

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Wilson v Brisbane City Council & Anor* [2019] QPEC 64

PARTIES: **EMILY WILSON**
(Appellant)

v

BRISBANE CITY COUNCIL
(Respondent)

and

**SETTLEMENT EQUITIES PTY LTD (ACN 622 595
911)**
(Co-Respondent)

FILE NO: 745/19

DIVISION: Planning and Environment Court, Brisbane

PROCEEDING: Hearing of an appeal

ORIGINATING
COURT: Planning and Environment Court of Queensland, Brisbane

DELIVERED ON: 13 December 2019

DELIVERED AT: Brisbane

HEARING DATE: 25, 26, 27 and 29 November 2019

JUDGE: RS Jones DCJ

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

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where
co-respondent submitted a development application for a
residential sub-division – where 38 separate lots are intended
on being developed – where the respondent council approved
that application subject to conditions – where the appellant
appeals against that approval – whether the development is
non-compliant with the objectives of the planning scheme –
whether the development causes unsatisfactory traffic and
town planning impacts – whether notwithstanding non-
compliance should the co-respondent’s development be
approved

TRAFFIC – whether the local road network can
accommodate increased traffic from the proposed
development – whether the proposed development would

have unacceptable safety impacts on the local road network so as to warrant refusal – whether the proposed development would result in unacceptable queuing times

TOWN PLANNING – where the proposed development is located in the Extractive Industry Zone – whether the proposed land use is non-compliant with the planning scheme – whether the planning scheme contemplated residential development in the zone – whether the proposed development will negatively impact the urban amenity of the locality – whether the proposed development provides a sufficient range of lot sizes – whether the intended land use aligns with community expectations

Legislation

Planning Act 2016 (Qld)

Planning and Environment Court Act 2016 (Qld)

COUNSEL:

Mr B Rix for the appellant
Mr J Ware for the Co-Respondent

SOLICITORS:

Connor O’Meara Solicitors for the appellant
Mr R Yuen, solicitor of Brisbane City Legal for the respondent
Milne Legal for the Co-Respondent

- [1] This proceeding is concerned with an appeal by Ms Wilson against a decision of the Brisbane City Council (the Council) to approve, subject to conditions, a residential development by Settlement Equities Pty Ltd (Settlement Equities) within an exhausted quarry site located at the Gap. For the reasons set out below, the orders of the court are:
1. The appeal is dismissed
 2. I will hear from the parties as to any consequential orders, if necessary

The subject land and the surrounding area

- [2] The land is located at 232 Settlement Road, The Gap and is more properly described as Lot 1 on RP224969. The land comprises 4.053ha in area and is generally rectangular in shape save for the eastern most boundary that follows the curved alignment of Settlement Road. The land has approximately 161m frontage to that road. Unsurprisingly, being an exhausted quarry, the land has a number of unusual features and, in particular, topographical features. These were described by three town planners retained by the parties; Mr Buckley for the appellant, Ms Roughan by the Council and Mr Ovenden for Settlement Equities, in their joint expert report (JER) in the following terms:¹

“The subject site is part of the northern elevated section of The Gap where it (and Settlement Road) climbs over the dominant ridgeline which separates The Gap from Keperra. It was previously used for extractive industry (a quarry) and as a result has a highly modified topographic profile. The site topography can be broken into three portions:

1. North-west portion;
2. Middle portion;
3. South-east portion.

The North-west portion of the site exhibits a sequence of steep benches that step down from the northern and western boundaries. Elevations in this portion range from approximately 140m Australian Height Datum (AHD) to 100m AHD.

The Middle portion of the site exhibits benched and graded earthworks that are less steep than the North-west Portion. Elevations in this portion range from approximately 100m AHD to 80m AHD.

The lower South-east portion gently slopes toward Settlement Road. Elevations range from approximately 80m AHD to 77m AHD....

The site is highly disturbed because of the previous quarry operation and therefore is sparsely vegetated. Some mature vegetation is present along the western, northern and eastern side boundaries. The value of this vegetation is considered in separate reporting discussed in the Ecology Joint Expert Report.”

¹ Exhibit 8, pp 4-5.

- [3] The topography of the land is shown in various plans.² These plans show the steep quarry face along the north-western portion of the land. Access to the land is currently via a crossover in the south-eastern corner from Settlement Road. The land is surrounded by a number of different uses. To the north, a large unimproved steeply sloping freehold lot that is densely vegetated. This particular area of land, along with other lots adjoining it to the east and west form a part of Keperra's green space corridor. Beyond that corridor, approximately 750m to the north, is the low-density residential suburban and major retail/commercial areas of Keperra. To the south is a detached housing development of lots varying in sizes from approximately 474m² to 836m², known collectively as Settlement Heights. This residential development is accessed via Poppy Place which turns to the west from Settlement Road. Further south are a number of sport and recreational facilities including indoor squash courts, outdoor tennis courts, gymnasiums and other uses. To the east, across Settlement Road, is a retirement and aged care facility and, to the south of that facility, low-density detached housing. To the west is a small pocket of low-density residential development comprising of detached dwellings on larger lots ranging from between 1000m² to 3000m².³
- [4] Pursuant to the Council's planning scheme, City Plan 2014 (CP2014), the land is currently included in the Extractive Industry Zone however, that is, in the main, of only historical relevance in the sense that the quarry ceased being operational many years ago. Under the Brisbane City Shape 2031 Land Use Strategic Framework Map, the land falls within the northern extremity of that area designated as a Suburban Living Area. It is also included in the Gap Neighbourhood Plan Area but is not defined within a precinct within that plan and does not otherwise support development of the type proposed other than not identifying it as an inappropriate use. The relevance of that plan is dealt with in more detail below.
- [5] The land is also subject to a number of overlays under CP2014. In the notice of appeal they were referred to in the following form:⁴

- i. High Ecological Significance sub-category of the Biodiversity overlay;
- ii. General Ecological Significance sub-category of the Biodiversity overlay;

² E.g. Exhibit 2, p 3.

³ See Exhibit 2, pp 1 and 2.

⁴ Exhibit 3, V1, p 2. It is also affected by a number of overlays under the City Plan 2014 (CP2014).

- iii High Hazard Area sub-category of the Bushfire overlay;
- iv Medium Hazard Area sub-category of the Bushfire overlay;
- v High Hazard Buffer Area sub-category of the Bushfire overlay; and
- vi Industrial Amenity Investigation Area sub-category of the Industrial Amenity overlay.”

