

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Adpen Pty Ltd v Moreton Bay Regional Council & Anor*
[2019] QPEC 59

PARTIES: **ADPEN PTY LTD (ACN 614 854 358)**
(Appellant)

v

MORETON BAY REGIONAL COUNCIL
(Respondent)

and

Oakey Flat Corp Pty Ltd (ACN 600 878 840)
(Co-respondent by election)

FILE NO: 232/19

DIVISION: Planning and Environment Court

PROCEEDING: Hearing of an appeal

ORIGINATING COURT: Planning and Environment Court of Queensland, Brisbane

DELIVERED ON: 20 November 2019

DELIVERED AT: Brisbane

HEARING DATES: 9, 10, 11, 12 and 13 September and 14, 15, 16 and 18 October 2019

JUDGE: RS Jones DCJ

ORDER: **1. The appeal is dismissed.**

2. I will hear further from the parties, if necessary, as to any consequential orders.

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where the appellant submitted a development application for preliminary approval to vary effect of the planning scheme to build a local centre – where the respondent council refused that application – where the appellant appeals against that refusal – where the co-respondent has preliminary approval from the respondent council to carry out commercial development on nearby land – whether the appellant’s proposal is compliant with the planning scheme – whether the respondent council has correctly interpreted the planning scheme in refusing the appellant’s application – whether the appellant’s proposal complies with relevant assessment benchmarks

NEED – where the co-respondent intends to develop on an adjacent site – whether the co-respondent’s site can fulfil the role of a local centre under the planning scheme – whether the co-respondent’s site can fulfil public expectations – whether there is a need for two local centres in the locality – whether approval of the appellant’s development application would prejudice the overall centres network

LAND USE – where the planning scheme does not plan for a local centre on the subject site – whether the planned centres in the planning scheme are indicative only – whether the proposed development is out of sequence – whether the proposed development would disrupt the hierarchy of centres contended for by the planning scheme – whether there is sufficient infrastructure to support the development on the subject site – whether there is a departure from the intentions of the planning scheme so as to dismiss this appeal

TRAFFIC – where issues with internal and external traffic arrangements were raised – whether the proposed development is compliant with council’s road structure planning – whether the development’s preliminary intersection designs cause safety concerns – whether the proposed development would have unacceptable transport and traffic engineering outcomes so as to dismiss this appeal

WHETHER ALL ISSUES RAISED BY PARTIES NEED BE CONSIDERED – where there has been significant non-compliance with the planning scheme – whether balance of issues need discussion – noise – air quality – lighting – stormwater – water and sewerage

Legislation

Planning Act 2016 (Qld)

Planning and Environment Court Act 2016 (Qld)

Sustainable Planning Act 2009 (Qld)

Cases

Ashvan Investments Pty Ltd v Brisbane City Council [2019] QPEC 16

Bell v Brisbane City Council (2018) 230 LGERA 374

Brookside Estate Pty Ltd v Brisbane City Council [2019] QPEC 33

Elan Capital Corporation Pty Ltd & Anor v Brisbane City Council & Ors [1990] QPLR 209

Family Assets Pty Ltd v Gold Coast City Council (2008) 161

LGERA 43

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

Harbour Radio Pty Ltd & Anor v Wagner & Ors [2019] QCA 221

Isgro v Gold Coast City Council & Anor [2003] QPELR 414

King & Ors v Australian Securities and Investments Commission [2018] QCA 352

Lipoma Pty Ltd v Redland City Council & Anor [2017] QPEC 53

Lucas v Chesterfield Gas & Water Board [1909] 1 KB 16

NL Horner & Horner Investments Pty Ltd v Brisbane City Council (1983) 9 QLCR 3

Sheezel & Anor v Noosa Shire Council [1980] QPLR 130

COUNSEL: Mr EJ Morzone with Mr KW Wylie for the appellant
Mr CL Hughes QC with Mr M Batty for the respondent
Mr B Job QC for the co-respondent by election

SOLICITORS: Warlow Scott Lawyers for the appellant
Moreton Bay Regional Council Legal Services for the respondent
Connor O’Meara Solicitors for the co-respondent by election

[1] This proceeding is concerned with the determination of an appeal lodged by Adpen Pty Ltd (Adpen) against the decision made by the Moreton Bay Regional Council (the Council) to refuse a development application over the subject land for a preliminary approval for a variation request to vary the effect of the planning scheme. The proposed development is for a full line supermarket and other commercial uses. Oakey Flat Corp Pty Ltd (Oakey Flat) elected to become involved in the proceeding essentially to protect its preliminary approval to carry out commercial development on land located to the north. For the reasons set out below, the orders of the court are:

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

The site and its surrounds

- [2] The subject land is located at 285-293 Oakey Flat Road, Morayfield. It comprises three allotments described as Lot 8 on RP196576 and Lots 2 and 3 on RP804516 which, in combination, gives a total area of 3.81 hectares. The majority of the land comprises of a regular configuration however, it tapers towards a relatively narrow frontage to Burbury Road to the west. It has a 160m frontage to Oakey Flat Road but only a 18.5m frontage to Burbury Road. The whole of the site lies within the Emerging Community Zone (Transition Precinct). A particularly significant feature is that it slopes downwards from east to west, a fall of in the order of 11.5m. The topography of the land was described by the town planners in their Joint Expert Report (JER) in the following way:¹

“Topographically, the land rises gently to the west from Oakey Flat Road to a mild ridge about mid-way along the property before falling toward Burbury Road. The difference in RL between Oakey Flat Road and Burbury Road is significant.”

- [3] Oakey Flat Road connects Morayfield to the north with Narangba to the south and, accordingly, carries a significant amount of traffic. It is currently designated by the Road Hierarchy Overlay of the Council’s planning scheme as a Council arterial road. On the other hand, Burbury Road culminates in a cul-de-sac towards the western end of the site. More will be said about the future for Oakey Flat Road below. The site is currently improved with three dwellings, one on each of the separate lots and a tennis court on Lot 3. Two of those dwellings would be demolished to facilitate the proposed development. One will remain and be situated on one of the proposed residential lots to the west.²
- [4] The immediate surrounds could be described as having a rural residential character. Further to the north is the more densely developed Morayfield urban area.³ In the more immediate vicinity though, are a number of proposed residential developments. To the north, the Lake View estate and Morayfield Heights developments are presently under construction. There are a number of other sites which are either approved for development or, where development approvals have been granted but have been withdrawn or lapsed, and others where the development

¹ Exhibit 11, p 5, para 12.

² See Exhibit 1, pp 8 and 9.

