sup> T6-59 ll 5-14; See also T6-46 ll 23-37.

issues insofar as Mr Buckley was concerned. That is, in my respectful opinion, obvious from his use of words such as there are other issues which are “*of more material nature*” and that the question of height and/or number of storeys does not tip the scales necessarily against approval but instead “*certainly reinforces the misalignment with the planning scheme*”.

- [130] In the event that there was an established need for the proposed development and no unacceptable amenity outcomes, that was a very frank concession made by Mr Buckley. That answer correctly recognises that the neighbourhood plan is designed to capitalise on its strategic location by developing both business and low impact industrial activities that are associated with the hospital<sup>116</sup> and, that where circumstances warrant, community expectations in respect of height, bulk and scale may be disappointed.<sup>117</sup> Mr Buckley’s answer also of course includes his opinions about the need to preserve land zoned for low impact industrial purposes within proximity to the CBD. That matter has already been dealt with.
- [131] Before going on to deal with the proper construction to be afforded to OO(4)(d), it is necessary to deal with the issue of public expectations. It is well established that, subject to there being sound reasons to warrant otherwise, the planning scheme will be the embodiment of the public/community interest.<sup>118</sup> As part of that is that the community ought be able to expect that what the planning scheme intends to achieve or sets as benchmarks will be complied with. It is in this regard that the appellants submit that what is proposed constitutes an inappropriate built form. As has been identified above, the appellants quite properly, in my view, point out that in respect of issues of height, bulk and scale, issue was only taken in respect of its height.
- [132] In respect of the issue of public expectations, both OO3(m) and PO1 of the Ithaca neighbourhood plan code refer to development being consistent with or being in alignment with community expectations. Quite clearly then, at least at face value, by reference to PO1 and table 7.2.9.2.3B, at six storeys and at nearly 20m in height the proposed development might offend community expectations. However, the informed member of the community would know that the three storey and 10m

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<sup>116</sup> OO(e) and OO(4)(d) of the neighbourhood plan.

<sup>117</sup> OO3(m).

<sup>118</sup> *Bell v Brisbane City Council & Anor* [2018] 230 LGERA 374; *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132; *Brookside Estate Pty Ltd v Brisbane City Council* [2019] QPEC 33.

limitations might be overridden when there was both a community and economic need to do so.

[133] The informed member of the community would also be aware that the planning scheme stated an express intention to capitalise on business and low impact industrial activities which were proximate to key facilities such as, in this case, the hospital. Also, in this context, regard must be had to the physical environment in which the subject land is located. That has already been addressed above and I would only add to that that the dominance of the hospital, together with associated uses such as the seven storey car park, was of such an enormous scale as to warrant Mr Buckley referring to it as a “*mini suburb*” and a “*large beast*”.<sup>119</sup> Not surprisingly, Butterfield Street carries significant loads of traffic particularly in peak hour events. In short, the subject land is located in an environment that is busy and dominated by the built form to a material extent. As Mr Buckley observed, the proposed structure would not be “*out of scale*” given the character of the locality.<sup>120</sup>

[134] Having regard to the planning provisions to which I have referred and the physical characteristics of the location in which the subject land finds itself, I am satisfied that an architecturally designed six storey car park would not be beyond what the community might reasonably expect.

[135] This then brings me to what the appellants say is the critical and perhaps decisive issue, namely the proper construction to be given to OO(4)(d). In sub-precinct 1(a), in which the subject land finds itself, development must be of type that “*supports non-residential uses*” that have a close nexus with the hospital. According to the appellants:<sup>121</sup>

“The error in the approach taken by Mr Schomburgk and Mr Ovenden (and so contended for by Silverstone and the Council) is exposed by their opinion in the TPJER that:

‘The proposed use is a non-residential use that has a close nexus with the hospital.’

That involves a serious misreading of OO4(d). OO4(d) does not provide for ‘non-residential uses that have a close nexus with’ the hospital; rather, it provides for development in sub precinct 1(a) that ‘supports non-residential uses that have a close nexus with’ the hospital. On the other parties’ interpretation, the word supports is given no work to do.