The proposed development

- [6] The land lays approximately 9.5km northwest of the Brisbane CBD. The Development Application sought approval for:
1. Preliminary Approval (Variation Request) for Building Work and Material Change of Use for Sales Office, Dwelling House, Rooming Accommodation and Home Based Business;⁵ and
 2. Development permit for reconfiguring a lot (one lot into 38 lots and common property, lot 800.
- [7] A Development Permit for Operational Works also was sought to facilitate filling and excavation over the land. On 21 December 2018, the Council approved the development subject to a number of conditions. Particular features of the proposed development include 38 residential lots located in the south eastern corner of the land. In the very south eastern corner will be a drainage and retention area which is to be common property maintained by a body corporate. The lot sizes range from 400m² to 780m² with the majority of allotments being less than 450m², culminating in an average lot size of 437m². To the immediate north and west of the area of the land to be developed for residential purposes, is a fire maintenance trail which will be secured by an easement. To the immediate west of that, is a fuel management (bushfire prevention) zone which will be a covenanted area. To the north and west of those areas, is common property comprising of a rehabilitation area which is also to be maintained by a body corporate.⁶
- [8] A significant feature of the proposed development is that the current access to the land via Settlement Road will be closed and instead, access will be via Poppy Place and Eliza Close being two relatively narrow streets running through the Settlement Heights residential development to the south.⁷
- [9] There were 12 properly made submissions, including that of Ms Wilson, objecting to the proposal. After providing further information requested by the Council and a

⁵ Exhibit 3, p 360.

⁶ Exhibit 2, p 4 and Exhibit 2A, p 7.

⁷ Exhibit 2, p 1.

minor change application dealt with by this Court on 17 December 2018, on 21 December 2018, the Council approved the development subject to a number of conditions. Ms Wilson lodged her appeal on or about 1 March 2019. Notwithstanding Ms Wilson being the appellant in this proceeding, the onus rests with Settlement Equities to satisfy the court that the appeal ought be dismissed.⁸

The issues in the appeal

- [10] In the notice of appeal, a number of grounds were raised which it is said ought to have warranted refusal. Without going into those grounds in detail, as they were overtaken by events, the issues raised included negative impacts on the ecology and biodiversity, traffic issues including traffic safety and amenity, risk of bush fire and other general amenity issues. Following various court orders, the issues were narrowed.
- [11] Firstly, by Ms Wilson re-stating the reasons which she relied on contending for refusal.⁹ Those reasons still included concerns about traffic, negative impacts on the ecology and biodiversity, impacts on urban amenity and the risk of bush fire, but the extent of the disputes were narrowed. Insofar as town planning issues were concerned, a number of particular matters included that the proposed development was not one reasonably expected by the zoning of the subject land or, in the alternative, to the extent that some residential development might have been contemplated, not of the intensity proposed. Issues were also raised in respect of associated negative traffic impacts. A number of quite lengthy particulars were then set out:¹⁰

“Given the above, the approval of the proposed development would not advance the purposes of the PA (*Planning Act 2016*), in that:

- (a) it does not create or maintain a resilient community with safe development given the unacceptable risks from bushfire and ability of fire appliances to access all parts of the development in an emergency;
- (b) it does not supply infrastructure in an efficient way given the adverse impacts to the Settlement Road intersection and within Poppy Place;
- (c) it does not apply safety in the built environment in a way that is of public benefit given the unacceptable risks from bushfire and ability of fire appliances to access all parts of the development in an emergency; and

⁸ *Planning and Environment Court Act 2016* (Qld), s 45(2).

⁹ Exhibit 3, tab 4, pp 19-25.

¹⁰ Ibid, pp 24-25.

- (d) it does not avoid or mitigate adverse environmental effects of development, including creating congestion and traffic queuing at the Settlement Road intersection and within Poppy Place.”

[12] Following discussion between the parties, it was determined that Ms Wilson’s concerns regarding bush fire and bush fire risk could be addressed by appropriate conditions. As a consequence, an agreed list of disputed issues were identified:¹¹

“Traffic

1. Whether the proposed development would result in an unacceptable traffic impact at the intersection of Settlement Road and within Poppy Place as a consequence of the vehicle movements generated by the proposed development, and does not provide for safe access for all types of vehicles, therefore departing from the assessment benchmarks in City Plan as follows:
 - (a) Transport, Access, Parking and Servicing Code:
 - (i) Overall Outcomes 2(c), 2(d), 2(e)
 - (ii) Acceptable Outcome 1; and
 - (iii) Performance Outcome 1.

Environmental

2. Whether the proposed development would result in unacceptable impacts to ecological systems and the natural environment and therefore departs from the assessment benchmarks in City Plan as follows:
 - (a) Biodiversity Overlay Code:
 - (i) Overall Outcome 2(e)
 - (ii) Acceptable Outcomes 6.1 and 6.2
 - (iii) Performance Outcome 6.

Town Planning

3. Whether the proposed development:
 - (a) is not reasonably expected by the zoning of the subject land;
 - (b) or in the alternative, to the extent some development other than extractive industry is contemplated, the intensity of development exceeds reasonable expectations pursuant to 3.4.2 Element 2.1 S05 of the Strategic Framework in City Plan 2014; and
 - (c) would result in unacceptable impacts to the existing residents of the area as a result of increased housing density and associated traffic impacts and therefore departs from the above assessment benchmarks.

Advancing the purposes of the Planning Act

4. Given the above, whether the approval of the proposed development would not advance the purposes of the Planning Act, in that:

¹¹ Exhibit 1.

- (a) it does not supply infrastructure in an efficient way given the adverse impacts to the Settlement Road intersection and within Poppy Place; and
- (b) it does not avoid or mitigate adverse environmental effects of development, including creating congestion and traffic queueing at the Settlement Road intersection and within Poppy Place.

Relevant matters

5. Whether there are relevant matters which warrant approval of the proposed development namely:
 - (a) there is a planning need for the proposed development;
 - (b) the proposed development is not out of character with surrounding development;
 - (c) the proposed development does not result in any unacceptable amenity outcomes;
 - (d) the subject land is well located for the proposed development with close and convenient access to:
 - (i) shopping facilities;
 - (ii) employment, health and educational facilities; and
 - (iii) public transport;
 - (e) the proposed development will contribute towards the achievement of desirable town planning objectives stated in the CityPlan 2014 and the South East Queensland Regional Plan including:
 - (i) the provision of housing choice and diversity across the city, including in locations proximate to the city and other infrastructure;
 - (ii) the encouragement of housing of this type in well located areas, near public transport;
 - (iii) that land be used efficiently; and
 - (iv) that public infrastructure be used efficiently;
 - (f) the proposed development will contribute towards achieving targets for new dwellings in the South East Queensland Regional Plan as it represents an efficient form of infill development which takes advantage of its location;
 - (g) the proposed development will contribute towards affordability and diversity of housing in the area;
 - (h) approval of the proposed development would result in improvements to amenity and traffic due to land no longer being able to be used for the purposes of extractive industry and the proposed upgrade to the intersection of Settlement Road and Poppy Place;
 - (i) residential development would be an expected and appropriate use of the land in circumstances where the historical extractive industry use has ceased;
 - (j) the draft Biodiversity Overlay Code in CityPlan 2014 proposes to map a lesser portion of the land;

- (k) the proposed development footprint avoids impacts on ecological features and ecological processes, koala habitat trees, areas of strategic biodiversity value and wetlands;
- (l) the proposed development will ensure that parts of the land in the High ecological significance sub-category area are protected, conserved and restored to ensure the area's long-term viability;
- (m) the proposed development will result in a net increase in native vegetation cover and potential habitat niches (habitat value) on the site compared with the existing land use. This will result in an increase in the biodiversity and habitat value of the site over time, particularly when compared with the current condition of the land;
- (n) the outcome of the proposed rehabilitation will result in the partial restoration of ecological features and associated ecological processes in areas which are currently devoid of ecological features and where ecological processes are disturbed;
- (o) the total extent of rehabilitation and revegetation envisaged by the proposed development (even allowing for bushfire protection) exceeds the mapped extent of high ecological significance sub-category areas and general ecological significance sub-category areas in the Biodiversity areas overlay;
- (p) the zoning of the land as extractive industry has been overtaken by events; and
- (q) the design of the proposed internal roads complies with and in fact exceeds the requirements of both the Respondent and the QFES.”

