PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Kenlynn Pty Ltd v Noosa Shire Council* [2019] QPEC 65
PARTIES:	**KENLYNN PTY LTD** (appellant) **v** **NOOSA SHIRE COUNCIL** (respondent)
FILE NO/S:	456/18
DIVISION:	Planning and Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	13 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	18, 19, 20, 21, 22 March 2019 and 3 and 4 June 2019. Further written submissions received to 13 November 2019
JUDGE:	Rackemann DCJ
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – where the appellant submitted a development application for a development permit to reconfigure a lot – where the respondent refused the application – where the appellant appeals against that refusal – where the development application is code assessable – whether non-compliance with assessment benchmarks warrants refusal of the development application – where significant ecological issues for determination – where the appellant proposed offset in respect of vegetation clearing – whether conditions can be imposed to achieve compliance with assessment benchmarks – whether the application ought be approved in the exercise of discretion
LEGISLATION:	*Planning Act 2016* (Qld) ss 43, 45, 60 *Planning and Environment Court Act 2016* (Qld) ss 43, 46 *Planning Regulation 2017* (Qld) s 27
CASES:	*Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16. *Jedfire Pty Ltd v Council of the City of Logan & White* [1995]

QPLR 41.

Rainbow Shores Pty Ltd v Gympie Regional Council & Ors [2013] QPELR 557.

Smout v Brisbane City Council [2019] QPEC 10.

COUNSEL:	B Job QC and M Batty for the appellant
	C L Hughes QC and J Lyons for the respondent
SOLICITORS:	Anderssen Lawyers for the appellant
	Wakefield Sykes Solicitors for the respondent

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Introduction

[1] This appeal is against the Council's decision, of 22 January 2018, to refuse an application for a development permit to reconfigure land at 2 David Low Way, Castaways Beach and more particularly described as Lot 71 on MCH2854. The application sought to reconfigure the site from one lot into six. Subsequently to the institution of this appeal, the application was changed by reducing the number of proposed lots from six to five.

[2] The site is 9,677m^2 in area and lies on the eastern side of David Low Way, to which it has a 250m frontage. It is opposite an isolated settlement of low density development known as Castaways Beach.

[3] The surrounding land uses were described in the joint report of the town planners as follows:[1]

(a) To the north is Burgess Creek, which separates the subject land from Sunrise Beach further to the north, with access along David Low Way being by an elevated bridge structure.

(b) On the opposite side of David Low Way to the north west is a sewerage treatment plant.

(c) To the north and north west is the Sunrise Beach coastal area which provides residential development comprising primarily dwellings on standard residential allotments with some higher density unit developments. David Low Way follows the coast for about 500m before traversing inland away from the coastal dune system.

(d) To the south is coastal vegetation with the closet [sic] development on the eastern side of David Low Way being located about 1.5km to the south, which is separated from the Castaways Beach enclave by open space, but forms part of the locality.

(e) To the east is coastal vegetation and the beach dunal system which includes the subject land.

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1 Exhibit 9 p 6, para 14.

(f) To the west of David Low Way is the Castaways Beach low density residential development area, which is separated from Sunrise Beach and Peregian Beach by the Noosa National Park to the south and Burgess Creek to the north.

(g) The road reserve which forms David Low Way at this location is relatively wide and contains a significant amount of vegetation.

The Council is the trustee of the adjacent conservation area.

[4] The site is presently improved with two dwellings built in the early 1980's together with carports and other outbuildings. They are located on the relatively flat cleared/disturbed areas of the site of about 2000m^2. The site is otherwise well vegetated, albeit subject to weed infestation. The same can be said of the adjoining conservation land in the Council's control.

[5] The appellant has owned the land since 1978.[2] On 22 December 1993 a town planning consent permit was granted for a duplex ("the Duplex Approval"), which remedied the then existing unlawful use of the site. The permit was subject to conditions as to landscaping as well as a condition that existing trees on the site and within the road reserve were to be retained, except where required to be removed due to building operations or the conduct of the approved use.

[6] On 6 December 2016 the Council granted a development approval ("the 2016 Approval") for a reconfiguration in order to subdivide the land from one lot into two. Under that approval, the cleared area of the site, centred around the existing cleared area, could be increased to some 4,100m^2, but the majority of the site was to be subject to a vegetation protection covenant. The 2016 Approval has not been exercised.

[7] The appellant now seeks approval of the subject application to achieve more development at the cost of greater loss of onsite vegetation. In particular, it seeks five lots ranging in size from 1062m^2 to 3897m^2. Each of the proposed lots is to contain building location envelopes which range in size from 507m^2 to 621m^2. The lots are to include environmental covenant areas which, in total, comprise of

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2 Exhibit 46.

3,713m^2, being some 38 per cent of the site.[3] Those areas would be subject to weed control, supplementary planting and maintenance. There are also areas to be the subject of covenants for bushfire risk purposes. The potentially cleared area of the site (including the bushfire covenant areas) would increase from approximately 2000m^2 to some 5964m^2, being 62 per cent of the site, although that does not take account of the possible retention of some trees in the bushfire covenant areas[4] or an area of 134m^2 which the bushfire experts classified as available for an extended environmental covenant area.[5]

[8] It is proposed to relocate the site access. Additional clearing of vegetation in the road reserve would be required in order to provide appropriate sight distance for the new access. Access to each of the proposed lots is to be via an internal driveway with easements to be registered over each allotment.

[9] The ecological impact of the proposal is a matter of controversy. Whilst the appellant maintains that its proposal is acceptable, it recently proposed that, if required, any approval could be conditioned to provide for what was described as an offset. It contends that, with an offset, there would be an ecological benefit. The proposed offset does not involve providing additional land that is not already protected. Rather, it proposes works, for a limited period, in an already protected area. In particular it is proposed that, until environmental offset benchmarks are achieved (being a period of not less than three years), an area of 15,375m^2 of the adjoining vegetated and Council controlled conservation land be the subject of weed control, supplementary planting and maintenance. The appellant indicated that, in the alternative, it would be prepared to provide a financial contribution calculated under the *Queensland Environmental Offsets Policy*, or some combination of offset works and financial contribution.

[10] I would not be prepared to rely on a financial contribution, since no such contribution is sought by the respondent and there is no basis to conclude that any financial contribution would result in the achievement of anything which would offset the impact of the proposal. In their supplementary submissions, Counsel for the appellants withdraw reliance on the *Queensland Environmental Offsets Policy*

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3 Subject to the 134m^2 extension referred to later.
4 T4-46.
5 Exhibit 8B, para 4.8.

and advised that no reliance was placed on the *Environmental Offsets Act 2014* or the *Environmental Offsets Regulation 2014*.

[11] At a special meeting on 7 March 2019 the Council resolved to advise the appellant, and this Court, that, as road authority for the area, it would not permit, or accept, the removal of vegetation and maintenance thereof in the road reserve in order to achieve sight lines, nor would it allow site access in the location proposed by the appellant. Further, as trustee of the adjoining conservation land, it does not accept, nor would it undertake responsibility for the maintenance of, the appellant's proposed offset works.

[12] It was accepted that this Court cannot, in deciding this appeal, dictate the Council's decision as road authority or as trustee of the conservation area. It was also accepted, however, that the Council's presently advised attitude does not prevent the Court from granting an approval subject to conditions, although, depending on its terms, that approval may not be able to be exercised until and unless the appellant can subsequently persuade the Council to change its attitude. That is further addressed later in the context of the proposed offset.

Decision framework and issues

[13] The development application is code assessable and was made in August 2017 when the *Planning Act 2016* ("PA") and the *Planning and Environment Court Act 2016* ("PECA") were in effect. They provide that, in this appeal:

(a) the appellant bears the onus;[6]

(b) the appeal is by way of hearing anew;[7]

(c) the Court carries out code assessment as if it were the assessment manager;[8]

(d) code assessment must be carried out only against the assessment benchmarks in a categorising instrument for the development and having regard to any matters prescribed by regulation;[9]

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6 s 45 of the PA.
7 ss 43 and 46(1) of the PECA.
8 s 46(2) of the PECA and s 45 of the PA.
9 s 45 of the PA.

(e) the matters prescribed by regulation include the common material and any development approval for, and any lawful use of, the premises or adjacent premises;[10]

(f) the decision must be based on the assessment;[11]

(g) the application must be approved to the extent the development complies with all of the assessment benchmarks for the development;[12]

(h) the application may be approved even if the development does not comply with some of the assessment benchmarks;[13] and

(i) to the extent the development does not comply with some or all of the assessment benchmarks it may be refused only if compliance cannot be achieved by imposing development conditions.[14]

[14] The issues in the appeal were:

(a) whether the development conflicts with certain assessment benchmarks;

(b) whether, if so, compliance can be achieved by the imposition of development conditions; and

(c) if not, whether the application ought, in any event, be approved in the exercise of the discretion afforded by s 60(2)(b).

[15] The assessment benchmarks for assessable development are identified in the assessment tables in the planning scheme.[15] The planning scheme provides[16] that code assessable development is to be assessed against all the assessment benchmarks identified in the assessment benchmarks column.

[16] Pursuant to the planning scheme, the subject land is:

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10 See s 27 of the *Planning Regulation 2017* ("PR").
11 s 59(3) of the PA.
12 s 60(2)(a) of the PA.
13 s 60(2)(b) of the PA.
14 S 60(2)(d) of the PA.
15 s 43(1)(c) of the PA and Exhibit 4 p 19, s 2.6.
16 Exhibit 4 p 21, s 2.6.4(d)(i).

(a) in the Eastern Beaches Locality;

(b) in the Detached Housing Zone;

(c) affected by a number of overlays including:

(i) the Biodiversity Overlay; and

(ii) the Natural Hazards Overlay.