³ See generally Exhibit 1, p 12.

application has been refused by the Council and that decision is currently under appeal.⁴

The proposed development

- [5] The development application under consideration seeks the preliminary approval (variation request) to vary the effect of the Council's planning scheme 2015. The development sought was said to be in accordance with the Centre Zone (Local Centre Precinct). Insofar as the Council's planning scheme is concerned, the substantive provisions are the Strategic Framework, the Emerging Community Zone Code and the Centre Zone Code.
- [6] On more than one occasion Mr Morzone, leading counsel for the appellant, stressed that the approval sought was only preliminary. That said, the various iterations of what was proposed includes a mixed use local centre with a full line supermarket anchoring a number of other uses including, but not limited to, a child care centre, a service station and fast food outlets. A residential component is also intended for the south-western more irregularly shaped area of the land fronting Burbury Road.
- [7] In its first iteration, the area of the site intended to be developed for commercial purposes was 2.1375m², comprising of:
- (a) Fuel shop – 210m² tenancy 185m²;
 - (b) Food drive thru (sic) 150m²;
 - (c) Hand car wash/DT bottle shop 385m²;
 - (d) Commercial/retail 523m²;
 - (e) Medical centre 800m²;
 - (f) Supermarket 3200m²;
 - (g) Specialty (shops) 500m²;
 - (h) Childcare facility (125 children) 1095m².
 - (i) In total 316 car parks were also to be provided; and
 - (j) To the west 18 single dwelling residential lots of various sizes were intended.⁵
- [8] In its second iteration, the proposed development increased by approximately 1000m². The most significant difference being in the amount of commercial/retail space increasing from 523m² to 1320m².⁶ Somewhat consistent with Mr Morzone's insistence that only a preliminary approval is being sought, were the more recent

⁴ See Exhibit 1, p 14.

⁵ Exhibit 1, p 8.

⁶ Exhibit 1, p 9.

plans relied on by Adpen which contained materially less particularity than previously.⁷

- [9] It is convenient at this stage to note that the Council has granted a Preliminary Approval to vary the effect of its planning scheme to permit development in accordance with a Modified Assessment Table for the Local Centre Zone. That approval was granted to Oakey Flat on 11 August 2017, and has a currency period of 6 years. That approved centre is located approximately 700m north of the subject site at 192 Oakey Flat Road, Morayfield on the corner of Clark Road. The Oakey Flat site is materially smaller than the subject comprising of 1.2 ha. Consistent with that, a more modest commercial development was intended comprising of a supermarket of 3,600m² and limited speciality shops.⁸
- [10] At present, the approval is subject to a condition which limits the proposed centre to a combined maximum of 2,500m² gross floor area (GFA) of retail uses with a maximum individual tenancy of not more than 1,000m². The commercial development was limited to one supermarket or mini major grocery store. In essence, under the Council's planning scheme, the development was properly described as a "*neighbourhood hub*". However, the relevant condition⁹ also provided that the Council could consider an increase in the GFA of retail uses together with a greater maximum individual tenancy size where it was able to be demonstrated that it could meet the role of a "*local centre*" under the planning scheme.
- [11] In December 2018, a change application was lodged seeking to amend what was approved to allow for a combined maximum of 4,000m² GFA, with a maximum individual tenancy size of not more than 1,000m², save for a supermarket of up to 3,350m².¹⁰ Accompanying the change application was an economic assessment which stated that a clear economic need existed for a local centre on the site. The Council issued an Information Request in February 2019 and the response to that request provided details which included a layout plan depicting a full line supermarket of 3,600m² together with speciality shops of up to 400m².¹¹ Coles has

⁷ Exhibit 1, pp 10 and 11.

⁸ See for example Exhibit 19, p 37.

⁹ Condition 4.

¹⁰ Exhibit 8, p 43, at para 72.

¹¹ See Exhibit 20, p 155.

expressed an interest in taking up a supermarket on the Oakey Flat site and more will be said about that when dealing with the question of need.

- [12] Pursuant to s 45 of the *Planning and Environment Court Act 2016*, Adpen bears the onus of satisfying the Court that the appeal ought be allowed.

The issues in dispute

- [13] While there is a significant degree of commonality between the parties as to what the issues in dispute were, they are not couched in identical terms. That said, it is clear that the central issues to be addressed, if necessary, are as follows:

- (i) Whether the proposed development would be an appropriate use of land having regard to, in particular, the Council's centre network planning and strategy, the planning intent for the land and the surrounding locality;
- (ii) Whether the proposed development is out of sequence in respect of necessary infrastructure;
- (iii) Whether the proposed development constitutes acceptable design including visual amenity;
- (iv) Whether the proposed development would result in unacceptable amenity, noise, light and air quality impacts;
- (v) Whether the proposed development would result in unacceptable hydrological, flooding, water quality and storm water impacts;
- (vi) Whether there is sufficient need for the proposed development;
- (vii) Whether approval of the proposed development might prejudice the rights of submitters if allowed to be approved as proposed;
- (viii) Whether an acceptable outcome can be achieved on the subject land in respect of traffic accessibility (ingress and egress) and safety issues;
- (ix) What, if any, impact would the proposed development have on other existing and approved developments in the locality;
- (x) Whether there are other relevant matters that favour or negate approval of the proposed development;
- (xi) It is uncontroversial that pursuant to s 45 of the *Planning and Environment Court Act 2016* (PECA) it is for Adpen to satisfy me that the appeal ought be allowed.

The expert witnesses

- [14] Consistent with the above mentioned issues in dispute, the parties relied on expert evidence to deal with the following topics:

- Storm water;
- Water supply and sewerage;

- Need;
- Traffic;
- Noise, air quality and lighting;
- Town planning.

[15] In addition to those areas of expertise, the Council also relied on the evidence of Mr Curtis, a highly qualified and experienced architect, to deal with the topics of urban design and visual amenity. It is convenient at this stage to deal with the evidence of Mr Curtis.

Urban design and visual amenity

[16] Mr Curtis prepared two reports. One dealing with urban design¹² and the other visual amenity.¹³ It is clear from both reports that Mr Curtis was of the firm opinion that the conceptual designs¹⁴ initially advanced by Adpen contained numerous elements which did not comply with relevant provisions of the planning scheme.¹⁵ Thankfully, it is not necessary to trawl through all of those potential areas of non-compliance identified by Mr Curtis. That is so because of a number of concessions made by him when cross-examined by Mr Morzone. Rather than taking issue with each of the issues identified by Mr Curtis, Mr Morzone focussed on the ability to design and construct a mixed use commercial development including a full line supermarket that would address his concerns both in respect of visual amenity and urban design.

[17] Without intending any disrespect whatsoever to the evidence of Mr Curtis, I think it could be fairly summarised as follows. First, what is proposed is inconsistent with the rural residential character of the surrounding land. However, over time, as the area becomes more urban in character, it would not be out of character. Second, providing necessary infrastructure was available (in particular water and sewerage), there would be no reason why a development of the type proposed could not occur on the land. Finally, given the physical constraints of the land and, in particular, its topography, it was more likely than not that a suitably designed and constructed centre would eventually be less intensive than that now proposed. During the

¹² Exhibit 27A.

¹³ Exhibit 27B.

¹⁴ Exhibit 1, pp 8 and 9.

¹⁵ Exhibit 27A, appendix E re urban design; Exhibit 27B, appendix D re visual amenity.

course of his cross-examination, the following exchange took place between myself and Mr Curtis:¹⁶

“Q. Does it come down to this Mr Curtis? Assuming in the fullness of time the infrastructure arrives at the site and the surrounding community changes from semi-urban (sic) to a more urban type development, what we have is a site that has challenges, and in over-and, in particular, the slope from east to west. And in addressing those challenges you might end up with a smaller development than that proposed?

A. Yes, I think that’s a fair comment, your Honour. Yes.

Q. Is that a fair summary of what’s involved?

A. Yes. Yeah. I think, you know, the missing link is that we don’t know what adjoins it. If that was established then it would be far easier to construct or resolve the interface between the site and the adjoining site...”

[18] I accept the evidence of Mr Curtis but, even so, I am sufficiently satisfied that having regard to the total area of the subject land, a materially more extensive commercial development could be achieved when compared to that currently proposed on the land owned and intended to be developed by Oakey Flat.