[13] Following Mr Ware's, counsel for Settlement Equities, opening and the inspection, on the first day of the hearing, it was agreed that there were no biodiversity or other ecological issues that would warrant refusal as any concerns could be addressed by appropriate conditions.

[14] Accordingly, the real issues in dispute centred around the differences of opinion expressed by the town planners and the traffic engineers.

Town planning issues

[15] In their JER, the town planners agreed that their issues in dispute could be summarised as follows:¹²

- “1. Acceptability of residential development in the extractive industry zone and in respect of orderly development principles;
...
2. The suitability of the proposed density of residential development
...
3. Acceptability of amenity considerations.”

¹² Exhibit 8, p 9, at para 5.4.

[16] While Mr Ovenden and Ms Roughan supported approval, Mr Buckley did not. In the JER he summarised his reasons as being “*that the number of allotments, the layout, and homogeneous lot size is at odds with local character and a contributor to a potential worsening of sub-standard access arrangements to the local area*”.¹³

[17] Mr Ovenden and Ms Roughan disagreed. It was their opinion that the proposal was “*a logical planning outcome*” and was consistent with:¹⁴

- (a) the higher order intentions of the regional plan and strategic framework;
- (b) the low density residential zone and neighbourhood plan intentions;
- (c) the character of the surrounding area; and
- (d) reasonable community expectations.

[18] In his evidence in chief, Mr Buckley was asked to give a summary of where he and Mr Ovenden and Ms Roughan parted company. His answer was to the effect that it centred around the intensity and character of what was proposed and what reasonable community expectations might be having regard to the relevant provisions of CP2014 and, with what has physically occurred in the existing urban areas surrounding the subject land. Mr Buckley also gave evidence about his concerns regarding the increased number of users of the intersection of Poppy Place and Settlement Road. He pointed out that his conclusions were set out in paragraphs 7.11 to 7.14 and paragraph 8.21 of the JER.¹⁵

[19] After discussing a number of issues in the previous paragraphs, in paragraph 7.14 Mr Buckley stated:

“Orderly development principles understandably link land use and traffic/transport. The Codes that are called up within City Plan for different residential development scenarios consistently encourage considerations of integration and connection. (See for example the Emerging Community Zone Code...; the Road Hierarchy overlay code; and the Subdivision code...) In this case the proposed development:

- does not achieve the degree of integration anticipated by the planning scheme;
- has scant support from the Neighbourhood Plan within which it exists;
- does not proceed in a way that is responsive to local character and development patterns; and
- seeks to develop an intensity beyond reasonable expectations.”

¹³ Exhibit 8, p 27, at para 11.3.

¹⁴ Ibid, at para 11.5.

¹⁵ T3-81 ll 40-47; T3-82, ll 1-23.

[20] There is of course a degree of overlap between the first, second and third of those matters. Turning then to paragraph 8.21 of the JER, Mr Buckley relevantly stated:

“... The site remains in the Extractive Industry Zone and is not a Potential Development Area in the Neighbourhood Plan. Whilst conversion to some form of low density style development has prospects, the extent and intensity of it requires a careful assessment that is more than a demonstration of the layout’s ability to meet road width, minimum area and frontage requirements.”

[21] A matter of concern to Mr Buckley was whether a safe intersection arrangement could be achieved where Poppy Place intersects with Settlement Road.¹⁶ This issue also arose during the course of his oral testimony. However, he accepted that that issue was really one for the traffic engineers and, if a safe intersection could be designed and constructed, his concerns otherwise centred around matters of intensity and character.¹⁷

[22] In respect of lot size and road width, both Mr Ovenden and Ms Roughan were of the opinion that the proposed development was consistent with the character and intensity of the surrounding urban footprint. It was Mr Ovenden’s view that development on both sides of Settlement Road was a “*mixed bag*” of both land uses and lot sizes. It was also his opinion that typically, smaller lots were located on the flatter land and the larger lots on the more steeply sloping land. In that regard, he produced a document that identified both land use, lot size and topography. That piece of evidence provided strong support for Mr Ovenden’s opinion on this matter.¹⁸

[23] Returning then to Mr Ovenden’s mixed bag of uses, on the eastern side of Settlement Road, directly opposite the proposed development, is the large Regis aged care facility. On the western side of Settlement Road there are also a number of non-residential uses including a sports/health centre, tennis courts, etc. Also, on both sides of Settlement Road there are a mixture of smaller lots and larger lots where, again, consistent with the evidence of Mr Ovenden, the smaller lots tended to be located on the flatter land. That said, Settlement Road effectively divides this part of The Gap and, it is quite clear that on the eastern side of that road there is a much higher proportion of more intensive small lot developments than occurs on the

¹⁶ Exhibit 8, p 18, at paras 7.13(f) and (g).

¹⁷ T3-88 ll 6-37.

¹⁸ Exhibit 22. See also T3-41 ll15-20 per Mr Ovenden.

western side. In this regard, I agree with Mr Buckley's assessment that community expectations for what might occur on the subject land would be more informed by what has physically occurred to date on the western side of Settlement Road. I also agree with his observation that, generally speaking, residential development on the western side of Settlement Road has occurred on larger lots, even on the flatter land.

[24] To make his point, Mr Buckley prepared a colour coded plan identifying lot sizes on both the western and eastern side of Settlement Road.¹⁹ For the reasons already stated, I intend only to deal with what has occurred on the western side of that road. On the subject land, a total of 38 lots are proposed. The minimum lot size being 400m², the maximum being 780m² and the average lot size being 437m². The internal road will also only be 10m wide whereas the existing street pattern involves road widths typically in the order of 14m. The point being made by Mr Buckley was that in the Settlement Heights development immediately to the south and other urban development to the south and west, there is a greater variety of lot sizes. Mr Buckley's investigations of some 302 suburban allotments revealed:

- 18 lots of less than 400m²;
- 56 lots of between 400 and 450m²;
- 38 lots of between 451 and 600m²;
- 67 lots of between 601 and 800m²;
- 42 lots of between 801 and 1000m²; and
- 81 lots of 1000m² or more.