[17] The assessment benchmarks of relevance are the:

(a) Eastern Beaches Locality Code ("EBLC");

(b) Biodiversity Overlay Code ("BOC");

(c) Transport Roads and Drainage Code ("TRDC");

(d) Driveways and Carparking Code ("DCC");

(e) Reconfiguring a Lot Code ("ROLC"); and

(f) Natural Hazards Overlay Code ("NHOC").

[18] Those codes were said to have provisions of relevance to the following:

1. whether approval of the proposal would result in unacceptable amenity and character impacts (including impacts upon vegetated views from David Low Way and other public vantage points);

2. whether approval of the proposal would require unacceptable vegetation clearing and earthworks;

3. whether the appellant has demonstrated a compliant, safe access is able to be provided to the site in accordance with appropriate standards and whether the provision of such access would result in unacceptable clearing of vegetation and earthworks; and

4. whether the proposed plan provides appropriate access for fire fighting.

[19] There is a hierarchy of assessment benchmarks.[17] Relevantly for present purposes, overlays prevail over all other components[18] to the extent of inconsistency. Locality codes also prevail over use codes, works codes and other development codes, other than overlay codes.

[20] The respondent notified a large number of provisions of the applicable codes in relation to those issues. Ultimately, however, it was prepared for the Court to narrow its focus to a lesser number of "focal provisions".[19]

[21] The planning scheme provides[20] that code assessable development that complies with the overall outcomes of a code complies with the code. Further, code assessable development that complies with the probable solutions complies with the overall and specific outcomes of the code.

Bushfire risk

[22] The site is classified as being, at least in part, in a bushfire prone area.[21] The locality contains areas of bushfire prone vegetation that pose a potential threat to existing and future residential use of the site and adjacent properties to the west of David Low Way that form part of the broader Castaway Beach residential community.[22]

[23] In their joint reports,[23] the bushfire experts agreed that the original proposal did not effectively respond to bushfire issues within and around the site by way of appropriate building setbacks to retained areas of bushfire prone vegetation.[24] They also agreed, however, that conditions could be imposed to achieve compliance with relevant provisions.[25]

[24] Ultimately the respondent accepted there would be no bushfire reasons which would warrant refusal if the proposal was amended to incorporate a 3m wide pavement access way for fire-fighting appliances (within a 6m easement) from the northern

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17 Exhibit 4 p 18, s 2.5.2(c).
18 Other than for the matters in s 2.5.2(a) and (b) which are not presently relevant.
19 Exhibit E(ii), Reply submissions on behalf of the respondent Council.
20 Exhibit 4 p 21, s 2.6.4(d)(iii).
21 Exhibit 8A, para 2.6.
22 Exhibit 8A, para 2.5.
23 Exhibit 8A and 8B.
24 Exhibit 8B, para 2.1.
25 Exhibit 8B, para 3.1.

end of the internal driveway to the south-eastern extremity of covenant F, being a bushfire covenant area which runs along the northern and eastern boundaries of the northernmost of the proposed allotments.[26]

[25] It was contended for the Council that, in the absence of such a provision, there is conflict with the NHOC and, in particular, overall outcomes 13.30.2(a) and (b) and specific outcomes O9 and O11. Those specific outcomes seek, relevantly, fire breaks or fire access tracks which provide adequate access for fire-fighting and other emergency vehicles. The overall outcomes seek that:

(a) development in areas at risk from natural hazards is compatible with the nature of the natural hazard so as not to place people, property, economic activity, social wellbeing and the natural environment at risk; and

(b) development is resilient to natural hazard events by ensuring siting and design accounts for and minimises potential risks of natural hazards to people and property.

[26] The asserted need for this pavement area within covenant F was raised relatively late. The bushfire expert retained by the respondent, Mr Friend, conceded that he did not raise it in the joint reports and that it was only when specific outcomes O9 and O11 were brought to his attention that he thought the access should be provided to comply with those provisions.[27] From a 'first principles' perspective he was, and remained, content that there was suitable access for an urban fire appliance.[28]

[27] The bushfire expert retained by the appellant, Mr Delaney, considered that there was no need for what the respondent now sought. In his view there is adequate provision for fire appliances on the formed driveway where they would be better positioned in terms of safe access to and egress from, the site and also in terms of access to the fire hydrant that is to be established as part of the proposed development. He considered that access within the bushfire covenant area would easily and most appropriately be provided by personnel operations on the ground. In his view, for safety and efficiency reasons, fire-fighting appliances should be

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26 Exhibit 39.
27 T4-80, 80.
28 T4-81.

confined to the formed shared driveway.[29] I accept his evidence. I am satisfied that the proposal complies with the code by meeting the overall outcomes even if there is some departure from the specific outcomes.

Access

[28] Access to the lots is proposed via an internal driveway (with easements over each lot) to/from a new access point on David Low Way, which is an arterial road constructed as a 2-lane rural high standard road with shoulders forming cycle lanes. The road has an undulating winding alignment, a posted speed limit of 70km/h in the vicinity of the site and carries daily traffic flows of approximately 12,000 vehicles. It has little direct property access except in lower speed urban areas.

[29] It was contended for the respondent, consistently with the evidence of Mr Holland (a traffic engineer called by it), that:

1. the proposed access would have inadequate sightlines, and

2. the grade of the driveway near the access point is too steep.

[30] Those deficiencies were said, by the respondent, to result in conflict with a number of provisions of the TRDC,[30] DCC[31] and ROLC,[32] particularly as they relate to safety issues. The overall outcomes of the TRDC seek, in part, to ensure that vehicle access to development does not compromise the capacity and safety of the road system[33] and that development works are designed and constructed to a standard that meets community expectations, prevents unacceptable offsite impacts and optimises whole of life cycle costs.[34] The overall outcomes of the ROLC include that reconfiguration results in lots with suitable, safe and appropriate access.[35] The overall outcomes of the DCC include to ensure safe and reasonable access from the public road edge to and from vehicle accommodation and standing areas within the property[36] and that the safety of pedestrians and cyclists is protected.[37]

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29 T4-48, 49.
30 OO(a)(iv) and (b), 04, 07(a)(i), 07(d)(i).
31 OO(a), (b), SO 04(a).
32 OO(c).
33 OO(a)(iv).
34 OO(b).
35 OO(c).
36 OO(a).
37 OO(b).

[31] There are three things to observe at the outset in relation to the sightline issue. First, safety in relation to traffic arrangements is a relative concept. No traffic arrangement is entirely risk free and provisions which call for safe access must be approached with that in mind. As Counsel for the respondent acknowledged in their written submissions, traffic arrangements need not be utopian. That is consistent with the long established approach of this Court.[38]

[32] Secondly, Mr Holland thought that consideration should have been given to what he regarded as the safest location for the access, namely the position of the current access, where better sightlines could be obtained by a similar extent of vegetation clearing. It is however, not to point that there might be what Mr Holland considers to be a better solution, so long as the proposal warrants approval based on an assessment of its merits.

[33] Thirdly, it is clear that an appropriate access can be provided. The greater sightlines sought by Mr Holland can be obtained at the proposed access, albeit at the cost of greater works/vegetation clearance. Further, on the evidence of Dr Johnson, the only civil engineer to give evidence, there would be an engineering solution to accomplish the grade that Mr Holland is looking for.[39] Accordingly, neither issue requires refusal of the application. The extent of clearing required to achieve appropriate sightlines however, is of relevance to other issues in the case.

[34] The proposal is to provide a new access point further to the south, in lieu of the existing one. It is proposed to clear sufficient vegetation in the road reserve so as to provide a sight distance of 118m to the north and 130m to the south.

[35] It was agreed that the existing sight distance to the north is substandard, providing only 44m. A convex mirror has been installed to assist in observing vehicles from that direction. The proposal would provide substantially greater sightlines to the north and remove the need for reliance on the mirror. The proposal would also make a left hand provision for cars travelling north so as to reduce the risk of rear end collision (which does not presently exist) and would substantially increase the width of the driveway access. Mr Holland acknowledged those benefits.[40] The proposal would also provide a greater sight distance to the north than the 95m required in

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38 *Jedfire Pty Ltd v Council of the City of Logan & White* [1995] QPLR 41 at 4.
39 T2-26.
40 T1-70.

relation to the 2016 Approval, although Mr Holland was not willing to concede that the proposal is better than the 2016 Approval overall, given the 2016 Approvals' greater sight distance to the south.

[36] There is an Australian Standard (AS/NZS 2890. 1:2004) which deals with access driveways in the context of off-street car parking. The traffic engineers agreed that the proposal is for an access driveway, rather than an intersection. The Australian Standard is that referenced in the 2016 Approval and in the standard from which the 95m requirement for that approval was derived.

[37] Mr Trevilyan, the traffic engineer called by the appellant, was of the view that it was appropriate to apply the same Australian Standard to this case. That produces a different requirement than for the 2016 Approval because the Australian Standard treats an access for a property comprising three or fewer domestic units (as was the case for the 2016 Approval) as a domestic property. The subject proposal however, falls in the "other than domestic" category, which attracts a more stringent requirement, even though the use, in this case, is still of a domestic nature as that expression is generally understood and the volume of traffic generated by the proposal is still very low.

[38] For the "other than domestic" category, the Australian Standard provides "desirable" distances (by reference to a 5 second gap) and minimum distances (by reference to SSD). Those vary depending on the frontage road speed. Here the posted speed is 70km/h which, if adopted, produces a desirable distance of 97m and a minimum of 85m. The experts adopted that for the south, since data showed the 85th percentile speed was 68km/h.