Is the proposed development out of sequence?

[19] The proposed development lies within the Council’s Emerging Community Zone – (Transition Precinct). Unsurprisingly, the planning scheme is designed to promote orderly expansion of urban development. This includes:

- To manage the timely conversion of non-urban land for urban purposes;¹⁷
- Maintaining the semi-rural character of the locality until infrastructure is delivered;¹⁸
- Delivering infrastructure in an efficient and cost effective manner;¹⁹ and
- Providing for the coordination and integration of land use and infrastructure.²⁰

[20] By reference to the existing pattern of urban growth, at face value, the proposed development is out of sequence and is situated at an unplanned centre location. It could not be described as involving a timely conversion of a semi-rural/rural residential area to a more intensive and out of centre use. It would not be what the community would expect in this locality.

¹⁶ Transcript (T) 3-32 ll 1-16.

¹⁷ Section 6.2.3.2(1)(b), see Exhibit 5, V3, p 529.

¹⁸ Section 6.2.3.1.1(1)(a), see Exhibit 5, V3, p 531.

¹⁹ Section 3.6.6, see Exhibit 5, V1, p 65.

²⁰ Section 3.13.2.4(2)(a), see Exhibit 5, V1, p 96; Also s 3.14.9.7.

[21] It is also clear from the engineering evidence of Messrs Bristow, Collins and Gould that there are a number of issues involving the level of infrastructure currently available concerning stormwater, water and sewerage.

[22] After referring to a number of provisions of the planning scheme it was submitted on behalf of Adpen:²¹

“For the **reasons explained below**, the Appellant submits that the court would accept the site is capable of connection to trunk sewer network, such that all proper services are available to the subject site... and the surrounding locality, is ready for development in accordance with the intention of the scheme.

Otherwise, words used in the broader Strategic Framework provisions are not enough to tell against the finer-grain provisions identified above, particularly when demand clearly exists for development in the short term. Approvals for residential subdivision and current development applications before the court demonstrate that the market is ready to facilitate development. Meeting such demand for growth ought not be constrained, given the State Planning policy intentions that population growth be accommodated and provided for within the urban footprint and the intention that councils take up that task.” (emphasis added)

[23] It is not to the point to say that the subject land is capable of connection to all relevant infrastructure. That will no doubt be the case at some time in the future, but this submission fails to address what is really in issue, namely that it is the Council’s intention that urban growth, together with the necessary infrastructure to service that growth, occurs in an orderly fashion. The reference to “*demand clearly exists for development in the short term*” and the reference to residential subdivision may, for the sake of the argument, also be correct. However, again the submission again fails to take into account the sound planning policy of the Council to ensure the orderly growth of urban development.

[24] Also, in my view, the reference to the fact of there being approvals for residential subdivision and current applications before the court demonstrating that the market is ready to facilitate development, is misconceived. That submission fails to recognise that the Oakey Flat site is materially closer to existing subdivision, residential development presently under construction and land approved for further urban development than is the subject. Indeed, consistent with the Council’s sound planning strategy of orderly growth, it has refused a number of applications for

²¹ Adpen’s written submissions at paras 111 and 112.

residential development more proximate to the subject land.²² That a number of those refusals are under appeal is not particularly relevant.

[25] I consider it unnecessary to refer to the “*reasons explained below*” as it essentially refers to the evidence of Mr Craven. His evidence is dealt with below where relevant. Finally, in this context, some reliance was placed on the fact that no evidence was called by the Council to establish whether the proposed development would compromise or constrain the efficient expansion of the infrastructure system and services required to service development and/or the corridors required for provision of infrastructure.²³ I can understand the thrust of that submission. That said however, even if it were accepted that the subject approval would not have those impacts or effects, that is of little consequence in the circumstances of this case as will become apparent.

[26] Insofar as water and sewerage are concerned, Mr Bristow and Mr Gould agreed on a number of matters of concern. In particular, that the site is not capable of being serviced by the existing sewerage network.²⁴ Accepting for the moment that the stormwater concerns expressed by Mr Collins can be addressed and that water will be made available in due course, the lack of infrastructure, particularly in respect of sewerage,²⁵ tends to confirm the out of sequence nature of what is proposed.

[27] Being out of sequence militates against approval but need not be decisive. That is, if there are sound planning reasons that warrant approval even if out of sequence with the planned development strategy in place at the time. As will become apparent below, no such warrant exists in this case.

Planning and Need

[28] It is, in my view, now uncontroversial that the planning scheme, *prima facie* represents the embodiment of the public interest.²⁶

[29] The Oakey Flat site sits on the south-eastern corner of the intersection of Oakey Flat Road and Clark Road. Within the Council’s strategic framework, Map 3.13.2

²² Refer to Exhibit 1, p 14.

²³ Adpen’s written submissions, para 114.

²⁴ Exhibit 7, at paras 4, 6, 8, 9 & 10.

²⁵ An on-site sewerage plant is planned for.

²⁶ *Bell v Brisbane City Council* (2018) 230 LGERA 374; *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132; Also *Brookside Estate Pty Ltd v Brisbane City Council* [2019] QPEC 33.

identifies the site as the indicative location of a new local centre or neighbourhood hub.²⁷ As Mr Morzone pointed out, in respect of this designation, two things in particular needed to be borne in mind. First, the location is indicative only. Second, it identifies both a local centre or a neighbourhood hub as being appropriate uses. That is, that a local centre occurring on this site was in no way mandated by the planning scheme. It can be accepted that the identification of the Oakey Flat site for either a local centre or a neighbourhood hub is indicative only, but that has to be seen in the context of a number of provisions of the planning scheme and its location.

- [30] The Oakey Flat site is clearly closest to the population growth centre to the north than the Adpen site which lays some 700m further to the south. In that regard, it is more in line with the planning theme under the Council's strategic framework that development is to be consistent with the settlement pattern and urban form of the Council's local government area.²⁸ It is also more in line with the strategic outcome of attempting to achieve a more compact urban form.²⁹ The identification of the Oakey Flat site as a local centre or neighbourhood hub also sits more comfortably with the Council's land use strategy that local centres will generally be located on central intersections with good accessibility and visibility, in locations that support active transport and a network of well-connected and attractive streets and open spaces within the neighbourhoods.
- [31] While Oakey Flat Road is a designated Council arterial road, Clark Road is a designated sub-arterial road. In the future, Oakey Flat Road is intended to be a sub-arterial road and Clark Road, which will extend to the west, will become a district collector road. Under the planning scheme, Oakey Flat Road and Clark Road are identified as a Primary Active Transport Network and Secondary Active Transport Network respectively.
- [32] Significantly, the intersection of these two roads is identified in a number of the Council's planning scheme strategic maps as the location of a future Local Centre or Neighbourhood Hub.³⁰ The maps reflect a deliberate and consistent theme.

²⁷ Exhibit 1, p 4.

²⁸ Exhibit 5, V1, p 90.

²⁹ Ibid, p 63.

³⁰ Strategic Framework Map 3.6.1 (Exhibit 1, p 3); Map 3.13.2 (Exhibit 5A, p 8); Map 3.14.1 (Exhibit 1, p 5).