[25] I do not consider it appropriate to bring into account those lots of 800m² or more as they clearly dominate the steeper areas to the west. However, having regard to the other lot sizes identified by Mr Buckley, it can readily be accepted that there is not only a greater variety in the lot sizes located to the south of the subject land but also that that variety includes lots noticeably larger than proposed. In this context, I also agree with Mr Buckley's evidence that, while what is proposed adds additional variety in the context of the overall surrounding urban development, what the relevant provisions of CP2014 also envisage is a variety of lot sizes within any particular proposed development. To the extent that there is a variety of lot sizes within the proposed development, it is only marginal. Almost 82% of the lots are between 400-450m² whereas, in the Settlements Heights estate, only some 24% fall into that category. Excluding lots exceeding 800m², almost 31% of the lots range from 451m² to 800m². In this context, I therefore also agree with Mr Buckley that

¹⁹ Exhibit 13A.

what is proposed will result in a more intensive form of development than that which surrounds it. This is demonstrated not only in the work produced by Mr Buckley but also in a number of other documents.²⁰

[26] That what is proposed involves more intensive land use is not however, in my view, the end of the matter. The form of development proposed is to a very significant extent driven by the surrounding topography. For Settlement Equities to provide more lots in the range of 450m² to 600m² would likely result in a materially smaller number of lots being produced. It would of course have been possible to create larger lots along the northern and western extremity of the proposed development by extending the length of those lots further into the steeper areas of the land. That was a matter I raised with Mr Ovenden and it was also a matter taken up by Mr Ware in his cross-examination of Mr Buckley. Mr Buckley accepted that “*mathematically*” that would add to the mix by creating more larger lots however, he had a number of reservations about the practicality of that occurring due to topographical issues. More importantly though, Mr Buckley pointed out that that would have no impact on the width of the frontages to the street and, accordingly, would not reduce the intensity of development which he described as resulting in a “*cluster of houses... cheek by jowl*”.²¹

[27] As to Mr Buckley’s “*cheek by jowl*” analogy, that would only apply to the proposed lots 11 to 16 which have a frontage of between 10m to 12m. As Ms Roughan’s plan shows, the balance of the proposed lots range from in the order of 15m up to 20m. Frontages of that order are consistent with those in the Settlement Heights estate.²²

[28] Also, as Mr Rix emphasised, to extend any or all of those lots 10 to 23 into the open space area might address the lot size issue but it does not, in reality, address the level of intensity of what is proposed. That is because, unlike the situation in the Settlement Heights estate, the intensity is not broken up by areas of green space that form part of the street scape.²³

²⁰ E.g. Exhibit 2A, p 8.

²¹ T3-94 ll 1-23.

²² Exhibit 23; T3-65 ll 7-27.

²³ E.g. Exhibit 2A, p 8.

[29] When this matter was taken up with Mr Ovenden, he also accepted that those lots could be extended in length thereby creating larger lots and, in this context, the following exchange occurred between Mr Ovenden and the bench:²⁴

“Q: Because the reason I asked, it seemed that the shape of the proposed development seems to, if you like, follow inside that line before the topography starts to increase dramatically... Is that right?

A: Your Honour, that’s– that’s what’s– that’s how it’s been designed, but it also has been designed in a way to manage bushfire risk, for example, in the buffer area. So that’s in common property, rather than in private property. But, your Honour, I’ll also draw your attention to, for example, just getting back our discussion earlier, lots 17, 18, 19, their– their– their frontages are 16 metres, 16, 18 metres, 18 metres. So that’s significantly bigger frontages than what’s – what you’re finding in Eliza Close as you even enter the development.”

[30] What Mr Ovenden was referring to in that latter part of the exchange was that the street frontage of a number of the proposed lots was not inconsistent with, and in some instances even greater than, a number of lot frontages in the Settlement Heights estate. In this context, I also accept the evidence of Mr Ovenden²⁵ and Ms Roughan²⁶ that the style or type of houses that might be erected if the proposed development were to go ahead would be materially the same as to that which has occurred to the south. During his cross-examination, Mr Buckley also accepted that a similar style of contemporary houses could be expected.²⁷

[31] On balance, I am satisfied that in the event that the proposed development went ahead and houses were built on each of the lots, there would be no material change in the character of the houses when one moved from the Settlement Heights estate into the proposed development and vice versa.²⁸ That a similar form of residential development might occur on the subject land is of course not a complete answer to Mr Buckley’s concerns. It will still present as a more intensive form of development not only by reference to lot size and frontage but also taking account the materially narrower road system. Mr Ovenden accepted that the 10m road system was “inconsistent” with the existing form of road infrastructure but saw that as a part of the compromise associated with community title development when

²⁴ T3-60 ll 5-13.

²⁵ T3-58 ll 40-T3-59 ll 1-3.

²⁶ T3-76 ll 23-33.

²⁷ T3-99 ll 23-27; also T3-93 ll 13-35.

²⁸ To a limited extent the style of housing constructed on the smaller lots in the Settlement Heights development is shown in Exhibit 21A.

compared to freehold development.²⁹ In this context, it is tolerably clear that the footprint of the proposed development is to be, as far as is practicable, confined to the already highly disturbed part of the land.³⁰ That that could be achieved was a matter of importance to the ecologists.³¹

[32] On balance, I am not satisfied that the proposed development fully complies with relevant provisions of CP2014. It fails to provide a sufficient range of lot sizes due to its predominance of lots between 400-450m². As Mr Buckley pointed out, it does not comply with SO4 of part 3.7.6 of the planning scheme concerned with local character where infill development should produce lots of a size that reflects that which “*predominates in the neighbourhood*”.³²

[33] The number of small lots together with the narrower streets also could not be said to reinforce or strengthen local identity of the area. It is of itself a different pattern of development to that which already exists.³³ I should note here that while Mr Roughan was not prepared to accept that the proposed development was inconsistent with the existing locality, she was prepared to accept that it was “*different*”.³⁴

[34] For the sake of completeness, I should refer to the submissions made on behalf of Ms Wilson concerning The Gap Neighbourhood Plan. After pointing out that that plan came into existence some 12 months after the development application was lodged, it was then emphasised that, notwithstanding that passage of time, no attempt was made to re-designate the future use of the land or to include it in a potential type of development precinct.³⁵

[35] That may well be so, but that plan did not identify that a different land use was a more appropriate use for the land or that residential development was a non-preferred use. That is, its identification as a “*Suburban Living Area*” remained in place. On balance, I have concluded that the neighbourhood plan neither detracts from nor assists the assessment of acceptability of the proposed development.

²⁹ T3-56 ll 12-27

³⁰ Exhibit 2A, p 1; Exhibit 2, p 3.

³¹ Exhibit 6, para [40] per Mr Moffitt; paras [58]-[60] per Dr Watson.

³² Exhibit 4B, p 21

³³ Exhibit 4, p 42, SO5 of part 3.4.2 of CP2014.

³⁴ T3-76 ll 4-10.

³⁵ Appellant’s written submissions, at paras 53-57.