[39] The proposal, at 130m, is well in excess of the desirable distance for the north. The traffic engineers interpolated between the figures for 70km/h and 80km/h because of data showing that the 85th percentile speed is 74km/h. This produced a desirable distance of 102m and a minimum of 93m. That is a conservative approach because the Australian Standard itself says that the posted speed is used unless the 85th percentile speed is more than 5km/h above the limit (which it is not).[41] In any event,

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41 It may be noted that the 2016 Approval was more conservative again in adopting the distance of 95m which relates to a frontage road speed of 80km/h.

the proposed sightline to the north comfortably complies with the desirable distance derived by the application of the Australian Standard.

[40] Whilst he acknowledged compliance with the Australian Standard for an access driveway and that the proposal is for an access driveway (rather than for an intersection), Mr Holland considered that the proposal should nevertheless meet the greater requirements for an intersection in Part 4A of Austroads. Those guidelines refer to three types of sight distance, namely approach site distances (ASD), safe intersection sight distance (SISD) and minimum gap sight distance (MGSD). The proposal would meet the requirements for ASD and MGSD, but, if treated as an intersection, would not meet the requirements for SISD of 152m north and 155m south.

[41] The respondent was content with a 95m sightline for the 2016 Approval. Mr Holland did not say that was inappropriate, although he saw it in the context of the historical use of the site for two dwellings and said that the requirement represented an absolute minimum improvement requirement for those dwellings.[42] It is difficult to accept that vehicles emerging from a 2 lot subdivision on the subject site could do so with an acceptable level of safety if they have a 95m sightline derived from the Australia Standard but that vehicles emerging from a 5 lot subdivision on the same site would require a sightline in the order of 150m derived from Austroads. As Mr Trevilyan pointed out,[43] the 5 lot subdivision would still produce extremely low traffic volumes (in the order of 4 vehicles per hour, with a likely maximum of 3 in any one direction) such that any individual decision made by the driver of a vehicle associated with the access driveway would be essentially the same as for a 2 lot subdivision.

[42] Mr Holland pointed out that David Low Way is a busy arterial road, to which direct property access would ordinarily be prohibited,[44] the design of which is itself governed by Austroads. Because the road is busy there is a greater likelihood of a departing vehicle being confronted with vehicles approaching from both directions at the same time. Because there are not a lot of accesses along the road, drivers on David Low Way would not be at a heightened state of alert. He considered that, in

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42 Exhibit 6, para 3.26.
43 Exhibit 6, para 3.32(c).
44 See Exhibit 22 pp 5-4 para 2.1 (a)(iv).

such circumstances, the safer requirements of Austroads should be provided. He described a sightline which complied with the Australian Standard for a driveway but not the Austroads provisions for an intersection as "on the limit" and said that having "on the limit" sightlines in one direction and good sightlines in the other is a much safer outcome than having "on the limit" sightlines in both directions, as would be the case with the proposal. He considered that provision of SISD in both directions to be the "safest outcome". It was also pointed out that Planning Scheme Policy 5[45] provides for easements to be used only for up to two lots and for an access road to be used for the number of lots proposed here. If an access road was proposed then Austroads would apply.

[43] Providing greater sightlines would, of course, be safer. Mr Trevilyan acknowledged that the sight distance applicable for an intersection would be desirable, but he did not see it as required. He considered that it was appropriate to adopt the Australian Standard in this case. He pointed to the extremely low traffic volumes involved and considered an access driveway to be an appropriate solution to service the proposed dwellings.

[44] Mr Trevilyan explained, in his evidence in chief, the different considerations which can come into play for an intersection, but which would not apply to the proposed driveway.[46] He observed that the Australian Standard specifically relates to access driveways and was used for the 2016 Approval. He thought it self-evident that the Australian Standard was the appropriate standard to use.

[45] Prior to being cross-examined, Mr Holland had focused on the sight distance requirements for vehicles at intersections in section 3-2 of Part 4A of Austroads. Part 4 of Austroads refers the reader to Part 4A and also to the Australian Standard.[47] Austroads does not say that its requirements must be applied to sight distance at property entrances. Part 4A s 3-4 of Austroads provides that "desirably" sight distances at accesses should comply with the sight distance for intersections, but goes on to acknowledge that the criteria "often cannot be obtained at accesses on roadways with", amongst other things, vegetation. It goes on to say that "for new roads" minimum sight distances at accesses should comply with:

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45 Exhibit 22.
46 T1-37.
47 Exhibit 20A pe 38.

1. Minimum gap sight distances

2. SISD under the extended design domain

[46] The proposal is not for a new road but for a driveway accessing an existing road. In any event, the proposal:

(a) complies with minimum gap sight distance

(b) complies or approximates compliance[48] with SISD under the extended design domain for vehicles other than trucks

(c) is only non-compliant with the SISD (under the extended design domain) for trucks, which is 140m to the north and 155 for the south

Whilst Mr Holland still contended for the safer SISD requirements for intersections, the above puts the extent of the proposals departure from Part 4A of Austroads in context.

[47] In determining whether sightlines which comfortably satisfy not only the minimum but also the desirable distances in the Australian Standard are acceptable in this instance, or whether the SISD applicable to intersection under Austroads should be required, reference should be had to the planning scheme, to the extent that it assists. Austroads is referenced in the TRDC and, in particular in probable solution 7.2, which relates to road and pathway planning and design. Planning Policy 5, which is referenced in probable solution 7.1 of the same code, speaks of property access being designed and constructed to provide not less than the minimum sight distance specified in a particular table of Austroads. That is however, a reference to a long superseded version of Austroads.[49] Further, the probable solution relates to road planning and design supporting the hierarchy and functional aspects identified in ss 2 and 3 of the policy[50] rather than every provision of that policy.

[48] The DCC applies specifically to driveways. The first specific outcome is that:

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48 T2-12.
49 T1-69.
50 See particularly Exhibit 22, s 2.1.

> "vehicular access does not adversely impact on safety, capacity and operations of the existing or planned road networks, the proposed driveway, cycleway or pedestrian pathway systems"

Probable solution s 1.1 is that vehicular access is located and designed in accordance with the Australian Standard.

[49] The respondent pointed to other provisions of the DCC, such as O2, which requires driveways and crossovers to be suitable and safe, but which does not refer to the Australian Standard. However, in light of the express reference to the Australian Standard in a probable solution dealing with the location and design of vehicular access, in support of a specific outcome relating to, amongst other things, the impact of the access on the safety of the road network and the proposed driveway, cyclist or pedestrian pathways, it is difficult to accept that a driveway access which is located and designed so as to comfortably comply with not just the minimum but also the desirable sight distances derived by application of the nominated Australian Standard, ought be regarded as unacceptable on safety grounds by reason of inadequate sight distance.

[50] Whilst I accept that the increased sight distances which Mr Holland prefers and which could be achieved for an access at the proposed location (or at the existing location), subject to work, would provide an even greater degree of safety, I do not consider that is required. I accept Mr Trevilyan's evidence to the effect that the proposal would achieve an appropriate level of safety in relation to sight distance.

[51] The second access issue relates to the grade of the driveway access. Both traffic engineers referred to s 3.3 of the Australian Standard in relation to this issue. That provides, in part, as follows:

> "**3.3 GRADIENTS OF ACCESS DRIVEWAYS**
>
> At entry and exist points, the access driveway should be graded to minimize problems associated with crossing the footpath and entering the traffic in the frontage road.
>
> Maximum gradients on and near access driveways, other than at domestic properties (see Clause 2.6), shall be as follows:
>
> (a) *Property line/building alignment/pedestrian path*—max. 1 in 20 (5%) between edge of frontage road and the property line, building alignment

> or pedestrian path (except as provided in Item (d)), and for at least the first 6 m into the car park (except as provided below).
>
> …
>
> (d) *Across footpaths*—where the driveway crosses a footpath, the driveway grade shall be 1 in 40 (2.5%) or less across the footpath over a lateral distance of at least 1.0m.
>
> NOTE: The advice of the relevant regulatory authority should be sought to obtain grade requirements for footpaths"

[52] The proposal is to provide 5m from the edge of the road at a 3% grade (which matches the cross fall of David Low Way). As Mr Trevilyan explained, such a provision is functionally equivalent to a 6m provision at 5% and achieves the desired opportunity for a vehicle to prop, before entering the road. Mr Holland agreed.[51]

[53] Mr Holland and Mr Trevilyan however had a difference of opinion about the construction of the provision in so far as it relates to the footpath. Mr Holland reads it as requiring a grade of no more than 1:20 within 6m of the approach to the road edge and within 6m of the approach to the pedestrian/cycle path located within the road verge. The proposal does not provide the nominated grade for the nominated distance on that approach. Mr Trevilyan, on the other hand, saw the reference to a "pedestrian path" in (a) as different from a "footpath" in (d). He saw the former as a reference to a path with a carpark (noting that the Australian Standard applies to parking facilities) and the latter as a reference to the path that people use to travel parallel to the road.

[54] It is unnecessary for me to resolve the issue of construction because, even if Mr Holland's construction is accepted, I am satisfied, on the basis of Mr Trevilyan's evidence, that any safety risk for pedestrians or cyclists can be adequately mitigated by advisory speed signs. As Mr Trevilyan pointed out, all relevant persons will be travelling at relatively safe speeds. The vehicles using the driveway will be at low speed. Pedestrians would, for the most part, be at walking speed. Any cyclists using the footpath, rather than the designated cycle lane on the road, are likely to be the slower cyclists. In that context and with the benefit of advisory signs, Mr Trevilyan saw the arrangements as entirely satisfactory from a traffic engineers perspective.

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51 T2-7.