[33] Mr Craven, the town planner relied on by Adpen, accepted that the indicative location of local centres and neighbourhood hubs within the subject area were “supported by solid planning principles”.³¹ The broad thrust of Mr Craven’s evidence could be summarised as follows. First, he accepted the indicative identification of sites for particular uses is an important planning strategy and that the identification of the Oakey Flat site as a local centre or neighbourhood hub at the intersection of Oakey Flat Road and Clark Road was indicative of that being the “best” location for such uses insofar as the Council was concerned. Finally, that notwithstanding that apparent strategic intention, the proposed development was warranted because it was on a larger site and, accordingly, was more likely to be able to accommodate a full line supermarket together with a larger number of specialty shops and other uses such as childcare centres, service stations etc. That is, what the public would expect from a fully developed and mature local centre. In that context, he readily accepted that if the Oakey Flat site was of a similar size to the subject land there could be no justification for approving a local centre on the subject land.³²

[34] In *Elan Capital Corporation Pty Ltd & Anor v Brisbane City Council & Ors*,³³ Quirk DCJ said:

“It should not be necessary to repeat it but this Court is not the Planning Authority.... It is not this court’s function to substitute planning strategies (which on evidence given at a particular appeal might seem more appealing) for those which a Planning Authority in a careful and proper way has chosen to adopt.... Adopting the phraseology of those cases which deal with the non-derogation principle, **I feel that to allow this appeal would be to ‘cut across’ in quite an unacceptable manner, a planning strategy which has been adopted by the Planning Authority and publically exhibited for community comment.**”³⁴ (Emphasis added)

[35] In *Australian Capital Holdings Pty Ltd v Mackay City Council & Ors*³⁵ the Court of Appeal noted the importance of the hierarchy of retail shopping centres or precincts established by planning schemes and the necessity of not acting so as to prejudice the viability of the established hierarchy. Reference was also made to the need to bear in mind the relevance of expectations based on existing planning.³⁶

³¹ T7-7 l 45 – T7-8 l 1; Also T7-14 ll 43-46 and T7-15 ll 1-2.

³² T7-16 ll 1-16.

³³ [1990] QPLR 209, 211.

³⁴ See also *Sheezel & Anor v Noosa Shire Council* [1980] QPLR 130 and *Lipoma Pty Ltd v Redland City Council & Anor* [2017] QPEC 53.

³⁵ [2008] QCA 157.

³⁶ *Ibid*, [58].

[36] As all the relevant witnesses accepted, the identification of the Oakey Flat site for a local centre or neighbourhood hub was indicative only. That said, there can be little room for doubt that it has been strategically identified for the location of such a centre and has a number of physical attributes that warrant that recognition. As a consequence, the proposed development ought properly be described as being out of centre development. The Council's planning scheme expressly identifies that out of centre development may occur. However, only where certain criteria are met. Section 6.2.1.6l of the Local centre Precinct provisions of the planning scheme provide:³⁷

“Out of centre development, including centre expansion (into adjoining zones and precincts) or the establishment of a new centre **only occurs where:**

- i. It maintains the scale and function of a local centre consistent with Table 6.2.1.1 including provision of one full line supermarket plus local specialty shops and lower order commercial uses.
- ii. Expansion strengthens the existing centre as an important local activity node, or for a new centre, strengthens the centres network within the region.
- iii. Clear separation from existing higher order, district and local centres within the network are maintained to reduce catchment overlap and to establish 15 minute walkable neighbourhoods (generally local centres should be separated from other centres by 2,400m and neighbourhood hubs by 1,600m, measured from the centre of each centre or neighbourhood hub).
- iv. For expansion...
- v. For a new centre, it is located on a sub-arterial or collector road.
- vi. Designed to include active frontages around a main street core.
- vii. Expansion does not result in an elongated centre forming a ribbon of development along regional through roads.” (Emphasis added)

[37] In my view it can be accepted that the subject land would be consistent with the attributes prescribed in Table 6.2.1.1 of the planning scheme.³⁸ It would also be located on a sub-arterial or collector road but, not at the intersection of a sub-arterial road and another major road as is the case for the Oakey Flat site. Notwithstanding, the proposed development, if approved, would cut across a clearly identified centre planning strategy which has been adopted by the Council and published for consideration by the public. It would not be located at a prominent intersection and would be removed from existing and planned intersections and would be removed

³⁷ Exhibit 5, V2, p 449.

³⁸ Exhibit 5, V2, pp 241-243.

from existing and planned urban development. Perhaps most importantly, as is discussed below, it would reduce any development on the Oakey Flat site to that of a neighbourhood hub at best. It would also have potential negative impacts for the planned neighbourhood hub at Robb's Road. To adopt the words used in s 6.2.1.6, there would not be the separation from other centres of 2,400m or even 1,600m and there would be material catchment overlap. Additionally, the proposed development would be likely to have a material negative impact on the existing neighbourhood hub, Excelsior Park, which would be only some 600m removed.

[38] Mr Craven expressed the rather odd opinion that the desirability of avoiding catchment overlap was more superficial than real.³⁹ That opinion stands in stark contrast to the much more persuasive evidence of Messrs Ganly, Brown and Buckley. The approach adopted by Adpen could quite reasonably be, in my respectful opinion, described as being artificial. It starts from the premise that the proposed development will be the local centre and the Oakey Flat site will be limited to a neighbourhood hub.⁴⁰ According to Adpen, appropriate development on the Oakey Flat site might be for a "*small retail convenience shop*" and that within the short to medium term "*the level of population is likely to have grown to a sufficient level to support the retail floor space across both centres*".⁴¹

[39] The position taken by Adpen in reality amounts to little more than an attempt to justify approval without having any regard to the Council's strategies and policies concerned with the location and viability of centres.

[40] Before turning to the issue of need, I should refer to certain aspects of the written submissions on behalf of Adpen. A number of submissions were made, designed to create an unfavourable impression of the Oakey Flat site in comparison to the subject land. First, it was submitted that notwithstanding approvals over that land being granted some two years ago, nothing has yet occurred. The implication being I assume, that this site is not a desirable one for a local centre. That submission fails to take into account the evolution of what is proposed to be developed on the Oakey Flat site and, perhaps more importantly, the fact that Coles has now

³⁹ Exhibit 18, p 10, at para 35.

⁴⁰ See Adpen's written submissions at [139]; T2-30 ll 24-34 and T2-44 l 22 – T2-45 l 25.

⁴¹ Adpen's written submissions, at paras 139-140.

expressed an interest in the site for a full line supermarket and has set quite specific time frames for certain events to occur.

[41] It is then submitted that the approval of a local centre on the Oakey Flat site is a misnomer and, because of its limited area it will only be capable of producing a development that would operate as a neighbourhood hub. This submission fails to take into account, if not at all, then at least inadequately, a number of matters. First, it is intended to be developed as a local centre and, as a consequence of that, will accommodate a full line supermarket together with a number of specialty shops and/or other commercial uses. Second, that commercial development that might occur on the Oakey Flat site will be incapable of expansion in the future. For the reasons given below, I am not satisfied that is the case.

[42] Adpen's submissions proceed on the basis that the extent of the development proposed on the existing Oakey Flat site will pale in comparison to the extent of the development that would be capable of being accommodated on the subject land. I am unable to give much weight to those submissions in that they again seem to proceed on the basis that there is no potential for expansion at the Oakey Flat site. The second problem with that submission is that it again fails to give any or any sufficient weight to the interest of Coles in locating a supermarket on the Oakey Flat site, whereas no anchor tenant has, as I understand the evidence, expressed any interest whatsoever in being involved in development on the subject land. The evidence of Mr Duane was that securing the interest of a major player like Coles is a significant positive step towards final development actually occurring and also in securing its viability. Finally, the submissions fail to recognise that the full range of uses that one might expect at a fully developed and mature local centre would not be required, based on the evidence of their own economist, until at or about 2031.