[36] For the reasons given, I am not satisfied that the proposed development would be entirely consistent with community expectations. However, I am satisfied that to the extent there is a level of intensification that might offend community expectations, it would not be particularly stark. That is so for a number of reasons. First, as Mr Buckley was prepared to accept, purchasers of the proposed lots would be likely to build a form of housing consistent with those that already exist.³⁶ Second, and associated within the first matter, the frontages of the proposed lots are relatively consistent with those in the Settlement Heights estate. Third, having regard to the location of the proposed development, there would be very little interaction or, to perhaps put it more accurately, connectivity between those that would reside in the proposed development and those who reside to the south. Traffic within the proposed development would be to a very significant extent limited to those who reside in it. This was a matter Mr Buckley accepted as a relevant consideration.³⁷ For the same reasons, I have reached the same conclusion that insofar as there might be an erosion of amenity, it would be towards the lower end of the scale.

[37] Insofar as community expectations are concerned, five local residents prepared statements in respect of this proceeding.³⁸ While all raised concerns about traffic safety, the only concerns raised about the intensity of the proposed development were directed to the expected increased number of traffic movements. That is, none of these witnesses seemed to have been concerned about lot sizes, frontages or the width of the proposed internal roads. This evidence, or lack of it, is far from determinative but, insofar it is to be given some weight, it tends to support the conclusions expressed above about the level of non-compliance with CP2014. The traffic issues are dealt with below.

[38] Pursuant to s 45(5) of the *Planning Act 2016*, any development requiring impact assessment, as this does:

- (a) Must be carried out—
 - (i) Against the assessment benchmarks in a categorising instrument for the developments; and

³⁶ T3-93, ll 13-35.

³⁷ T3-95, ll 13-25.

³⁸ Exhibits 14 to 18.

- (ii) Having regard to any matters prescribed by regulation for this subparagraph; and
- (b) May be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise.

[39] Relevant matters associated with this development include that, in addition to providing a form of infill residential development, the demand for which was not put in issue, it also provides the opportunity for the useful development of a disused quarry site with significant topographical constraints, where all the town planners were agreed that some form of residential development ought to occur. The only dispute being about the intensification of such development. It is, as is discussed below, of particular relevance that, in the event that the proposed development went ahead, there would be an improvement on the existing traffic safety issues associated with the Poppy Place/Settlement Road intersection. Finally, a particularly significant benefit of the proposed development will be the provision of managed bushfire controls and the rehabilitation of a significant area of the balance land. As has already been identified, to the north and west of the area to be subdivided are areas identified as common property set aside for the purposes of bushfire management and rehabilitation.³⁹

[40] The conditions imposed with the approval include those directed towards managing and protecting onsite vegetation, the entering into a bushfire covenant with the Council, and fauna and vegetation management and rehabilitation. In respect of the latter condition, the developer is required to submit to the Council a rehabilitation plan that is required to address a number of specific matters. Condition 10(b) is concerned with the implementation of the approved rehabilitation plan and provides:⁴⁰

“Carry out the rehabilitation works in accordance with the approved Rehabilitation Plan.

Timing: Prior to issue of Certificate of Classification/Final Inspection Certificate or prior to commencement of use, whichever comes first (MCU or BW), or prior to Council's notation of the plan of subdivision (ROL), and then to be maintained.”

[41] In this context, the following exchange took place between Mr Ware and Mr Buckley:⁴¹

³⁹ Exhibit 2, p 4.

⁴⁰ See Exhibit 3, p 367.

⁴¹ T3-101 ll 32-35.

“Q: Finally, Mr Buckley, we’ve talked about the large amount of land to be rehabilitated and revegetated. When you throw things into the mix, as you referred earlier, this is something on the positive side of the ledger that goes into the mix as well?”

A: Yes, but I have to accept that. Yes.”

[42] While I accept Mr Buckley’s evidence that the proposed development does not strictly accord with the relevant provisions of the planning scheme insofar as the level of intensity is concerned, that level of non-conformity tends towards the lower end of the scale, and to the extent that as there is such non-conformity or non-compliance, it is outweighed by the other relevant matters to which I have referred.

[43] In conclusion on this topic, during oral submissions Mr Rix urged that not much weight ought be given to the bushfire and rehabilitation management outcomes. That was so according to Mr Rix because, a fully compliant form of development could be expected to achieve the same benefits or outcomes.⁴² Obviously there is some weight behind that submission. That said, given the conclusions reached about the level of non-compliance, I do not consider that it would be appropriate to discount to any significant extent those beneficial outcomes.

Traffic

[44] The proposed treatment of the intersection at Poppy Place and Settlement Road was a determinative aspect of this case. That is, as the Council accepted, in the event that the road works associated with the proposed development resulted in a more dangerous outcome, then the appeal ought be allowed. According to Mr Yuen, who appeared for the Council, “*because safety comes first*”.⁴³

[45] Access to and from the proposed development is via Settlement Road, Poppy Place and Eliza Court. The most significant traffic manoeuvre insofar as this proceeding is concerned, is the right turn from Poppy Place onto Settlement Road to travel in a southerly direction. As identified above, five local residents provided statements. Upon the acceptance of all the parties that none of the authors had been in contact with the Council expressing concern about trees located within and outside the road reserve, they were not required for cross-examination.⁴⁴ The concerns of those local residents can be summarised as follows:

⁴² T4-4 ll 33-47; T4-5 ll 1-17.

⁴³ T4-39 l 40.

⁴⁴ T3-36 ll 33-37.

- The width of Poppy Place and Eliza Court;
- The waiting/queuing time exiting Poppy Place particularly when turning into the southbound lane;
- The line of sight distance, again with particular reference to the right hand southbound turning manoeuvre;
- The lack of any space on Settlement Road to perform a two staged right-hand turn onto Settlement Road.
- The impediment to visibility caused by the fence and trees on the southwestern side of Settlement Road.

[46] Having regard to the geometry of the existing intersection, a matter discussed in more detail below, I have no difficulty in accepting that their concerns are ones genuinely held and need to be carefully considered. However, it needs to be borne in mind that each of those residents were expressing their concerns about the impact on safety resulting from the introduction of a further 38 houses, based on the operation of the intersection in its current form.

[47] The existing design of this intersection is as a consequence of the development of the Settlement Heights estate. That initially involved litigation between a Mr Fitzgerald and a Ms Odlin, the Council and Settlement Heights Pty Ltd. The appeal was eventually resolved without the need for the Court to decide the outcome. In that matter, as is the case here, all three parties retained traffic engineers. Mr Beard for the Council, Mr Douglas for Settlement Heights and Mr Viney for the appellants. Mr Viney of course also acts for the appellants in this proceeding. The first JER of those traffic engineers identified a number of issues and concluded that further investigations were necessary. In their second JER, Mr Beard and Mr Douglas, subject to site distance and verge amendments, were prepared to accept the proposed intersection design as being “*satisfactory*”. Mr Viney was of the opinion that unless the intersection was signalised, the development ought not proceed.⁴⁵

[48] In their JER, the traffic engineers in this proceeding identified the following matters as requiring specific attention:⁴⁶

- (i) Traffic growth on Settlement Road and the impact on intersection capacity;
- (ii) The lack of sufficient site distance to the south for traffic exiting Poppy Place;

⁴⁵ Exhibit 7, p 34.

⁴⁶ Exhibit 7, p 2.