[55] Mr Holland acknowledged that the advisory signs would be a positive thing which he would support and commented that they would partially overcome what he saw as a deficiency in the design. He still held a level of concern,[52] but accepted that any non-compliance "in itself it's probably not a reason for refusal".[53] It may be noted that, in his individual statement of evidence, Mr Holland referred to the sightline issues as the "main traffic issue" and this as the "other issue". Notwithstanding Mr Holland's residual concerns, I am satisfied, on the basis of Mr Trevilyan's evidence that, subject to the signage of which he spoke, the proposal would achieve an appropriate level of safety in this respect.

[56] The alleged non-compliance of the proposal with codes relating to traffic was said to arise from the failure of the appellant to demonstrate a compliant, safe access in accordance with appropriate standards. Issue was also taken with the works/clearing required, but that is dealt with in the context of the amenity/character and ecological issues.

[57] In light of the findings I have made, I am satisfied that the proposal complies with each of the overall outcomes of the TRDC, DCC and ROLC relied upon by the respondent as focal provisions. The proposal therefore complies with the codes. Whilst it is unnecessary to consider the specific outcomes referred to in the focal provisions, there is no inconsistency there either on the basis of my findings.

Amenity / Character

[58] It was contended, for the respondent, that the proposal would result in unacceptable amenity and character impacts such that it would not comply with the EBLC and, in particular, the following focal provisions:

(a) Overall outcome (v) which is that "vegetated views from the beach and the David Low Way are protected from the potential impacts of development" and

(b) Specific outcome (2), which relates to the character and function of the David Low Way and provides that:

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52 T2-9, 2-22, 2-23.
53 T2-7.

> "The vegetated character of the David Low Way is protected and new development recognises and protects the function, capacity and efficiency of the David Low Way as the major north-south link throughout the coastal part of Noosa."

[59] The respondent's contention is that the vegetation clearing and earthworks required for the proposed development would result in a negative impact on the vegetated views from and vegetated character of, David Low Way. The respondent abandoned any suggestion of adverse impacts on views from the beach.

[60] That David Low Way has a "vegetated character" and affords "vegetated views" which are to be protected does not mean that there is no development or that development is invisible. As Mr McGowan (the expert called by the appellant in relation to visual amenity) said in his statement of evidence:[54]

> "Peregian Beach, Marcus Beach, Castaways Beach, Sunrise Beach, and Sunshine Beach form a string of small neighbourhoods hugging the coastline along David Low Way, set between the Noosa National Park to the west and the beach to the east. The coastal landscapes (particularly the coastal vegetation and undulating dunal topography) along with the beach and the coastline largely define the character and amenity of the area, and provide structure and definition to the small settlements. That said, the journey along David Low Way (in either direction) and views from the beach are also characterised by visible pockets of housing (including housing on both sides of the road), some of it integrated with the landscape but much of it contrasting with the natural landscape. This is particularly true for viewpoints near the subject site, where the built form to the north and west of the subject site is often visible from David Low Way and from the beach…"

[61] It was pointed out, on behalf of the respondent, that the site falls in a 2km stretch of the David Low Way where there is no other development on the eastern side of the road. Mr Adamson (the town planner called by the respondent) saw the site as isolated from the western side of the road and as having a vegetated character which would be appreciated by those looking towards the ocean.[55] It does not follow however, that development on the subject site needs to be invisible. Indeed, as Mr

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54 Exhibit 13, para 12.
55 T4-17.

McGowan pointed out,[56] one of the two houses currently on the subject site is located on a high point at the north-eastern part of the site and can be partially seen from locations, including when travelling south along David Low Way. Further, it is distinctly possible that new houses built on the site, in the event that the 2016 Approval was exercised, would also be partly visible.[57]

[62] In Mr Adamson's opinion, the character and amenity of the locality are intrinsically linked to the protection, conservation and rehabilitation of the vegetation on the eastern side of David Low Way.[58] Whilst in the joint town planning report Mr Adamson acknowledged that dwellings on the proposed lots would not be highly visible from David Low Way,[59] in his individual statement of evidence[60] he opined that the loss of vegetation would have a serious impact on the present character and amenity. Mr Cumming (the town planner called by the appellant) considered[61] that if a robust visual buffer can be maintained (or created) along David Low Way, specific outcomes relating to amenity and character can be achieved.

[63] As Mr McGowan pointed out,[62] there is seldom a direct correlation between the extent of vegetation clearing and the significance of any impact. It is significant in this case that the most visually prominent vegetation and that which affords screening of the site, is to be substantially maintained. Although there will be some loss of vegetation within the road reserve, much of that which is to be removed on site contributes little to the character of the area or the screening of the site, given that the cleared area will generally be surrounded by vegetation.

[64] To assist in forming his views, Mr McGowan had regard to some modelling conducted by Mr Otto (who was not required for cross examination). That modelling assumed:

(i) buildings to a height of 8m across the entire footprint of the building envelopes (a conservative approach).

(ii) clearing of the driveways, building envelopes and fire trail.

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56 Exhibit 13, para 13,14.
57 Exhibit 13, para 15-16.
58 Exhibit 9, para 86.
59 Exhibit 9, para 92.
60 Exhibit 16, para 17.
61 Exhibit 9, para 135.
62 Exhibit 13, para 21.

(iii) clearing in the road reserve for sightlines.

(iv) buildings would feature colours and material treatments that integrate with the landscape.[63]

[65] The modelling captured predominantly the top of trees/vegetation rather than the full extent of vegetation to the ground. More dense vegetation will, in reality, exist. The model is conservative in this respect.

[66] The modelling led Mr McGowan to conclude that:[64]

(a) the retained vegetation would do much to screen future built form.

(b) such built form would, even on the conservative assumptions adopted, be substantially or entirely obscured.

(c) the small parts of the potential built form that may be visible:

(i) would not detract from character or amenity of the area;

(ii) would not cause the contribution of the site to the character and amenity of the area (particularly the contribution made by the vegetation across the site) to be eroded in any significant way; and

(iii) would be consistent both with the visibility of existing built form on the site, and with other well screened built form in the local area.

[67] In his testimony Mr McGowan said that the changes to the edge to David Low Way[65] and the potential to catch some glimpses of built form are the impacts which he described in his report as minor or negligible.[66] He confirmed his view that the potential future built form on the proposed allotments can be accommodated, without unacceptable visual impacts, because the vegetation that is being retained and protected is sufficient to screen and integrate that built form.[67]

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63 Which Mr McGowan suggested could be subject of conditions.
64 Exhibit 13, para 33(d) and (e).
65 With some loss of vegetation in the road reserve.
66 T3-87.
67 T3-89.

[68] I accept the evidence of Mr McGowan which I found to be soundly based and well considered and which satisfactorily dealt with the concerns raised by Mr Adamson. On that basis, I find that the proposal complies with the focal provisions upon which the respondent relied in relation to this issue.

Vegetation clearing

[69] It was contended, for the Council, that the proposal would entail unacceptable vegetation clearing and earthworks and, as a consequence, fail to comply with focal provisions of the Biodiversity Code.

(i) Values

[70] The Noosa Plan shows biodiversity features on Biodiversity Overlay Maps.[68] Map OM4.1 ("Overlay Map") shows the site as being subject to a Riparian Buffer Area designation. That is obviously related to the site's proximity to Burgess Creek to the north. The majority of the vegetation on site is not riparian in nature.[69] There is no concern about the proposal in relation to its role as part of the riparian buffer to Burgess Creek.

[71] The Overlay Map also shows the whole of the site as within the Environmental Protection Area. The site is also shown on the Open Space Networks Map[70] as existing native vegetation and part of an open space corridor. The particular attributes of the site, in context, and the likely impacts of the proposal were examined by Dr Robertson (engaged by the appellant) and Dr Watson (engaged by the respondent). It was common ground that the site has some ecological value.

[72] It has already been noted that there is a cleared/disturbed area of some 2,000m^2 on the site. The remainder of the site is vegetated. Some of that vegetation is native and some is weed species. Despite the weeds however, the experts were able to recognise the remnant regional ecosystem ("RE") vegetation communities across the site in the areas not already cleared. There are vegetated dune ridges and swales on the site which forms part of a dunal ecosystem.[71]

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68 Exhibit 4 p 13, s 1.11.1.
69 T2-43.
70 Schedule 5 Map 4.
71 Exhibit 7A, para 31 and 104.

[73] There are four RE vegetation communities on the site. At its northern tip, the site extends into an area of RE 12.2.15 which is a swamp community associated, in this location, with Burgess Creek. That will be unaffected by the proposal. The eastern parts of the site extend into an area of RE 12.2.14, which itself extends eastwards to the beach. It is a foredune complex. The central and western parts of the site feature forest vegetation communities, in particular RE 12.2.5, being open forest on beach ridges, and RE 12.2.2, being vine forest on beach ridges. Those forest communities also extend into the road reserve. RE 12.2.2 is listed as "of concern" under the *Vegetation Management Act 1999* with an "endangered" biodiversity status. It is rare in Noosa.[72] It represents the greatest proportion of any single RE in the area of the site and adjacent road reserve.[73]

[74] As Dr Watson attested,[74] the forest type RE's (RE 12.2.5 and RE 12.2.2) are very different from the foredune vegetation. The forest communities have a greater diversity of species of vegetation which reflects their biodiversity value. They provide a lot of micro habitats and resources for different fauna. In short, they are more complex environments, providing more resources and more habitats compared to the foredune vegetation which is more sparse, with fewer trees and vegetation. Dr Robertson acknowledged a general difference in microclimate and environment and that the two forest RE's are of conservation significance.[75]

[75] The vegetation on the site is likely to be used by a range of fauna species.[76] In so far as threatened species are concerned, the site and surrounds are identified as essential habitat for the threatened Glossy Black Cockatoo[77] and several threatened species are known to occur in the locality around the subject site. Dr Robertson acknowledged that the vegetation on the subject site, as part of a wider block of native vegetation, potentially forms at least some habitat for the range of threatened species, particular wide ranging threatened fauna,[78] although he considered that none of the threatened species would reside in, or make significant use of the habitats on the site.[79]

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72 T2-59.
73 Exhibit 7A, para 74.
74 T2-72, 3-30.
75 Exhibit 7A, para 91, 96.
76 T3-30.
77 Exhibit 7A, para 46.
78 Exhibit 7A, para 95.
79 Exhibit 7A, para 56.