[43] A number of other criticisms were made about design including traffic ingress and egress. However, insofar as some of those criticisms may be legitimate, the evidence of the traffic engineers leaves me satisfied that any traffic issues or transport design issues that may exist at the Oakey Flat site would be capable of resolution in the final design stages. For the same reason, it is more likely than not that the design issues raised by Mr Craven and accepted by Mr Curtis could also be addressed in the final design stages. That evidence is discussed further below.

- [44] Consistent with the evidence of Mr Craven and the layout plans,⁴² it was submitted on behalf of Adpen:⁴³

“At 3.8ha in area, (the site) is sufficiently large to accommodate a range of day-to-day retail, commercial and community facilities required by the local community in the same clustered location, as evidenced by the indicative layout’s accommodation of a full-line supermarket, specialty shops, food outlet, medical centre, childcare centre and residential units. With the detailed planning anticipated in the code assessable development application that must precede any development, the appellant is able to deal with deficiencies in the current indicative layout. In effect, the subject site can become a local centre which, particularly compared to a smaller centre, enhances the benefits of a single site for a range of community services and contains impacts to a single site. The more that range of every day retail, commercial and community needs can be met, the more vital, convenient and accessible the focal point and meeting places become.” (footnotes deleted)

- [45] After referring to a number of provisions of the planning scheme which it was said supported the proposed development, emphasis was placed on the neighbourhood design policy and even more emphasis on the planning scheme policy for Centre and Neighbourhood Hub Design.⁴⁴ Quoting from s 8.6 of that policy it was, in effect, submitted⁴⁵ that the subject land would, unlike the Oakey Flat site, be able to meet the requirements of the policy which provides:⁴⁶

“**A diverse mix of uses is essential in delivering a successful centre** (excluding specialised centres). The compactness and diversity of uses in centres can significantly reduce the number and distance of trips dependant on private motor vehicles. **Effective mixed use centres create opportunities for people to conduct one trip to cater for multiple purposes (i.e. shopping, banking, libraries, entertainment and dining).** Effective mixed use centres provide the opportunity for people to access these centres without the need for a private motor vehicle, through integrated public and active transport networks and the location of residential living options throughout and surrounding a centre.

Centres with a diverse mix of uses can also **provide more opportunities for social interaction, improve safety and economic and social diversity that lead to greater economic resilience.** The appropriate mix of uses can vary from centre to centre and is dependent on the location or context, market demand and the scale of development.” (original emphasis).

- [46] In the event that any development on the Oakey Flat site would not, over time, be capable of meeting the public expectations as to what a mature local centre would

⁴² Exhibit 1, pp 8-11.

⁴³ Adpen’s written submissions, at para 99(i).

⁴⁴ Exhibit 5, V4, pp 801-842.

⁴⁵ Adpen’s written submissions, at para 81.

⁴⁶ Exhibit 5, V4, p 832.

provide, would be a relevant matter that would have to be brought into account in the assessment exercise.⁴⁷

[47] In *Gold Coast City Council v K&K (GC) Pty Ltd*,⁴⁸ the Court of Appeal, citing as authority the earlier decision of that court in *Bell v Brisbane City Council*,⁴⁹ said that it must be accepted that it was in the public interest to maintain the terms of a planning scheme unless the contrary is demonstrated. Both *Bell* and *K&K (GC)* were decided under the operation of the *Sustainable Planning Act 2009* that prescribed a vastly different assessment regime than that prescribed under the *Planning Act 2016*.⁵⁰ That said, it is clear that even under the current assessment regime, the starting point is that prima facie the planning scheme must be accepted as “*a comprehensive expression of what will constitute, in the public interest, the appropriate development of land*”.⁵¹

[48] In *K&K (GC)* it was said that “...conformity with the Planning Scheme is, prima facie, in the public interest”.⁵² As a part of the public interest encapsulated in a planning scheme is the legitimate expectation that, unless there are good reasons to the contrary, the local authority will deliver the objects and outcomes identified in the scheme.

[49] In this case, the identification of the intersection of Oakey Flat Road and Clark Road as the location of a local centre or neighbourhood hub, is the result of a clear and deliberate planning strategy. There is no evidence that the planning strategy had been ill informed or overtaken by events. As identified above, Mr Craven was prepared to accept that the centre planning policies of the Council were supported by solid planning principles. There can be no reasonable room for doubt that the informed member of the public would expect a centre or hub, if not actually on the Oakey Flat site itself, then on one of the other corners of that intersection. The public would not be expecting a local centre on the subject land.

⁴⁷ *Planning Act 2016* s 45(5)(b).

⁴⁸ [2019] QCA 132, at [42].

⁴⁹ (2018) 230 LGERA 374, 392 at [70].

⁵⁰ *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132, at [47]; *Ashvan Investments Pty Ltd v Brisbane City Council* [2019] QPEC 16, at [38].

⁵¹ *Bell v Brisbane City Council* (2018) 230 LGERA 374, 391-392 at [66]-[68].

⁵² At [47].

[50] In the circumstances of this case, Adpen could only succeed if it were able to satisfy the court that the identified location of a centre would not be capable of delivering what the public would expect.

[51] This then requires a consideration of the competing evidence going to the issues of need.

Need

[52] The concept of planning need was discussed by Wilson SC DCJ (as he then was) in *Isgro v Gold Coast City Council & Anor* [2003] QPELR 414 at 418. His Honour said:

“Need, in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community Of course, a need cannot be a contrived one. It has been said that the basic assumption is that there is a latent unsatisfied demand which is either not being met at all or is not being adequately met....”

[53] As to the second of the matters referred to above, Rackemann DCJ in *Family Assets Pty Ltd v Gold Coast City Council*⁵³ relevantly said:⁵⁴

“...the grant of inappropriately premature approvals can have implications and create uncertainties. One cannot say that all things will remain unaltered or that assumptions made at this stage, will necessarily be borne out. Circumstances can change. Development intentions and proposals can alter over time by reason of, for example, changes of ownership, potential key tenants or other circumstances. Uncertainties can subsequently arise as to whether a proposal, approved years in advance of an intended opening, will proceed or proceed in its approved form. Other changes can also occur in relation to population growth and distribution and market needs and trends, to name but a few variables. These can reflect on the appropriateness of a development prematurely approved years earlier. Approvals, although prematurely given and not yet acted upon, are prone to weigh on the planning authority, in considering the appropriate planning strategy to adopt as part of a planning scheme review and in considering other applications on the subject site or on other sites. They can become a practical impediment or at least a hurdle to competing proposals which might otherwise have been brought forward.

[54] As I have said, the Coles offer to lease⁵⁵ is of particular significance for at least two reasons. First, it supports the evidence of the economists that there is a need for a full line shopping centre within this part of the emerging community. Second, it also brings about a sense of certainty that development on the Oakey Flat land will

⁵³ (2008) 161 LGERA 43.

⁵⁴ *Ibid*, at [38].