- (iii) The difficulty in turning right from Poppy Place due to the high traffic flow using Settlement Road;
- (iv) The inadequate storage space available in Settlement Road for drivers exiting Poppy Place via a two-stage right turn;
- (v) The implications for the Poppy Place access when Settlement Road is upgraded to four lane divided standard in the future;
- (vi) The feasibility of a redesign of the overall street network to overcome the site distance problems of the existing Poppy Place/Settlement Road intersection.

[49] As to the first of the matters identified, it is sufficient to say that Settlement Road carries a significant number of vehicles and, in particular, southbound during peak hours in the morning and northbound in the afternoon.⁴⁷ Traffic on Settlement Road has historically grown by 1.07% pa (compounding) over the past three or so years. As to the second matter, all the traffic engineers agreed that the available site distance to the south of Poppy Place did not meet the normal Austroads minimum requirements. This issue took centre stage in the dispute between Mr Pekol, retained by Settlement Equities, Mr Trevilyan, retained by the Council and Mr Viney by Ms Wilson. As to the fifth matter, the traffic engineers agreed that it did not require consideration at this stage.

[50] All of the traffic engineers agreed that if this development was occurring in a “*greenfield*” situation, it ought not be approved as the prescribed line of sight distance of 120m would not be achievable. Mr Pekol originally estimated the line of sight to be 91.2m. Mr Viney however, disagreed with that estimate considering it to be over stated as a consequence of his observation of local driver’s behaviour. That is, contrary to Mr Pekol’s assumption, local residents when turning right from Poppy Place, tended to stop behind the existing give way markings. Mr Viney took a number of photographs of such driver behaviour.⁴⁸

[51] As to the third and fourth matters identified above, it can be readily accepted that the intersection, as it currently exists, presents as a difficult manoeuvre for drivers turning out of Poppy Place intending to enter the southbound lane. In respect of the storage space available in Settlement Road, again, under its current design, there is little room for doubt that the ability to perform a two staged turn manoeuvre is unsatisfactory.

⁴⁷ Approximately 20,000vpd.

⁴⁸ Exhibit 7, p 42-44; Refer also to p 4 at paras 15-16.

[52] As to the last of the matters identified above, Mr Viney advocated a form of development that had an additional or alternative access point further to the north. For the reasons set out below, it is unnecessary at this stage to consider this matter any further to reject it. Other than to perhaps point out that no meaningful attempt had been made to identify how this alternative could be achieved, or how it would operate. Accordingly, it is only necessary to resolve the dispute concerning the interrelated issues of line of sight, queuing time and storage space to determine the outcome of this aspect of the proceeding.

[53] In the event that the proposed development proceeded, the intersection of Poppy Place and Settlement Road is to be upgraded to the standard shown in the JER of the traffic engineers.⁴⁹ The original design was amended following certain concerns raised by Mr Viney and, insofar as there were differences between the first iteration and the final iteration,⁵⁰ the line of sight was reduced from 91.1m 89.6m and the distance between a driver stopped at the give way sign and the potential conflict point with a vehicle travelling north bound on Settlement Road was increased from 3m to 5m.⁵¹ Importantly though, the 6m storage space in the median separating the north and southbound lanes on Settlement Road remained unchanged.

[54] According to Mr Pekol and Mr Trevilyan, an intersection in the form proposed by Mr Pekol would result in a superior and safer intersection for the existing residents of the Settlement Heights estate even with the additional traffic that would be generated from the proposed development. However, Mr Viney contended that the proposed development ought be refused on the basis that the intersection as proposed was unsafe. It was Mr Viney's opinion that:⁵²

- (a) the existing sight distance to the south does not meet the absolute minimum requirements of Austroads (i.e. Extended Design Domain Standards) or Council's TAPS Policy;
- (b) the design proposed to improve the centre of road storage to encourage a two-stage right turn is inadequate;
- (c) the case made by Mr Pekol and Mr Trevilyan to allow traffic using the substandard intersection of Poppy Place with Settlement Road to expand by 146% is unacceptable built on minimum standards on top of minimum standards;
- (d) the worst minimum adopted is the use of an observation point 3 metres from the existing edge line rather than 3 metres from the curb.

⁴⁹ Exhibit 7, Appendix L.

⁵⁰ Exhibit 9, p 14.

⁵¹ T2-8 ll 39-45 to T2-9 ll 1-10.

⁵² Exhibit 7, p 11, at para 37.

- To this is added a minimum reaction time of 1.5 seconds and use of the minimum design standards of EDD;
- (e) the proposed development should not proceed until such time as the identified deficiencies in site access are satisfactorily resolved since any increase in Poppy Place traffic demand would worsen an existing traffic safety problem.

[55] In his court report, Mr Viney considered Mr Pekol's proposal to be "*unacceptable since it would result in*" the following outcomes:⁵³

- (i) A narrow southbound lane at the southern end of the right turn lane for Poppy Place;
- (ii) Poor horizontal geometry for southbound traffic with a "kink" or tighter curve radius introduced just to the south of intersection;
- (iii) Deletion of the existing road shoulder/cycle lane on the southbound lane and reduced shoulder/cycle lane width for northbound traffic;
- (iv) Reduction in the length of the deceleration lane taper for the left turn into Kilbowie Street;
- (v) Poor visibility to southbound traffic for right turn drivers from Poppy Place sheltering within the 6.0 metre wide central refuge, particularly for drivers of commercial vehicles.

[56] Those consequences were marked by Mr Viney on Mr Pekol's design plan.⁵⁴ According to him, the Safe Intersection Site Distance (SISD) should be no less than 111m.⁵⁵ As I understand the evidence, that is simply an impossible outcome given the physical characteristics associated with the existing intersection. Indeed, my overall impression of Mr Viney's evidence was that he was prepared to adopt somewhat of a sniping approach to this issue. By way of examples, during cross-examination he accepted that insofar as his reference to there being a resultant narrow through lane with no shoulders, that was a feature not uncommon along this section of Settlement Road, it being a rural standard road.⁵⁶ As to his reference to the storage space being insufficient to accommodate a 6.4m long small rigid vehicle, that may well be the case but, that has to be seen in the context of the existing and more dangerous situation.

[57] As to his reference of there being an unacceptable tight radius curve/kink in the design, Mr Viney readily accepted that this was a matter that could be addressed in

⁵³ Exhibit 12, pp 2-3, at para 11.

⁵⁴ Ibid, p 5 (plan attached to end of exhibit).

⁵⁵ Ibid, p 4, para 16.