[76] As has already been observed, the vegetation communities are weed infested. The weeds include those which the landholder has a statutory duty to prevent the spread of.[80] The site is also unsewered and the leaching of nutrients from septic tanks adds to the weed problem.[81] The existence of weeds is of some significance because, as Dr Watson acknowledged,[82] they reduce the ecological value of the vegetation. As Mr Delaney explained,[83] weeds also increase the risk of more intense fire, because they produce more fuel and some species can act as a fire ladder up to the canopy. RE 12.2.2 is fire sensitive. If left unchecked, weeds can lead to a gradual decline in, and even a change in the structure of, a vegetation community. As Dr Robertson acknowledged[84] however, the presence of weeds does not necessarily justify destruction of a vegetation community. Further, I accept Dr Watson's evidence[85] to the effect that the impact on the forest communities on the subject site has not been too great to date, because the weed infestation in those communities is predominantly[86] at ground level, leaving a relatively intact canopy of species which constitute the two communities.

[77] Dr Robertson conducted a tree survey. It revealed 246 trees within the surveyed area. All bar 10 of which are native.[87] There are 22 large native tress (DBH >300mm).

[78] It was common ground that the vegetation on the site has habitat value. Indeed Dr Robertson confirmed, in his testimony, that all of the native vegetation that occurs on the site provides habitat for some native flora and fauna and has ecological value.[88]

[79] The vegetation on the site is contiguous with the surrounding landscape east of David Low Way and lies at the junction of two habitat corridors. One is the north/south coastal corridor, which is a long corridor, running parallel with and extending to, the beach and which is also within the Environment Protection Area in the Overlay Map. The other is the east/west corridor associated with Burgess Creek.

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80 Exhibit 25.
81 Exhibit 7A, para 91.
82 T2-75.
83 T4-54, 55.
84 Exhibit 25.
85 T2-74, T3-19.
86 I note Mr Delaney's evidence that weeds extend into the canopy (T4-55) but I accept Dr Watson's evidence as to the level at which the weed species predominate in the forest communities.
87 Exhibit 7A, para 72.
88 T2-67.

[80] In the first joint report of the ecologists, Dr Robertson said:[89]

> "As the subject site vegetation is part of two habitat corridors (the coastal corridor and Burgess Creek catchment) and as it supports some habitats of conservation value (RE 12.2.2 and RE 12.2.15) I acknowledge that it is part of a landscape or locality that has retained environmental values"

[81] Dr Watson saw the site as having habitat and corridor values.[90] In the first joint report of the ecologists he said that the site supports known areas of ecological significance. In that regard he referred to,[91] amongst other things, the site's native vegetation, stands of trees, including large native trees, habitat for a diversity of fauna, remnant vegetation (RE's) and vegetated dunes and swales. I accept his evidence to the effect that the site has ecological values of significance.

(ii) Impact

[82] The proposal would result in earthworks and clearing over the majority of the site, with only some 38% of the site remaining for inclusion in environmental covenant areas.[92] There would also be clearing in the road reserve. The clearing would remove a significant number and proportion of the surveyed trees. 127 of the surveyed trees would be removed, including 13 of the 22 large native trees. The only 2 Moreton Bay Ash trees with a DBH of 7500 would be removed.[93] The proposal would also, on the other hand, see the retained vegetation in the environmental covenant areas subject to active rehabilitation including weed removal and supplementary planting by the developer, followed by ongoing maintenance by the lot owners.

[83] The ecologists differed in relation to the significance and acceptability of the impacts of those changes. Dr Watson saw the proposal as an overdevelopment of the site resulting in a poor ecological outcome. Dr Robertson, on the other hand, viewed the vegetation clearance as being balanced by the proposed conservation and active management within the covenant areas. He also referred to the benefits of the

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89 Exhibit 7A, para 96.
90 T3-30.
91 Exhibit 7A, para 104.
92 Subject to the 134m^2 extension referred to earlier.
93 Exhibit 7A p 12, Figure C7.

proposed sewer connection. In his view the proposal would not have significant ecological impacts and its approval could be adequately conditioned.[94]

[84] In reaching his conclusion, Dr Robertson emphasised the relatively small proportion that the subject site and its vegetation bears to that in the broader locality. In so far as corridors are concerned, the proposal would not affect the east/west riparian areas along Burgess Creek, whilst even the removal of all vegetation on the site would, he pointed out, leave a broad and viable north/south habitat corridor.[95] In cross-examination, Dr Robertson clarified that would not be a good result, from an ecological perspective, because of the loss of the forest RE's on the site.[96] His point was as to the significance of any loss of corridor value.

[85] Dr Robertson accepted that the proposal would interfere with the value of the vegetation to provide opportunities for fauna to move across the site, particularly in an east/west direction in the location indicated by Dr Watson. He acknowledged that the on-site vegetation currently provided some "connectivity", but did not see it as a significant wildlife corridor "in the context of the site and the wider landscape".[97] He thought its loss would have a minor and not unacceptable ecological impact in the nature of contributing, in a small way, to the cumulative impacts on flora and fauna in the locality.[98]

[86] Dr Robertson also put the loss of habitat within a broader context, pointing out that it would represent 0.1% of the vegetation in the broader locality. He concluded that the loss of some native vegetation, by reason of the proposal, would not jeopardise wildlife habitat in the locality such that threatened fauna would be put at risk, particularly as the majority of the vegetation in the broader area is within conservation reserves.[99] He also pointed out that representatives of the RE types would be in the covenanted areas.

[87] Dr Watson, on the other hand, was influenced by the identified environmental values of what was found on the site, in its context, and the failure of the proposal to respect those values. For example, the proposal does not, in his view, achieve

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94 Exhibit 7A, para 91.
95 Exhibit 7A, para 98
96 T2.48.
97 T2-61.
98 T2-67.
99 Exhibit 7A, para 100.

appropriate retention and protection of native mature trees, RE's, corridors or dunes/swales.[100]

[88] Dr Watson was concerned not just about the quantum of native vegetation to be removed, but the location of the clearing. In his view, which I accept, it is the western part of the site, with the forest RE's, that has the highest ecological value[101] yet the clearing associated with the proposal would intrude significantly into that area, into vegetated parts of the road reserve.

[89] Dr Watson considered that bird species in particular would be using the forested vegetation either as a corridor to move through or as an area to feed. In his view, a lot of forest birds would not like using the more open foredune area. He saw[102] the vegetation as having habitat value but also some corridor value.

[90] Dr Watson wanted to see retention of a north/south connection through the forest vegetation communities on the subject site, for use by species including birds. He also wanted retention of an east/west connection following a vegetated swale or wedge between the existing houses, providing a connection for fauna to move from the beach, through to the forest vegetation. Dr Watson prepared an ecological constraints map which showed two areas, centred mainly on the cleared areas around the existing houses, which he considered to be generally suitable for development and showing the location of his east/west and north/south on-site corridors. The proposal would destroy the east/west wedge and would leave only a narrow north/south corridor which Dr Watson saw as more of a screen or buffer to David Low Way than a fauna corridor.[103] Dr Watson acknowledged however, that removal of those corridors would not prevent movement of fauna otherwise within and about the locality.[104] He did not suggest that any fauna depended upon the corridors through the site for survival.[105] It seemed that Dr Watson ultimately placed more weight on the habitat value of the vegetation.[106]

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100 Exhibit 7A, para 108.
101 T3-8, T3-30.
102 T3-30.
103 T3-39.
104 T3-13, T3-38.
105 T3-13.
106 T3-30 line 27.

[91] Whilst Dr Watson acknowledged that the rehabilitation within the covenanted areas would be a very good benefit,[107] his conclusion was that the proposal would produce a poor ecological outcome.

[92] Whilst I appreciate that a site must be viewed in context, I consider that Dr Robertson placed too much weight on the greater extent of vegetation within the locality otherwise. In particular, having acknowledged the conservation significance of two of the RE vegetation communities supported by the site (and road reserve), Dr Robertson was, in my view, too ready to accept the extent to which the proposal disrespects them. That there is a much larger area of vegetation in the broader locality does not, in my view, justify the destruction of vegetation of value on the subject site (or in the road reserve).

[93] In the second joint report, Dr Robertson referred to Dr Watson's evidence in *Rainbow Shores Pty Ltd v Gympie Regional Council & Ors*[108] ("*Rainbow Shores*") which, he said, advanced the same type of argument as Dr Robertson was advancing in this case "namely, that for the subject site proposed for the five lot subdivision, the additional area cleared is not significant (i.e. 1900 square metres) when compared with the very large, permanently conserved corridors of habitat that exist in the locality". The reference to 1900m^2 is a reference to the additional clearing over that contemplated by the 2016 Approval that is considered below. The argument is however, one that I rejected in *Rainbow Shores* as follows:[109]

> "[305] The destruction of habitat on the subject site is not, in my view, justified by pointing to habitat elsewhere which will provide for the survival of the species. The planning documents do not suggest that the vegetation on the subject site is expendable having regard to what exists within the broader area. Generally speaking, the planning documents require development of RS2 to be cognisant of environmental values and to occur in a sensitive way. As Mr Caneris pointed out, development which relies upon the balance of existing habitat elsewhere to justify the destruction of the majority of valuable on-site habitat, without offsets (and with reliance on vegetation retained in relatively narrow strips with a large perimeter-to-area ratios), for a site recognised in the planning documents as of

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107 T3-18.
108 [2013] QPELR 557.
109 Supra at [305].