⁵⁵ Exhibit FG1.

in fact occur and be viable. In that offer, certain milestone events identify a “*sunset date*” for the gaining of development approval and a “*required date*” for the practical completion of the lessor works. Those works are set out in the offer to lease but it is unnecessary to go into that matter in any detail. As Mr Duane identified, a full line supermarket, as would other uses, would be “*supportable*” by 2023/24.⁵⁶

[55] Mr Brown, the economist relied on by the Council, was of the opinion that if the approvals sought were granted and a supermarket developed on the subject land, it would have “*profound negative impacts*” on the subject land and it would be highly likely that what is proposed on the Oakey Flat land would fail.⁵⁷ Mr Brown’s evidence was that the proposed development would also prejudice the orderly development of the overall centres network contemplated by the planning scheme by impacting on the viability of the designated centre at Robbs Road.⁵⁸ Mr Ganly, the economist relied on by Oakey Flat, was in substantial agreement with the evidence of Mr Brown.⁵⁹ That two supermarkets in such close proximity (approximately 700m) could not co-exist was accepted by Mr Duane. In my view, to permit the proposed development to proceed and reduce the Oakey Flat Road to essentially a neighbourhood hub derogates to a material extent from the planning strategy of the Council.

[56] Conversely, in the event that a shopping centre were developed on the Oakey Flat site, there would be no need for a shopping centre on the subject land.⁶⁰ That is not surprising given the evidence referred to above. Also, in my view, the best evidence is that the Oakey Flat site provides the greater capacity to meet demand more efficiently than the subject land because of its proximity to the residential development to the north and also its proximity to residential estates either currently under construction or approved for development.⁶¹

[57] In his court report, Mr Brown made the following observation with which I agree:⁶²

⁵⁶ Exhibit 8, p 52, at para 121.

⁵⁷ Exhibit 23, p 6, at para 33.

⁵⁸ Exhibit 8, p 63, at para 150.

⁵⁹ Exhibit 8, p 64, para 152.

⁶⁰ Exhibit 8, p 68, para 156(iii).

⁶¹ See Exhibit 1, p 14.

⁶² Exhibit 23, p 6, para 29.

“The need for a Local Centre facilities within Morayfield South is adequately planned for, with both designated sites well located from an economic perspective to support growth and community well being as the area develops over time.”

[58] The other designated site to which Mr Brown referred was that at Robbs Road. If the proposed development went ahead the balance between those two centres would also be jeopardised.

[59] Turning then to the demand for a wider range of uses at the proposed local centre. It was Mr Duane’s opinion that that would not occur until at or about 2031. In the JER Mr Duane reported:⁶³

“GD contends that there is ongoing demand for a range of facilities typically provided in Local centres, which would ultimately depend on the rate of population growth within the defined trade area. By 2031 and assuming population growth after 2024 in line with population projections...facilities sustainable within the trade area would include:

- One full line supermarket at least 3,200m²;
- Smaller convenient supermarkets of less than 1,000m²;
- Two petrol stations;
- A range of fast food outlets;
- Specialty shops and non-retail stores; and
- At least two further childcare centres.”

[60] As I understood the evidence, given the supply of childcare centres in the vicinity, it is unlikely that one would be proceeded with on the subject land at least into the foreseeable future. I would note here that Mr Duane also dealt with the longer term of up to 2041. However, I do not consider it necessary to consider that aspect of his evidence.

[61] As identified above, the Oakey Flat site, unlike the subject, sits comfortably within the Council’s planning scheme insofar as it seeks to identify appropriate sites for local centres. It would be in and provide a more convenient location to the existing and future residential communities. However, the Oakey Flat site of itself would be incapable of accommodating all of the types of uses that Mr Duane said ought to be provided for within a local centre by 2031.

[62] That the subject land, because of its area, would be able to meet the demand for a wider range of uses and/or experiences as a local centre in the future, would only be

⁶³ Exhibit 8, p 55, para 133.

determinative if the Oakey Flat site could not meet that future need by necessarily expanding to include adjoining land.

- [63] Before going on to deal with the issue of future demand/growth, it is convenient to address some of the evidence given by Mr Buckley, the town planner relied on by the Council. During cross-examination by Mr Morzone, he was taken to various provisions of the planning scheme and policies. The net effect of that part of the cross-examination was to emphasise that local centres are expected to provide much more than just a supermarket and a few speciality shops or other uses.
- [64] Mr Buckley agreed in principle, but went on to point out that you do not adopt a “*build it and they will come*” policy to development. Rather, expansion occurs to meet the growth in demand over time. To do otherwise would likely result in vacancies up front or failed business and then vacancies.⁶⁴ Messrs Ganly and Buchanan both gave evidence to a similar effect.⁶⁵ That evidence appears to me to be eminently sensible.
- [65] The next question that needs to be addressed is whether the Oakey Flat local centre would be capable of expansion over time. According to Mr Duane, expansion of the centre to include adjoining land might occur but would involve “*great*” difficulties. The two principal reasons for that seem to be design limitations and what he described as piecemeal ownership.⁶⁶ Mr Craven expressed a similar concern based on the existing design.⁶⁷
- [66] Mr Buckley expressed a different view⁶⁸ as did Mr Ganly.⁶⁹ Messrs Craven and Buckley are town planners with no apparent expertise or experience in centre design. Messrs Duane and Ganly are economists. However, Mr Ganly clearly has considerable experience in the way shopping centres operate and function.⁷⁰ Whether Mr Duane has that experience was not explored.
- [67] Unfortunately, as far as I have been able to ascertain, the witness with the most qualifications in the area of architecture and urban design, Mr Curtis, was not asked

⁶⁴ T7-53 ll 1-47.

⁶⁵ T7-31 ll 13-27; T8-7 ll 20-32.

⁶⁶ T2-55 ll 1-46.

⁶⁷ T7-15 ll 16-22.

⁶⁸ T7-38 ll 6-55; T7-65 ll 7-27.

⁶⁹ T8-22 ll 30-47; T8-23 ll 1-17.

⁷⁰ T8-23 ll 1-10.

any questions about this issue. On the evidence, such as it is on the issue, I am not satisfied that the Oakey Flat centre could not expand onto other land over time due to design constraints.

[68] Turning then to the issue of land ownership, the subject site itself comprises of three lots under different ownership.⁷¹ On the last day of the hearing a call option was tendered. It gives to Oakey Flat an option to purchase the land to the immediate south.⁷² Given the circumstances surrounding this late piece of evidence, I am reluctant to give it too much weight. Notwithstanding, I am not satisfied that because Oakey Flat does not own the adjoining land that I should proceed on the basis that there is a real risk that amalgamation might not be achieved. It is quite well recognised in compensation law that adjoining owners can usually be expected to act in a way as to best advance their commercial interests.⁷³ In my opinion, hardly a surprising inference to draw.

[69] It was submitted on behalf of Adpen that the subject land, if approved for the local centre, would be consistent with the location requirements and be of sufficient size to meet the design requirements of the planning scheme. Thereafter, a number of particulars of why that is so were advanced.⁷⁴ I do not consider it necessary to say anything further about the size of the subject land. Turning then to each of the particulars provided, it is asserted that it is centrally located within an area designated as a growth area as part of the Emerging Communities (Transition Precinct) Zone. On the evidence before me, I am unconvinced that it could sensibly be described as “*centrally located*”. And, even if that was an accurate description, it is not as centrally located as the Oakey Flat site.

[70] The next particular is that it could form or provide a focal point (as intended by the scheme) for a walkable, connected neighbourhood which is not currently serviced by a local centre. Of course, if the Oakey Flat development goes ahead, the area will be serviced by a local centre. However, in any event the evidence establishes that as matters currently stand, the subject land could not be described sensibly as a part of a “*walkable, connected neighbourhood*”. It was then submitted that

⁷¹ Exhibit 45.