⁵⁶ T3-20 ll 13-27.

the final design stages.⁵⁷ As to the reference to a reduced length of a deceleration lane, when cross-examined, Mr Viney said he did not consider it to be a “*major problem*” and that, in any event, it complied with relevant design standards.⁵⁸ Finally in this context, in respect of his reference to reduced shoulder/cycle paths, Mr Viney also accepted that there were in fact no dedicated cycle lanes on either the northbound or the southbound side of Settlement Road and, along this section of Settlement Road, there were very few cyclists using the road. He also agreed that in any event, the loss of the shoulder markings was limited to in the order of 50m to 100m.⁵⁹ In respect of the issue of cyclist safety, it seemed tolerably clear to me that his concerns verged on the unrealistic and were materially influenced by him being a keen cyclist himself. As he said, he had a “*soft spot*” for cyclists.⁶⁰

- [58] The evidence of Mr Pekol and Mr Trevilyan was clearly that the proposed upgrading of the intersection would make it “*easier and safer*” to perform a two-stage right turn out of Poppy Place.⁶¹ Following consideration of a number of issues raised by Mr Viney, Mr Pekol revised his design, but only slightly, and concluded:⁶²

“In paragraph 31 of the JER, I claim that the recommended works to the Settlement Road/Poppy Place intersection would enhance traffic safety at this intersection. This improvement in traffic safety would benefit both the existing residents of Poppy Place as well as the new residents of the subject development. In the absence of the proposed development, the current situation at this intersection would remain.”

- [59] Turning then to the evidence of Mr Viney on this topic, as I understood his evidence, leaving aside the issue of vehicles of 6m and longer, he accepted that the introduction of the wider storage space was an improvement on the current situation.⁶³ However, after making that earlier concession, later in his cross-examination said: “*you’re improving the – the ability of cars to wait in the centre of the aisle – of the road, but you’re reducing the – the safety of vehicles using Settlement Road, and there’s 20,000-plus of those a day. And you’re reducing the safely (sic) of people coming out of the public place (sic) intersection.*”⁶⁴ The

⁵⁷ T3-24 ll 5-15.

⁵⁸ T3-24 ll 17-23.

⁵⁹ T2-86 ll 10-43.

⁶⁰ T3-19 ll 10-11.

⁶¹ Exhibit 7, p 9, at paras 29-31.

⁶² Exhibit 9, p 9, at para 39.

⁶³ T2-81 ll 30-45; T2-83 ll 39-41.

⁶⁴ T2-84 ll 16-19.

reference to “*public place*” is very likely a transcription error and should read “*Poppy Place*”.

- [60] In respect of the other issues concerning the safety of vehicles using Settlement Road, as I understand the evidence, those concerns have already been addressed, being the reduction in shoulder widths and shoulder line marking and the loss of the so called cycle pathway.
- [61] Insofar as this topic is concerned, I much prefer the evidence of Messrs Pekol and Trevilyan to that of Mr Viney. There is little room for doubt that the proposed upgrade will result in a safer and more efficient intersection for both its existing users and those generated as a consequence of the proposed subdivision.
- [62] The onus is of course on Settlement Equities to satisfy me that the appeal ought be dismissed. However, I felt it necessary to consider Mr Viney’s evidence in some detail given the number of issues he raised and those aspects of his evidence I found to be either contradictory or confusing. That might explain why, in the written submissions filed on behalf of Ms Wilson, the evidence of Mr Pekol and Mr Trevilyan insofar as it touched on the matters of queuing time, delay and the safety benefits of the proposed storage area, was not directly challenged. Instead the ultimate submission was:⁶⁵

“Ultimately the Appellant submits that in this case approval should not be granted to allow a 146% increase in the amount of traffic through an intersection which it is agreed does not meet ‘*the normal Austroads minimum requirements*’. The court would accept that, as Mr Viney posits, ‘*the proposed development would worsen an existing traffic safety problem and should therefore not proceed*’. The proposed development simply is not capable of:

- (a) Providing ‘*safe access...that does not impact adversely on the efficiency and safety of the transport network or diminish the amenity of nearby land uses*’;
- (b) Ensuring ‘*that impacts on amenity caused by traffic generation is consistent with the community’s reasonable expectations for the intended use*’;
- (c) Providing ‘*site access arrangements to ensure that any adverse impacts on other development, the transport network and those who use it, are minimised to maintain amenity of the area and the safety and efficiency of the transport system*’.” (Footnotes omitted – original italics)

⁶⁵ Appellant’s written submissions, at para 80.

[63] The italicised quotes in subparagraphs a, b and c are references to relevant provisions of CP2014.⁶⁶ The first of the italicised sections contained in that submission are referable to Mr Viney’s court report.⁶⁷

[64] The conclusion expressed by Mr Viney referred to in the submissions are however, dependent upon the following inputs:⁶⁸

- (i) Visibility (SISD) to northbound traffic from Poppy Place should be a minimum of 111m;
- (ii) The available sight distance measured 4.0 back from the existing edge line is approximately 84.5m; and
- (iii) The proposed design for staged crossing of traffic streams in Settlement Road is inadequate taking account of the impact of the design on the road geometry, the high traffic flows and the lack of an acceptable alternative access point for this residential area.

[65] As to the first of those matters, as has already been identified, a 111m line of sight is physically unachievable. As to the third matter, for the reasons given above, there can be no doubt that the ability to perform a staged crossing of Settlement Road will be materially improved with the proposed upgrading of the intersection.

[66] Turning then to Mr Viney’s calculation of 84.5m line of sight, in addition to participating in the JER exercise, Mr Viney produced two separate court reports.⁶⁹ It would not be unreasonable to say that throughout all those reports his principle concern was the SISD available to traffic intending to turn right onto Settlement Road. Indeed, in the first of his court reports, when dealing with the issue of site distances, he identified that as being “*the essential traffic engineering consideration in this appeal...*”⁷⁰

[67] It was submitted on behalf of Ms Wilson that:⁷¹

“Whilst Mr Viney identified that adopting about a 5.5m setback would see 86m of site distance available, where motorists are actually pulling up in practice (the existing give way line) sees a site distance of only 84.5m, less than the 86m required by EDD. The court would accept that using this metric is consistent with the requirement that ‘*if using EDD values, the reduction in standard associated with their use should be appropriate for the prevailing local conditions*’. **The prevailing local condition is this case, of course, being how motorists use the intersection. Mr Viney**

⁶⁶ Section 9.4.11.2(2)(c),(d) and (e) at Exhibit4, p 156.

⁶⁷ Exhibit 12.

⁶⁸ Exhibit 12, p 4 at para 16.

⁶⁹ Exhibits 12 and 12A.

⁷⁰ Exhibit 12, p 1, at para 5.

⁷¹ Appellant’s written submissions, at para 71(c).

identified during his cross-examination that the application of the EDD in this way represents an example of proper engineering judgment. The intersection fails the Austroads Safety Standards (whether in NDD or EDD) if this metric is adopted.” (original italics – footnotes omitted).