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<sup>119</sup> T6-59 l 23.

<sup>120</sup> T6-46 ll 3-37.

<sup>121</sup> AWS, at paras 34-36.

Another way of describing the error in the other parties' interpretation is to point out that they would wish that the word 'supports' were read as 'comprises'. But that cannot be done, for at least two reasons. First, as a matter of ordinary English, 'support' and 'comprise' are not synonymous. They have quite different meanings. Secondly, the use of the word 'comprise' in OO(4)(e) highlights that the drafter did not intend to use the same word, or a word with similar meaning, in OO(4)(d). The close juxtaposition of 2 words with different meanings is telling." (Footnotes omitted)

- [136] At the risk of putting it another way, if the proposed car park is the non-residential use that has a close nexus with the hospital, how can it then be said that it supports non-residential uses that have that nexus? It was stated in the appellant's written submissions that while a car park could sensibly be seen as a development of a higher intensity mixed use capable of co-existing with the hospital for the purposes of sub-precinct 1(b), "*for the purposes of sub-precinct 1(a), it would be nonsensical to read OO4(d) to say that a car park supports a car park*".<sup>122</sup> (Footnotes omitted)
- [137] According to the appellants, there are only two elements insofar as development within the sub-precinct 1(b) is concerned. First, the development and second, its need to be able to co-exist with the hospital. However, insofar as sub-precinct 1(a) is concerned, there are three elements. First, the development. Second, that that development must support non-residential uses and, third, that those uses have a close nexus with the hospital.
- [138] At the centre of the controversy between the parties was the purpose or outcome OO4(d) ought to achieve. In *SZTAL & SZTGM v Minister for Immigration and Border Protection* in the reasons of Kiefel CJ and Nettle and Gordon JJ, it was said:<sup>123</sup>

**"The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose.** Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected." (Footnotes omitted, emphasis added)

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<sup>122</sup> AWS, at para 40. Note: the reference to my "observation" was no more than an exchange between the bench and Mr Gore to clarify the appellants case, or part thereof, on this topic.

<sup>123</sup> (2017) HCA 34 at [14].



[139] In a similar vein, Gagler J observed:<sup>124</sup>

“The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from ‘a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural’, in which case the choice ‘turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies’.

Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, **‘the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation’** ‘is in that respect a particular statutory reflection of a general systemic principle.’” (Footnotes omitted, emphasis added)

[140] According to Silverstone, to interpret OO4(d) in the manner contended for by the appellants is contrary to the “*purposive approach*” to be taken to statutory interpretation and would lead to an absurd outcome.<sup>125</sup>

[141] It was then submitted:<sup>126</sup>

“The use of terms ‘*support*’ in respect of sub-precinct NPP/001a and ‘*comprise*’ in respect of NPP/001b is explained by the different zoning of the two relevant sub-precincts. NPP/001b is within the Mixed Use (Corridor) Zone. It is therefore unsurprising that the Neighbourhood Plan provides for development in sub-precinct NPP/001b to comprise higher intensity mixed uses. Clearly the legislature has determined that an, if not the most important, land use in this part of the Ithaca District Neighbourhood Plan area is the Hospital Complex, so land uses which **support** that Hospital Complex are encouraged in sub-precinct NPP/001a in the Low Impact Industry Zone whereas uses in the Mixed Use Zone sub-precinct NPP/001b may include higher intensity mixed uses which ‘*co-exist*’ with hospital uses but do not necessarily support them.

The use of the word ‘*supports*’ in Overall Outcome (4)(d) may also be compared with the use of the word ‘*support*’ in Overall Outcome (6)(a), which reflects a clear intention for Bishop Street to continue to provide an important industrial support functions for the city centre and its fringe.

In summary:

- (a) The proposed use as a Parking Station cannot sensibly be regarded as an incompatible use in the Low Impact Industrial Zone: the same use as a ‘*park ‘n ride*’ facility is code assessable, and it does not “*encroach*” upon or compromise the use of nearby land for other low impact industry purposes;

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<sup>124</sup> Ibid, at [38]-[39].