> environmental value, is not development which has been designed in an ecologically sustainable way."

[94] I accept Dr Watson's evidence to the effect that the proposal does not respect, and would have an adverse impact upon, the ecological values of the site.

(iii) The 2016 Approval

[95] It was pointed out that the matters prescribed by regulation, for consideration in code assessment, include any development approval for the premises. The 2016 Approval has already been noted. It would entail clearing which could increase the cleared areas of the site up to some 4100m^2, which is approximately 1700m^2 less than is currently proposed,[110] to which additional clearing in the road reserve must be added. It was pointed out, for the appellant, that it already has a right, pursuant to that approval, to carry out development which would involve some additional clearing, but would not be subject to the specific obligations proposed for the environmental covenant areas. Dr Robertson referred to the fact that the proposal involved only an increment of clearing above that permitted under the 2016 Approval in concluding that the impact of the proposal is not significant and that, having regard to the proposed environmental covenants, the impact is acceptable.[111]

[96] The 2016 Approval is subject to conditions requiring a vegetation covenant over the majority of the on-site vegetation. In support of a request for a negotiated decision notice and, in particular (and interestingly given the parties positions in this appeal), in successfully seeking the deletion of a condition that would have required rehabilitation of RE 12.2.14 in a 750m^2 cleared area of public land, the appellant asserted that "the terms of the covenant will include the removal of any declared weed species to enable natural vegetation".[112] The conditions do not expressly require that. Senior Counsel for the appellant, whilst confirming that his client would not walk away from that,[113] drew attention to the fact that while "some level of protection is likely in a vegetation covenant, there is no evidence of what it is"[114] and the conditions do not specify any obligations. I accept that the proposed

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110 When account is taken of the 134m^2 available for an extended environmental covenant area.
111 T2-68.
112 T6-19.
113 Exhibit 34 p 6.
114 T6-19.

environmental covenant obligations are more specific and robust than the conditions of the 2016 Approval.

[97] Dr Watson was criticised for saying, in the first joint report, that the comparison between the 2 lot 2016 Approval and the 5 lot current proposal is of limited value. He did not however, ignore the 2016 Approval. His comment about the utility of the 2016 Approval comparison was expressed to be "given" his observations about the lack of tree clearing in the road reserve required by the 2016 Approval and about various impacts of the subject proposal. He went on, in the following paragraph, to make a number of observations about the 2016 Approval relative to the subject proposal including that it would involve:

(a) significantly less clearing
(b) greater tree retention
(c) greater retention of the forest RE communities
(d) greater retention of linkages
(e) less fragmentation and more consolidation of vegetation and habitat
(f) overall greater protection of vegetation and environmental values

[98] The 2016 Approval would have some impact upon the corridors to which Dr Watson referred. Whilst it maintains much of the east/west 'wedge' between the existing houses, it ultimately traverses it before it reaches the forest RE's in the western part of the site. At the southern end of the site both the subject proposal and the 2016 Approval leave only a relatively narrow band of vegetation in a north/south direction between the cleared areas and the road, although the 2016 Approval leaves a wider forest vegetation area in the north western part of the site.

[99] Dr Watson saw development contemplated by the 2016 Approval as having much less ecological impact than the subject 5 lot proposal.[115] That was not just because of the quantum of the extra clearing of native vegetation with the subject proposal but also because of the location and types of vegetation communities in which that additional clearing would take place.[116] In particular, development pursuant to the 2016 Approval would leave the forest vegetation communities in the western part of the site relatively intact[117] and of a size whereby they could still function as a viable

115 T2-69.
116 T2-69.
117 T2-70, T3-39.

community, whereas the subject proposal involves substantial further clearing in that area.[118] When pressed about how much on-site clearing he would accept, Dr Watson responded[119] that it was not really about quantum and that if development included the vegetation in the western part of the site, being the area he considered to have the highest value,[120] then he would not think it a "particularly good ecological outcome".[121]

[100] I do not accept that the ecological impact of the subject proposal is insignificant or acceptable in light of the 2016 Approval. I accept Dr Watson's evidence to the effect that the impact of the subject proposal is significantly greater than would be associated with the 2016 Approval.

(iv) Bushfire clearing

[101] The bushfire experts agreed on building setback, for bushfire reasons, ranging between 10 and 12 metre for the subject proposal. The new buildings on the lots would also have to comply with the relevant Australian Standard. The existing buildings on the site are not so well set back from vegetation. Indeed the northern boundary is only about 3m from vegetation in the Council controlled conservation area. The buildings do not comply with the relevant Australian Standard. Mr Delaney described the current risk for the northern dwelling as extreme and for the southern dwelling as very high. Clearing would be required if that risk were to be mitigated.

[102] It was submitted, for the appellant, that:

(a) the appellant has an existing right to carry out clearing, at least on its site, in order to mitigate the fire risk under the planning scheme;

(b) that right could be exercised now, or in conjunction with the 2016 Approval if the existing buildings remained in situ;

(c) the Court is bound to have regard to that by reason of s 45(3) of the PA and s 27 of the PR; and

(d) the appellant may also be required to carry out clearing pursuant to a local law.

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118 Exhibit 7B, Figure 3.
119 T2-78.
120 T3-8.
121 T2-78.

[103] Whilst the submission is as to what might lawfully be done, there has been no real suggestion of such clearing to this point. There is no evidence of such clearing in the past or any intention to retain the dwellings and undertake such clearing in the future. Some of the clearing would be in the Council controlled conservation area and there is no suggestion that the Council proposes to conduct clearing. The appellant's current intention is obviously to remove the dwellings to make way for its current proposal if approved and implemented. Whilst it is pointed out that the 2016 Approval could be exercised without removal of the existing dwellings, the Bushfire Management Plan[122] lodged by the appellant in support of the request for a negotiated decision notice which became the 2016 Approval described the northern dwelling as "in a deteriorating state" and as "likely to be demolished and rebuilt in due course".[123]

[104] The 2016 Approval was initially subject to a decision notice granting only a preliminary approval subject to conditions including as to submission, review and approval of a site specific Bushfire Hazard Assessment containing recommendations including avoidance of interference with vegetation in the proposed covenant areas. That preliminary approval was changed to a development permit as a result of the appellant's request for a negotiated decision notice which was supported by a Bushfire Management Plan.[124] That plan made recommendations for any new residential buildings to be constructed in accordance with the relevant Australian Standard and be set back from the protected vegetation. The appellant's representation in support of its request for a negotiated decision notice is recorded, in part, as follows:[125]

> "As per the recommendations of the BHMP, the subdivision layout has been amended namely in relation to the proposed covenant area so as to provide default building envelopes within Lots 1 and 2 with the ability to achieve minimum fire setbacks from the protected vegetation"

[105] That is the context in which it is now submitted, for the appellant, that there is nothing in the 2016 Approval which prevents the continued existence of the present

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122 Exhibit 40.
123 Exhibit 40 p 7.
124 Exhibit 40.
125 Exhibit 34 p 2.

dwellings, with the consequence, it says, that clearing of protected vegetation could occur in the vegetation covenant area.

[106] It has already been noted that the duplex approval was subject to a condition that required existing trees on the site and within road reserves to be retained except where required to be removed due to building operations or the conduct of the approved use. That would not prevent clearing for the abatement of bushfire risk for the use of a building for residential purposes.

[107] Insofar as the right to carry out the clearing is concerned, Job QC[126] pointed to the fact that "exempt clearing" is a form of accepted development for the Biodiversity Overlay.[127] That expression is defined to mean a number of things, one of which is a "property maintenance activity". That, in turn, is defined to mean clearing of protected vegetation which is reasonably necessary for property maintenance "including" a number of specific things. Clearing to control fire risk is not one of the specific things, but it was submitted that it nevertheless falls within the definition. The difficulty however, is that the definition of "exempt clearing" otherwise specifically refers to clearing that is reasonably necessary for the control of fire risk to a building or structure. It does so in relation to Category 3 or 4 lots greater than 10 hectares in area.[128] It makes no such provision for Category 2 lots such as the subject site. That specific provision within the definition of exempt clearing, in relation to clearing for the control of fire risk, suggests that clearing for such purposes is not a property maintenance activity. I also note that clearing in the course of a "fire management activity" is another form of exempt clearing. That is defined by reference to pasture management. It was not suggested that it would have application to the subject site.

[108] The basis for the submission that the right to clear (if there were one) must be considered by reason of s 45(1) of the PA and s 27 of the PR is not clear. It has already been noted that s 27(1)(f) of the PR requires assessment to be carried out having regard to "any development approval for, and any lawful use of" the premises or adjacent premises. The clearing of vegetation for bushfire risk mitigation would not be a use of premises nor would the authority to carry out the

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126 T6-13.
127 Exhibit 4 p 118.
128 Exhibit 4 p 114(h).

clearing, to the extent to which it arose from the clearing being "exempt clearing", arise from any development approval.

[109] It was also pointed out that pursuant to the Council's Local Law No 3 an authorised person may, by compliance notice, require a responsible person to take specified action to reduce or remove fire hazard. There was no suggestion that this has or is proposed to be done. How that becomes a matter for consideration in this code assessable application was not explained.