- [68] The reference to NDD is a reference to the Normal Design Domain value and the reference to the EDD is a reference to the Extended Design Domain for intersections under the Austroads Guide to Road Design Part 4A. As the above submission recognises, where the NDD value of 120m is unachievable in either the before or after scenario, it is necessary to have regard to the EDD values. The EDD values may be considered in four situations. First, when reviewing the geometry of existing intersections. Second, where new intersections are being retro-fitted on existing roads in constrained locations. Third, when improving the standard of existing intersections in constrained locations. Finally, when building temporary intersections.⁷² There is no doubt that this intersection could be considered as one involving a “*constrained location*”.
- [69] The reference to the local conditions in the submission is a reference to that part of the EDD that recognise that the decision to use it should not be taken lightly and “*if using EDD values, the reduction in standard associated with their use should be appropriate for the prevailing local conditions. Generally, EDD should be used for only one parameter in any application and not be used in combination with any other minimum or EDD value for any related or associated parameters.*”⁷³ “*The prevailing local conditions*” relied on, is the evidence of Mr Viney to the effect that his observations revealed that drivers entering onto Settlement Road from Poppy Place tended to stop approximately 4.0m back from the edge line or 3.0m from the give way line or curb line.
- [70] The difficulty that I have with this submission is twofold. First, just how many drivers stopped 4.0m from the edge line was not quantified. I do not know whether it is 100% of drivers, 10% of drivers or somewhere in-between. The second, and perhaps the more fundamental issue is that the behaviour of an individual driver is not the test. As Mr Pekol put it, “*that’s not what Austroads is asking us to do*”.⁷⁴ Mr Trevilyan was also prepared to accept that a number of drivers intending to turn right onto Settlement Road might stop behind the existing edge line, but he, like

⁷² Exhibit 19, p 92.

⁷³ Ibid, p 92.

⁷⁴ T2-32 to T2-33 ll 1-13.

Mr Pekol, said that that was not the appropriate test for the purposes of the EDD exercise.⁷⁵ In this context, during his evidence in chief, Mr Trevilyan was taken to Mr Viney’s second court report where under the heading “*site distance and accident/crash risk*”,⁷⁶ he adopted a range of setbacks from the edge line and concluded that a setback of 6m from the potential “*conflict point*” would result in a SISD value of 83m. Mr Trevilyan emphasised that it was not the decision of individual drivers that were to be adopted but that it was the EDD that prescribed the relevant parameters for design.⁷⁷ In any event, on this matter, I accept the evidence of Mr Trevilyan to the effect that, even if Mr Viney was right in his estimate of 84.5m, the intersection upgrade as proposed would still result in a better/safer intersection than exists now.⁷⁸

- [71] As has already been identified, two of the major concerns by the local residents who provided statements were queuing time, particularly when intending to turn right into the south bound lane of Settlement Road, and the lack of any space within the existing geometry of that road to perform a two-staged right hand turn manoeuvre. In respect of the first of these matters, Mr Viney gave contradictory evidence. In response to a question from Mr Ware, Mr Viney said in part: “*the site distance is below – below standard. It ignores the fact that there is not a wide opening in the – in the median to allow for a car to stall and it would also ignore the fact that the 20 – the current 26 lots is going to go to 64 and that will create queuing problems and delay problems.*”⁷⁹ That stands in stark contrast to the evidence of Mr Pekol whose evidence was that the average delay for the right hand manoeuvre out of Poppy Place was 23 seconds in the existing situation. Whereas, with the proposed upgrading of the intersection, even with the additional traffic that would be generated from the proposed development, the average delay for the same turning manoeuvre would be in the order of 13 seconds.⁸⁰ His evidence was that he would expect with the proposed development in place including the upgraded intersection the delay would be about “*50 per cent of what it is now*”.⁸¹

⁷⁵ T2-68 ll 36-47.

⁷⁶ Exhibit 12A, at paras 5-12.

⁷⁷ T2-56 ll 7-27.

⁷⁸ T2-73 ll 5-30.

⁷⁹ T3-13 ll 11-14.

⁸⁰ Exhibit 9A, pp 3 and 4.

⁸¹ T2-5 ll 20-47; T2-6 ll 1-37.

[72] When Mr Viney gave his evidence about there being an exacerbation of the queuing and delay problems at the intersection, the following exchange took place between Mr Viney and the court:⁸²

“Q. And, Mr Viney, the evidence of Mr Trevilyan and Mr Pekol was to the effect that, with the proposed road works, the queuing time would be halved. But you’re saying quite to the contrary. You’re saying that not only will it not be bettered but it’ll be worse?”

A. Your Honour, the design that Mr Pekol has drawn up does not comply with the EDD design. It – it’s taken out the shoulders.

...

Q. Yes. Forget that for the moment just for this part of the question. They say that...broadly speaking if these were put in place, queuing time would be – in round figures – about half whereas you’re saying not only will that not be the case, it’d in fact, be worsened.

A. **I’m not quite saying that, your Honour. I’m saying that it might not be half** because I think that he may not have allowed for the fact that some cars will go from Poppy Place and – and wait in the – the...median; they’d have to wait there for some time before they can turn right because that’s the main traffic flow, particularly...in the morning.” (Emphasis added)

[73] Later in his evidence, at one stage Mr Viney again seemed to be suggesting that there would be an increase in queuing/delay but almost in the same breath said “*overall it might be reduced*” and that “*it may actually reduce the queuing time; it may not*”.⁸³

[74] Mr Viney also raised concerns about the operation of heavy machinery to and from Settlement Road during the construction of the proposed development. These concerns are soundly based. However, I am satisfied that this issue can be addressed by the implementation of an appropriate traffic management plan.

[75] Returning for the moment to the issues raised by the local residents identified above, the concerns raised are not only genuinely held but were recognised by all of the traffic engineers as being relevant. On the evidence before me, I am however, satisfied that with the proposed upgrading of the intersection, even with the traffic generated from the additional 38 lots, queuing time/delay will be reduced and a safer two staged right turn environment will result.

[76] As to the concerns about the interference with visibility to the south caused by fencing and vegetation, while nothing can be done about the fence, vegetation

⁸² T3-13 L 25 to T3-14 L 5.

⁸³ T3-14 ll 36-47.

located within the road reserve can be controlled to prevent the creation of an unacceptable risk. The same applies to vegetation that might intrude into the road reserve from private property.

[77] There can be little doubt that traffic volumes will increase significantly in Poppy Place and Eliza Court with the introduction of a further 38 lots, particularly during peak hours. That said, this did not appear to have been a matter of real concern to either the traffic engineers or the town planners. On balance, I am satisfied that the negative impacts that might arise from the resultant increase in traffic, would be offset by the creation of the safer intersection. Also, in this context it is relevant that in its current form, the ability of the intersection to operate safely would continue to worsen over time as traffic on Settlement Road increased. According to the unchallenged evidence of Mr Trevilyan on this topic, this would “*become a real problem some point in the relatively near future.*”⁸⁴ It would follow that, if not for the proposed roadworks, the appeal would have been allowed.

[78] By way of conclusion, I am satisfied that neither Mr Pekol nor Mr Trevilyan had made any errors in their application of the relevant provisions of Austroads. On the other hand, also for the reasons given, I am unable to accept much of Mr Viney’s evidence concerning the upgrade of the proposed intersection. In other words, I am satisfied that the proposed upgrade to the intersection will improve the traffic safety for those motorists using this intersection. In particular, those turning right onto Settlement Road.

[79] For the reasons given, while I have concluded that the proposed development does not comply with relevant provisions of CP2014, I am sufficiently satisfied that the level of non-compliance is outweighed by the benefits that would flow from the other relevant matters addressed above. Accordingly, I am satisfied that the appeal ought be dismissed.

Orders

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

⁸⁴ T2-54 ll 7-19.