<sup>125</sup> Silverstone written submissions, at para 53.

<sup>126</sup> Ibid, at paras 54-56.

- (b) The Neighbourhood Plan supports development in the Neighbourhood Plan area that ‘*supports...*’ or ‘*are associated with key facilities such as the Royal Brisbane and Womens Hospital*’;
- (c) OO(4)(d) specifically contemplates development of non-residential **uses that support and have a close nexus with the Hospital Complex** in this very sub-precinct.” (Footnotes omitted, original emphasis)

[142] The Council adopted a similar approach. According to it, “*in this context, the word ‘supports’ means provides, and overall outcome (4)(d)(i) seeks to encourage forms of development which provide a non-residential use that has a close nexus with the hospital.*”<sup>127</sup>

[143] While the construction contended for by Silverstone and the Council might appear attractive at first blush it is, in my respectful opinion, wrong. It fails to recognise the true context in which the word “*support*” is used. The outcome does not, as Silverstone submitted, encourage uses that support the hospital. It encourages development that supports non-residential uses with a close nexus with the hospital. The same can be said about the construction contended for by the Council. The outcome was not drafted to encourage development which provides a non-residential use with a close nexus to the hospital. That construction again misses the point. The outcome is not drafted to encourage development that “*provides*” a non-residential use but to “*support*” non-residential use with the necessary nexus with the hospital. As Mr Gore pointed out, had those who drafted OO4(d)(i)(a) intended the outcome contended for by Silverstone and the Council, it would have been a relatively straightforward exercise to do so. For example, it could have adopted language of the type used in OO4(e) concerning sub-precinct 1(b).

[144] The word “*supports*” must be given the meaning which best achieves the purpose intended. Examples of Low Impact Industry uses with a close nexus with the hospital were set out in the appellants’ written submissions. For the reasons given though, uses within sub-precinct 1(a) need not be of an industrial character. Accordingly, the development of a building that accommodated physiotherapists, specialist rooms and/or pathology services might also be considered to have a close nexus with the hospital. To take the example of a car park, if it provided parking for, or primarily for, employees of a use of the type referred to above, it may also be said to be supportive of those uses. On the other hand, as is the case here, a car park

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<sup>127</sup> Council written submissions, at para 82.

that will be predominately used for the parking of visitors or patients to the hospital, while having a close nexus with the hospital, does not support a “use” with that connection with the hospital.

[145] Accordingly, the conclusion I have reached is that the proposed development does not comply with OO4(d)(i) to the extent identified.

[146] That, however, is not decisive in my view. It is common ground that this appeal is to be determined under the *Planning Act 2016* and the *Planning and Environment Court Act 2016*. Section 60(3) of the *Planning Act* provides:

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

[147] That stands in stark contrast to s 326 of the *Sustainable Planning Act 2009* which mandated that the assessment manager’s decision must not conflict with a planning instrument unless there were sufficient grounds to justify approval despite the conflict. The distinction was emphasised by Sofronoff P (with Fraser JA and Flanagan J in agreement) in *Gold Coast City Council v K&K (GC) Pty Ltd*.<sup>128</sup> The President, after referring to submissions made on behalf of the Council, made the following observations:

“The Council did not identify any authority for the propositions contained in subparagraphs 317(c) and (d) of its written outline. That is not surprising because, for the reasons that I have set out above, those two propositions are wrong. The process under s 326(1)(b) does not involve a consideration of the ‘competing merit and weight of the grounds relied upon to justify approval’. That was the process required by former legislation, namely the *Local Government Act 1936* (Qld). Section 17 of the *Local Government Amendment Act 1975* (Qld) established criteria (for the first time) for a decision to allow a rezoning application. **In *William McEwans Pty Ltd v Brisbane City Council*, Carter DCJ said that the decision making process under the *Local Government Act 1936* (Qld) was a flexible one and that applicable statutory criteria would vary from case to case. That is not what s 326 of the SPA requires.**” (Footnotes omitted, emphasis added)

[148] In *Ashvan Investments Unit Trust v Brisbane City Council & Ors*,<sup>129</sup> after referring to the Explanatory Notes for the Planning Bill 2015, Williamson QC DCJ said:

“Dispensing with the so-called two part test means that non-compliance with assessment benchmarks, which include planning schemes, no longer

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<sup>128</sup> [2019] QCA 132 at [60].