[110] It is unnecessary for me to delay further on the issues of the existing right or potential obligation, to undertake clearing or whether that falls within the matters to which the Court is bound to have regard. For the reasons which follow that is in any event not an adequate answer to the objections to the clearing associated with the subject proposal.

[111] Mr Delaney calculated that, in order to provide appropriate protection for the northern dwelling, clearing should be undertaken in a 20m radius. In the case of the southern dwelling, he adopted 10m to the west and 20m otherwise. These were shown on Exhibit 35A. He calculated that such clearing would bring the total combined clearance within the subject land[129] to 4648m^2 of which 579m^2 is from RE 12.2.5 and 876m^2 is from RE 12.2.2. The off-site clearing he would recommend is in the Council controlled conservation area which has RE 12.2.14 vegetation and a small cleared area.

[112] The quantum of that clearing is less than is involved with the subject proposal. The impact on the forest communities is again of particular importance. Unfortunately, when Dr Watson was being cross-examined, Exhibit 35A had yet to be created. Exhibit 35 was put to him, but that showed a 20m clearance around the whole of the southern dwelling and so showed a much greater incursion into RE 12.2.2 to the west of that dwelling and a greater overall extent of clearing of RE 12.2.2 and of clearing overall.

[113] Insofar as the northern dwelling is concerned, Dr Watson accepted that the 20m radius roughly corresponds with the red-dashed line he presented on Exhibit 32 as the boundary of the area generally suitable for development and the limits of

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129 He also recommended clearing, outside the site, in the Council controlled conservation area.

clearing contemplated by the 2016 Approval.[130] Unsurprisingly he considered that that left a satisfactory area of RE 12.2.2 and RE 12.2.5 in that area of the site.[131]

[114] Examination of the clearing which may be achieved in order to provide the existing dwelling with adequate bushfire protection or in order to exercise the 2016 Approval ultimately shows that the clearing associated with the subject proposal is greater in quantity and extends further in to the part of the site with the greatest ecological value. It does not provide justification for the proposal.

(v) The offset

[115] The appellant volunteers conditions to achieve what it referred to as an environmental offset in part of the Council controlled conservation area adjacent to the subject site. The offset area, at 15,321m^2, is much greater than the area which would be cleared by the proposal. The offset is to be achieved by carrying out an initial program of weed control works, followed by a program of supplementary planting and a maintenance period of a minimum of 3 years or until environmental offset benchmarks are achieved.[132]

[116] The obligations, in relation to the offset, including for the maintenance period, are intended to fall upon the developer, rather than the lot owners. The appellant offers conditions of approval that, prior to any application for operational works or sealing of any plan of subdivision (whichever comes first), the developer:

(a) prepare and submit to Council a detailed Vegetation and Habitat Protection, Enhancement and Offset Plan ("VHPEOP") for all land located within the Vegetation and Habitat Protection Zone, the Temporary Clearance and Restoration Zone, and Council Reserve Environmental Offset Zone in accordance with the VMPs for both the "*construction and on-maintenance*" and "*occupation*" phases as contemplated by, and generally in accordance with, the VMP before the Council;

(b) establish the approved works, including supplementary planting, mulching and weed control measures in accordance with the approved VHPEOP; and

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130 T3-55, 56.
131 T3-64.
132 See Exhibit 8B drawing WE 17035-CVMP-002.

(c) provide an appropriate combination of a works bond and a performance bond determined in accordance with Noosa Planning Scheme Policy 7 – Performance Bonds to secure the performance of the maintenance of wed control and supplementary planting for a total minimum period of 36 months, or until environmental offsets benchmarks specified in the VHPEOP are achieved.

[117] It has already been observed that the Council has advised that, as trustee of the land the subject of the proposed offset, it does not accept, nor would it undertake responsibility for the maintenance of, the proposed offset works. It has also been noted that the Council's present attitude does not prevent approval subject to such conditions, albeit that the approval may not be able to be exercised if the Council's attitude remains unchanged. It was submitted, for the appellant, that "it, with respect, beggars belief that, should the development be approved with the offset obligation, that the Council would stand in the way of it actually being completed".[133]

[118] In written supplementary submissions on behalf of the appellant it was proposed that the conditions might be formulated such that the obligations in respect of the offset would not arise if the Council chose to deny implementation of the offset by denying access or approval of the VHPEOP or refusing to allow the works to be carried out. I would not be prepared to structure a condition in that way.

[119] It was submitted, on behalf of the Council, that this is an attempt to cajole the Council into accepting the offset works, and future obligations for them, which it cannot otherwise be forced to accept.[134] More fundamentally, if the proposed development is appropriate without an offset then no offset condition is required. If, on the other hand, the proposed development is only appropriate in the context of the offset, then the conditions of any approval should not permit it to occur unless the offset is achieved. That the Council might reject the offset works in its capacity as trustee of the land would not alter the inappropriateness of the proposal absent the offset. The appellant's suggestions would, as was pointed out for the Council, grant approval whilst leaving uncertainty as to whether offset obligations would arise and is not appropriate.

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133 T6-42.

134 Further submissions on behalf of the respondent Council para 12, 15.

[120] The report to the Council meeting which resolved to advise of its opposition to the offset raised issues in relation to the consistency of the proposal with the Noosa Plan (considered later), its merits as an offset (also considered later) and the ongoing maintenance obligations on the Council. It was submitted, for the Council, that whilst the proposed development (and associated clearing) would be enduring, the benefit of the offset works would be "ephemeral", absent continuing ratepayer investment in maintenance. It was also submitted that:[135]

> "It would be passing strange if, to ameliorate the destruction of vegetation to facilitate the private development of private land, the Council (and the ratepayers) were to be expected to assume the burden, in perpetuity, of maintaining the area of so-called "*offset*" activity so that it retains enduring benefit, coincidental with the operational life of the reconfiguration proposed."

[121] Whilst the developer's obligations in relation to the offset area are intended to be only for a period of 3 years or until certain benchmarks are achieved, the benefit of the offset works are intended to be more enduring. In particular, as Dr Robertson explained,[136] the intention is to provide a dense enough cover of native plants and to suppress weeds enough so that, in the future, when the native plants are self-sustaining, they will grow vigorously enough to exclude, or to significantly reduce, the weed cover. His expectation is that, within 3 years, the vegetation will be self-sustaining without the need for "further intensive sort of management".[137]

[122] Dr Robertson accepted that the more people are introduced to an area the more likely is the prospect of disturbance, particularly if the access is not managed.[138] I note that the proposal includes beach and riparian buffer access restriction fencing.

[123] I accept that the intention is as Dr Robertson attested, that the benefit of the offset works would endure beyond the time the developer's obligations ceased and that, if carried out as intended, the need for "intensive" future management should be minimised. I consider however, that Mr Delaney, who was responsible for the offset proposal, was right to concede that there would, absent some attention by the Council, be at least some potential for recolonization by weeds in the longer term.[139]

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135 Further submissions on behalf of the respondent Council para 9.
136 T2-42.
137 T2-54.
138 T2-55, 56.
139 T4-60.

[124] Whilst the proposed offset works would doubtlessly improve the area of the offset, there was debate as to whether they would be an appropriate or adequate offset for the loss of vegetation on the subject site. Dr Robertson expressed the view that, whilst the proposal was "approvable" without an offset in that its impact would be acceptable,[140] the offset offered a "net ecological benefit across an area much larger than the additional area estimated to be cleared".[141] Whilst he acknowledged that offsetting should not be the first option for developers to deal with ecological impacts, he saw the offset proposal as coming after feasible avoidance and mitigation measures, constituted by use of the cleared portions of the site, avoidance of portions of the site in the north and south and the rehabilitation of the covenant areas.

[125] Dr Watson, on the other hand, considered that the ecological/environmental features of the site should be protected rather than offset. In his view, there has been no attempt to avoid or minimise impacts on the areas of ecological value on the land. In any event, whilst he acknowledged that the offset proposal would enhance the adjacent conservation area[142] and that it would be preferable for any approval to incorporate the offset,[143] he did not see the proposed offset as making good that which would be lost by reason of the subject development. He saw offsets as compensating for a loss of values and whilst he saw the proposed offset as beneficial in terms of weed removal,[144] he regarded it as failing to replace that which would be lost.[145] He did not consider that it would be much of an offset and was of the view that it would certainly not be a good ecological outcome.[146]

[126] Mr Delaney accepted that, if one is removing important vegetation from one particular RE, it would be best practice to reconstitute it somewhere else. Similarly, Dr Robertson said that a replacement of "like for like is often the case"[147] depending on the purpose of the offset. Dr Watson conceded[148] that there is no "hard and fast rule" of 100% like for like, but did not see the proposal as adequate.

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140 T2-68.
141 Exhibit 7B, para 17.
142 T3-46.
143 T3-47.
144 T3-48.
145 T3-48.
146 T3-27.
147 T2-59.
148 T3-29.

[127] Some reference was made to probable solution S16.2(b) of the Biodiversity Overlay Code, which contemplates replacement plantings of plants of local origin but not of the same floristic structure as that removed. The Code's requirements are discussed later, but it should be observed that S16.2(b) only relates to replacement planting and only operates where it is not possible to comply with S16.2(a) by planting an equivalent area that replicates the floristic structure of the vegetation removed.