⁷² Exhibit FG2.

⁷³ *Lucas v Chesterfield Gas & Water Board* (1908) 1 KB 16; *NL Horner & Horner Investments Pty Ltd v Brisbane City Council* (1983) 9 QLCR 3.

⁷⁴ Adpen’s written submissions, at para 99.

surrounding residential development could be designed to prioritise pedestrian, active and public transport links to the centre. And, the “walkable catchment” to the subject land, particularly to the west, will increase as connections are established as new developments occur in that area. Even accepting that to be the case, the Oakey Flat site is clearly more suited to achieve those advantages or outcomes. Not only is it located nearer to existing and future urban development but it is located on a significant intersection within the Council’s road network.

[71] It is also asserted that it is easily accessible, visible and located on a main street. For reasons which will become apparent when dealing with the issue of traffic, it could not be said to be easily accessible in the sense of providing safe ingress and egress. Further, whilst it is, as is the Oakey Flat site, located on Oakey Flat Road, it does not have the additional advantage of being located at an intersection. It was asserted on behalf of Adpen that the subject land is also located on “*an intended corner*”. That submission has little weight given the uncertainty associated with the road that might run in an east-westerly direction on the northern boundary of the subject land and, in any event, that road, even if it does eventuate, will not have the prominence of the Oakey Flat site situated on the corner of Oakey Flat Road and Clark Road as will be extended to the west.

[72] Thereafter, reference is made to the subject land being able to accommodate a residential component. That is a matter of little if any significance having regard to what are the real issues in this case. As to the assertion that active frontages could be situated on any development that might occur on the subject land, it is just as likely that that could not also occur on the Oakey Flat site. Put bluntly, to adopt the language used in Adpen’s written submissions, insofar as the subject land might be able to comply with the location and design requirements for a local centre, the evidence is that the Oakey Flat site is more compliant and better located.

[73] It was also submitted that the clear intention and expectation is that the locality will be developed for urban purposes.⁷⁵ That may well be so, but that submission again fails to recognise that the Oakey Flat site is already in a locality which is being developed for urban purposes. After a detailed analysis of the relevant provisions of the planning scheme and supporting policies, it is then asserted.⁷⁶

⁷⁵ Adpen’s written submissions, para 63.

⁷⁶ Adpen’s written submissions, at para 82.

“The Court would reject any suggestion by some of the witness (sic) in this case, in particular Messrs Buckley, Buchanan, Brown and Ganly that the planning scheme does not intend or expect that local centres do not provide a diverse mix of uses. Clearly that is a major characteristic required and attended by the scheme for good reason. It is insufficient for a development for a local centre to provide little more than a supermarket. That is not even a ‘**good start**’ to what is intended by the scheme, particularly when the design of that centre effectively turns its back on the neighbouring east and southern adjoining properties, potentially will involve the construction of a retaining wall along those boundaries in order to fill the site and provides no hint of inter-connection. The attempts under cross examination to assert otherwise were belated attempts to obfuscate the deficiency. Rome may not have been built in a day, but the Scheme provisions identified above to (sic) not support delivery of the necessary mix of functions and services in the piecemeal fashion that appears to be advanced by Council and Co-Respondent by Election.” (emphasis added)(footnotes deleted)

[74] With respect to this submission, it is again misconceived for a number of reasons. First, none of the witnesses who were referred to, asserted or even suggested that the planning scheme did not intend or expect local centres to provide an appropriate and diverse mix of uses. What Messrs Buckley and Ganly in particular said, was that a prudent developer does not proceed on the basis of developing a full scale and mature local centre when demand does not exist. As identified above, the evidence of Messrs Buckley, Ganly and Brown was that to do so would result in untenanted space and that a rational approach is to expand the centre as and when demand requires. I would add here that, on the evidence of Messrs Buckley, Brown and Ganly, having Coles express an interest in the proposed supermarket on the Oakey Flat site, even accepting that there will only be some 400 m² available for other speciality shops and/or other uses is, contrary to the submissions made, a “*good start*”.

[75] For the reasons given, the conclusion that I have reached is that the proposed development does not meet or comply with Council’s strategic forward planning concerned with centre hierarchies and centre locations and there are no relevant matters that would warrant such a drastic departure from those planning strategies.

[76] By way of summary, the proposed development:

- Is not consistent with the Council’s settlement pattern and urban form for the relevant planning area.⁷⁷
- Does not have good accessibility⁷⁸ and is not located on a centrak intersection.⁷⁹

⁷⁷ Exhibit 5, V1, pp 90-94; Also Exhibit 5A, p 8.

⁷⁸ Refer to evidence concerning traffic.

- If approved, would not achieve a clear separation from other centres and would not achieve a reduction in catchment overlap.⁸⁰
- Within the Emerging Community Zone – Transitional Precinct, the proposed development would not maintain the semi-rural character of the locality and would involve a use not encouraged in this location.⁸¹
- Constitutes out of sequence development that is unwarranted.
- There is no current demand for a mature local centre.
- I am also not satisfied that the Oakey Flat development could not expand to meet demand as it arose.

Traffic

[77] During the course of this proceeding, a number of criticisms were made of both sites and proposed development plans by the other side. These included criticisms about design, visual amenity, pedestrian access and the provision of suitable public spaces. Criticisms were also made about traffic including ingress and egress to each of the proposed developments and, in respect of the Adpen site, the availability of water and sewerage infrastructure.

[78] For reasons that will become apparent below, the only matter of those to which I have identified that I need to now deal with is the evidence of the traffic engineers concerning access into and out of the proposed development. That is so because, insofar as internal traffic issues are concerned, they are probably capable of being resolved during the final design stages. And, insofar as the Oakey Flat site is concerned, the evidence is such as to lead me to comfortably conclude that there are no safety issues that would be likely to arise in providing access into and out of that site. The same cannot be said in respect of the subject.

[79] Three traffic engineers were retained by the parties. Mr Crank by Adpen, Mr Douglas by the Council and Mr Holland by Oakey Flat. In the summary of their JER it was relevantly said:⁸²

“All three experts agree that:

- (a) The information provided to date does not demonstrate integration with the existing and planned land uses and transport networks and hence does not demonstrate an appropriate contribution to the

⁷⁹ Sections 3.13.2.4.3(5), see Exhibit 5, V1, p 97; 3.14.9.4(6), see Exhibit 5, V1, p 155.

⁸⁰ Section 6.2.1.6.1(1)(iii), see Exhibit 5, V2, p 449.

⁸¹ Section 6.2.3.2.1, see Exhibit 5, V3, p 589.

⁸² Exhibit 9, p 10.

development planning pattern envisaged by Councils current zoning and Infrastructure Planning;

- (b) ...
- (c) The proposal does not identify nor provide appropriate traffic infrastructure;
- (d) **A comprehensive Integrated Transport Assessment has not been undertaken.** Such an assessment would be required to identify further potentially significant and widespread transport infrastructure requirements if the proposed development is to be considered further;
- (e) The proposal does not provide sufficient on-site traffic functionality nor demonstrate how this could reasonably be achieved.

Mr Crank is of the opinion that further work is required. He undertook to review and revise the proposed development plans, undertake a comprehensive Integrated Transport Assessment and seek to respond to the other items noted in this (report).