<sup>129</sup> [2019] QPEC 16 at [51].

has assumed primacy in the exercise of the planning discretion. As I said in *Smout v Brisbane City Council* (Supra) at [51], in this way, the discretion conferred by s.60(3) of the PA admits of more flexibility for an assessment manager (or this Court on appeal) to approve an application in the face of non-compliance with a planning document in contrast to its statutory predecessor. **This, the Explanatory Notes state, is to allow a ‘balanced decision in the public interest’ to be reached, based on an assessment of the merits of an application having regard to established policy and other relevant considerations.**” (Emphasis added)

[149] His Honour’s observations, in my respectful opinion, are clearly correct and reflect the reasoning of Judge Carter in the case of *William McEwans*<sup>130</sup> to which the President of the Court of Appeal cited with apparent approval in *K&K (GC) Pty Ltd*.

[150] More recently, in *Murphy v Moreton Bay Regional Council & Anor*, Kefford DCJ observed:<sup>131</sup>

“...As was noted by Judge Williamson QC in *Ashvan*, it is not possible to forecast the will of the community, in land use terms, with scientific precision. The needs of a community are not static and immutable.

The legislation requires a planning scheme to include measures to facilitate the achievement of the strategic outcomes. ....

When viewed in that context, one can appreciate that development that differs from that encouraged by the planning controls, or that fails to comply with benchmarks set in a planning scheme, does not necessarily result in haphazard development. Development may differ from the planning controls but be compatible with, ancillary to or designed to complement the planning outcome sought by the planning controls, or otherwise advance the needs of a community in a particular area without undue adverse town planning consequence, because of its own merits and the particular combination of facts and circumstances relevant to it. This underscores the importance of flexibility in the decision-making process.

...The (decision makers) decision must withstand scrutiny against the background of the planning scheme and proper planning practice. Not every non-compliance will warrant refusal. It will be necessary to examine the verbiage of the planning scheme to ascertain the planning policy or purpose of relevant provisions and the degree of importance the planning scheme attaches to them. **The extent to which a flexible approach will prevail in the face of any given non-compliance with a planning scheme (or other assessment benchmark) will turn on the facts and circumstances of each case.**” (Footnotes omitted, emphasis added)

[151] Accepting the level of non-compliance with OO4(d)(i), I have identified on the other side of the ledger is that there is a clear community and economic need for more car parking in the vicinity of the hospital and, for the reasons given, there will be no adverse impacts on amenity subject to suitable conditions being imposed.

<sup>130</sup> *William McEwans Pty Ltd v Brisbane City Council* [1981] QPLR 33.

<sup>131</sup> [2019] QPEC 46 at [19]-[22].

Further, also as identified above, a structure of the type proposed, given its surrounding built environment, would not offend public expectations to any material extent and, of particular significance, has a close nexus with the hospital, an important element of OO4(d)(i).

[152] In *Moncrieff v Townsville City Council (No.2)*<sup>132</sup> Durward SC DCJ, after referring to a number of authorities, went on to observe that it was well recognised that the existence of a planning need coupled with an absence of unacceptable impacts is a strong, if not determinative planning ground in favour of approval.<sup>133</sup> That the legislation under consideration by Durward SC DCJ was the *Integrated Planning Act 1997* does not derogate from the correctness of that observation in my respectful view.

[153] On balance, I have reached the conclusion that, for the reasons identified above, the balance falls in favour of approval despite the non-compliance with the planning scheme. Accordingly, the orders of the court are:

1. The appeal is dismissed.
2. I will hear from the parties if, necessary, as to any consequential orders.

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<sup>132</sup> [2011] QPEC 100.

<sup>133</sup> At [205].