Mr Douglas and Mr Holland are of the opinion that based on the information received to date, that the proposed centre should be refused on traffic grounds.

This assessment has focussed on the feasibility of the proposal generally. A more detailed and comprehensive assessment will be required to be undertaken by the experts to consider any additional materials that may be provided, such as those noted by Mr Crank.”
(Emphasis added)

[80] Following the preparation of that report, Mr Crank prepared a court report in which it was said that various physical attributes made the subject land “*inherently suitable for the delivery of a future local centre*”.⁸³ Unfortunately, that report fell far short of the investigations and reporting envisaged when the traffic engineers finalised their JER. This was acknowledged by Mr Crank during cross-examination.⁸⁴

[81] During cross-examination Mr Crank also made a number of telling concessions. These included that his assessment contained no identification of further potentially significant wide-spread transport infrastructure requirements that would be necessary.⁸⁵ He also acknowledged non-compliance with the Integrated Transport Assessment Policy in a number of respects.⁸⁶

[82] Particularly telling was that Mr Crank, on a number of occasions, stated to the effect that given the lack of detail associated with what was proposed on the Adpen site, he was unable to address in any meaningful way what the potential traffic ramifications might be. In his court report he identified a number of matters that

⁸³ Exhibit 19, at para 48.

⁸⁴ T4-84 ll 37-48; T4-85 l 1-2.

⁸⁵ T4-85 ll 1-10.

⁸⁶ T4-86.

required consideration so as to be able to be satisfied that acceptable transport and traffic engineering outcomes could be achieved. These included:⁸⁷

- (a) vehicular, pedestrian and cyclists safety....;
- (b) access and egress from the site....;
- (c) ...;
- (d) ...;
- (e) the capacity, efficiency and design of the external road network and its ability to accommodate the proposed development....;
- (f) ...;
- (g) Future road planning....;
- (h) The capacity and function of the road network....;
- (i) ...

[83] After being taken to a number of difficulties associated with the level of uncertainty associated with what was actually likely to occur on the subject land, the following exchange took place between Mr Job and Mr Crank:⁸⁸

“Q. And what I’m really getting to, what I’ll suggest to you, is that until we know what the proposed development is, or some sort of sufficient identification of what it’s going to be, an acceptable traffic and transport engineering outcome demonstrating acceptability in terms of those things we see in (a) to (i) can’t be addressed?

A. Not in any detail, no.”

[84] Not surprisingly in these circumstances, Mr Douglas and Mr Holland raised a number of significant concerns. On the part of Mr Douglas, these included that, notwithstanding there being an indication that access to the site would be by way of a signalised intersection, none of the development concepts presented had shown how that intersection would operate nor where it would be located.⁸⁹ It was also his opinion that the preliminary intersection designs contained in Mr Crank’s report⁹⁰ were non-compliant with the Austroads standards which in turn gave rise to genuine concerns about safety.⁹¹ According to Mr Douglas what had been advanced was “*not close to being a workable appropriate traffic solution*”.⁹²

⁸⁷ Exhibit 19, p 5, para 10.

⁸⁸ T4-89 ll 25-29.

⁸⁹ T5-37 ll 29 – T5-38 l 12.

⁹⁰ Exhibit 19, pp 30-31.

⁹¹ T5-38 l 29 – T5-39 ll 1-45.

⁹² T5-40 ll 5-8.

- [85] Mr Holland was of the opinion that Mr Crank had not yet been able to demonstrate how access to the Adpen site could be made compatible with the Council's road structure planning.⁹³
- [86] After referring to aspects of the evidence of Messrs Holland and Douglas, it was argued on behalf of Adpen to the effect that, being an application for a preliminary approval only, traffic solutions could be achieved in the final design stage. With enough time and money that may well be the case, but at this stage it has not been demonstrated, as all the traffic engineers agreed, just what the appropriate design and construct details might be and how they might be achieved.
- [87] The references to the evidence of Messrs Holland and Douglas also fails to deal with the opinion of those witnesses that, on traffic grounds, the application ought be refused. Neither resiled in any meaningful way from those opinions. Their evidence was not seriously shaken and I accept it.
- [88] Insofar as traffic is concerned, I am left in the situation where I am not satisfied that Adpen has demonstrated how it would address the traffic issues to which I have referred. It has been submitted on behalf of both the Council and Oakey Flat that the problems associated with traffic are sufficient to warrant refusal of themselves. For the reasons given, I agree.

Conclusions and orders

- [89] The non-compliances with the planning scheme identified above are sufficient to warrant refusal of the application and, accordingly, to dismiss the appeal. This is not a case where the non-compliance is at the lower end of the scale. Quite the opposite; it is profound. Further, there are no identifiable relevant matters that would warrant tipping the balancing exercise required under the *Planning Act 2016* in favour of Adpen in the face of such non-compliance.
- [90] Having reached that conclusion, it is unnecessary for me to express a final view about the internal traffic issues raised against the proposed development. For the same reasons, I do not consider it necessary to deal further with the other issues raised against the proposed development including the availability of infrastructure (water and sewerage), stormwater issues and the respondent's submissions on

⁹³ T6-24 ll 41-43.

“*submitter rights*”. In circumstances where no meaningful error in sound planning has been revealed and the proposed development is directly at odds with the planning scheme in many material respects, to use the words of Wilson SC DCJ (as he then was), the provisions of the planning scheme are entitled to be given their full weight and effect.⁹⁴ This appeal falls into the same category as that confronted by the court in *Elan Capital* where, to approve the development would be to unjustifiably cut across in an unacceptable manner the planning strategy adopted by the Council.⁹⁵ It must then necessarily follow that for the reasons given, the Council was right to refuse the application and this appeal ought be dismissed.

[91] In *Harbour Radio Pty Ltd & Anor v Wagner & Ors*⁹⁶ it was said:

“It is not possible to be dogmatic about the content of reasons required of a judge after a trial in a case in which the judgment may be challenged on appeal. In *King & Ors v Australian Securities and Investments Commission*⁹⁷ the Court (Morrison and McMurdo JJA and Applegarth J) derived from authorities the ‘general rule’ that the reasons will refer to the evidence of importance to the determination, set out material findings of fact and the reasons for those findings, including why the judge preferred one competing body of evidence over another, and engage with the parties’ submissions by explaining why one party’s case is preferred over the other party’s case...

Similarly, after the Court in *King & Ors v Australian Securities and Investments Commission* described the ‘general rule’ concerning the required content of reasons, the Court observed that although it was possible to state general principles about the topic, those general principles must be applied to the facts of the particular case.

There is ample authority for the proposition that the content of reasons required depends upon the circumstances of the case, including the submissions made by the parties...”

[92] In this case evidence was led and submissions made by all the parties but, in particular, by the appellant, in respect of infrastructure, design and amenity issues. However, in the circumstances of this case it is unnecessary in my view to trawl through all of the evidence on those matters and the submissions made in respect of them. That is so because, even if all of those matters were resolved in favour of Adpen, they either in their own right or in combination, would not warrant approval in the face of the non-compliance that I have found.

[93] Accordingly, the orders of the court are:

⁹⁴ *Stappen Pty Ltd v Brisbane City Council & Ors* [2005] QPELR 466, 473 at [34].

⁹⁵ A planning policy considered by Mr Craven to be supported by solid planning principles.

⁹⁶ [2019] QCA 221, at [45]-[47].

⁹⁷ [2018] QCA 352, at [39].

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