[128] In the areas to be cleared, the vegetation communities of particular significance are the forest communities RE 12.2.2 and RE 12.2.5. Whilst it is proposed that "species selection and planting densities within specific areas are to be varied to reflect the presence of RE 12.2.14, RE 12.2.5 and/or RE 12.2.2 in the surrounding area", the part of the offset area which lies to the east and north of the subject site, and which comprises the vast majority of the area of the proposed offset, is dominated by the foredune vegetation community RE 12.2.14 and has no forest vegetation communities. Understandably, Dr Robertson's evidence[149] was that the offset planting in that area would also be RE 12.2.14, since any attempt to plant the forest species in that area would see a high proportion of them die.[150] Dr Watson also attested that the forest vegetation would not establish in that area.[151] I reject Mr Delaney's evidence to the extent that he contemplated mixed RE communities in that area.[152] Dr Watson did not regard it as acceptable to clear the forested vegetation in exchange for weed removal in a different vegetation community. I accept that the works (including weeding and planting) in this, the bulk of the offset area, would not replace the loss of forest communities.

[129] The balance of the offset area lies in a much smaller area to the north/west of the site. That area presently features three vegetation communities, namely RE 12.2.15, RE 12.2.5 and RE 12.2.2. Dr Robertson's evidence is that plants from RE 12.2.5 and RE 12.2.2 would be planted in that area to reflect what is already there.[153] That would represent some increase in the quantum and diversity of native plants particularly at the ground layer at that location.[154]

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149 T2-61.
150 T2-62.
151 T3.-26.
152 T4-58.
153 T2-66.
154 Exhibit 7B, para 65 second box.

[130] Dr Watson did not see the works (including planting) in this area to the north/west as compensating for the loss of forest vegetation on the subject site.[155] As he pointed out, the forest communities in this offset area, despite the weeds, have a closed canopy[156] which characterises it as one or other of the forest communities. The works intended in that area will be beneficial, but will not increase the extent of the already protected forest communities in that location because aside from the perhaps "some patches where you could fit one or two trees in" there is no opportunity to replace the communities to be lost on the subject site.[157]

[131] The situation may be contrasted with a circumstance where an area of equivalent size, which is presently cleared[158] or has no or very little value, is being established or re-established as a particular vegetation community in order to replace the loss of that same community from a development site.[159] In those circumstances it may, depending on the circumstances, be possible to conclude that the loss of a vegetation community (and its associated habitat) from the development site is being made good by the offset.[160] As Dr Watson observed, there are not the large open areas in this part of the offset area to achieve that in this case.[161] Instead the proposal is to carry out works (weeding and planting) and maintenance for a period of time in an area which is already protected and has established vegetation communities in order to improve those areas, but not to make good the loss of those communities and their associated habitats on site. I accept Dr Watson's opinion in relation to the effect and deficiency of the offset.

(vi) The Biodiversity Code

[132] The proposal must be assessed against the relevant assessment benchmarks from an ecological perspective. The focal provisions which the Court has been asked to address, in that regard, are various provisions of the Biodiversity Code.

[133] There was some reference to the site's zoning, which contemplates single detached housing in the context of its Environmental Protection designation in the

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155 T3-52.
156 T3-26.
157 T3-26 and T3-17.
158 It may be noted that the condition initially put on the 2016 Approval required rehabilitation of an existing cleared area.
159 T3-16.
160 T2-73.
161 T3-17.

Biodiversity Overlay. Mr Adamson (the town planner retained by the Council) referred to the 2016 Approval as representing the appropriate "balance" sought under the planning scheme.[162] The written submissions on behalf of the Council referred to the 2016 Approval as representing the limit of a "reasonable compromise between the zone and the overlay codes". Mr Cumming (the town planner engaged by the appellant) saw what he described as the basic objective of the overlay (to retain vegetation) to be at odds with that of the zoning (to provide for development).[163] He considered the planning scheme regime applying to the land as somewhat at odds.[164] Mr Adamson, on the other hand, saw no such difficulty having regard to the hierarchy in the planning scheme.[165]

[134] It has earlier been observed that:

(a) the site is affected by the Biodiversity Overlay

(b) the Biodiversity Code is a relevant assessment benchmark

(c) the planning scheme provides a hierarchy of assessment benchmarks

(d) save for certain irrelevant exceptions, overlays prevail over other components to the extent of inconsistency

In those circumstances, the development potential of the site otherwise, by reason of its zoning, is subject to any constraints which apply by reason of a relevant overlay. This proposal falls to be assessed against, amongst other things, the Biodiversity Code. There is no warrant for compromising on the requirements of that code in order to perform some general balancing exercise, having regard to the zoning of the land.

[135] There was a deal of debate over whether the planning scheme contemplates the "remove and offset" approach of the appellant. It was pointed out, for the Council, that the only specific reference to a biodiversity offset in the Biodiversity Code is in probable solution S7.2 in relation to Koala Habitat Areas, in circumstances where clearing of non-juvenile koala habitat trees is unavoidable in certain areas. Offsets are not referred to in the focal provisions in issue in this proceeding. It was submitted, for the appellant, that its proposed offset nevertheless sits comfortably with, and indeed supports, relevant provisions of the Code. Those provisions are

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162 Exhibit 9, para 88.
163 Exhibit 9, para 71.
164 Exhibit 9, para 146.
165 Exhibit 9, para 131(g).

considered below. As is evident from the discussion of those provisions, I do not consider that they endorse an approach whereby development can be insensitive to on-site values so long as it improves values elsewhere. The appellant also drew attention to overall outcome (q) for the Eastern Beaches Locality which speaks of the environmental and cultural heritage values of the "locality" being conserved and well managed. I do not consider that that provision can be taken in isolation to conclude that the planning scheme is unconcerned about on-site values. I have also found that, in this case, the on-site and off-site works proposed would not make good the loss of on-site vegetation.

[136] Development that is consistent with the specific outcomes complies with the code.[166] The proposal does not comply with all of the specific outcomes of the Biodiversity Code. Specific outcomes O1 and O2 apply specifically to land in a number of areas including the Environmental Protection Area. The expression "of local origin" is defined to mean a species occurring in an area which is within its historical natural range. There was no suggestion that the native vegetation on site was other than of local origin. It was common ground that specific outcome 1(a)[167] and 2 apply. They provide as follows:

13.9 Vegetation retention and conservation[7]	
Environmental Protection Area & Environmental Enhancement Area Vegetation & Riparian Buffer Area ***O1*** Vegetation of *local origin*[8] on premises identified as— a) Environmental Protection Area[9] or Riparian Buffer Area on the Biodiversity Overlay Maps OM1.1 to OM9.1, is retained and conserved in its present form or improved to ensure its ongoing contribution to the natural resources and biological diversity of the Noosa Shire; and b) … AND ***O2*** For the purpose of Reconfiguring a Lot new lots are only created where they minimise the fragmentation and maximise the retention of existing vegetation.	***S1.1*** An Ecological Assessment Report prepared in accordance with *Planning Scheme Policy 18 – Ecological Assessment Guidelines* demonstrates that the flora on the premises does not constitute Environmental Protection Area or Environmental Enhancement Area vegetation.11 **OR** ***S1.2*** Where constructing a **Detached House**; or **Community residence** *interference with vegetation* does not extend beyond— a) 30m of a building or 10m of a structure on lots greater than 10ha; or b) 10m of a building or structure on lots 10ha or less but more than 0.3ha; or c) 3m of a building or structure on lots 0.3ha or less. ***S2.1*** Where *clearing vegetation* on the premises is for the purpose of **Reconfiguring a Lot—**

166 S13.6.

167 Written submissions for the appellant para 77(a) concedes that 1(a) applies.

	a) new boundaries to lots do not transect and fragment existing vegetation; b) new lots are created to allow for suitable *house site areas* or other future buildings and works to be located within existing cleared areas or areas of low ecological value; and c) building envelopes are designated for each lot.

[137] Specific outcome 1(a) requires the vegetation on the relevant premises to be retained and conserved in its present form or improved. The proposal does not do the first and the appellant did not suggest otherwise. Instead, it was contended, for the appellant, that compliance was achieved because the vegetation would be improved. That would be true for that vegetation which is proposed to be the subject of rehabilitation but not for that which is proposed to be removed. The provision applies to vegetation on premises identified as Environmental Protection Area. It does not matter, for present purposes, whether the relevant 'premises' are limited to the subject site or extend to all of the land identified in the Environmental Protection Area. As has already been observed, neither the proposed rehabilitation on-site or in the proposed offset area beyond the site would make good the extent of loss of forest RE vegetation communities. The proposal does not comply with specific outcome 1(a).

[138] There is non-compliance with O2. To minimise fragmentation is to reduce it to the smallest extent practicable.[168] To maximise the retention of existing vegetation is to retain it to the greatest extent practicable. The proposal is to create new lots which, to some extent, are over the cleared areas of the site, but which substantially intrude into areas of existing native vegetation. I accept Dr Watson's evidence[169] that the new lots would neither minimise fragmentation nor maximise the retention of existing vegetation.

[139] It was submitted, for the appellant, that whilst O2 is stated in absolute terms, which "if applied strictly and in isolation" would preclude any new lot which did not retain all vegetation on site,[170] an "orthodox construction" in the context of the land's zoning leads to the conclusion that the proposal achieves the objective, properly

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168 *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 at [163].

169 Exhibit 7A p 99.

170 A construction which is not correct since to minimise fragmentation and maximise retention does not necessarily require a 100% retention of vegetation.

construed. It was pointed out that localities are divided into zones to reflect, more precisely, the preferred use patterns. Further, it is through the use of zones and overlays that the scheme says that it identifies and seeks to protect areas of remnant vegetation.[171] In this locality, the intention for the Detached Housing Zone is for single detached housing to prevail albeit housing that, maintains, amongst other things, landscaping amongst buildings, retaining trees and vegetation wherever practicable.[172] The site is not included in the Open Space Conservation Zone the intent for which, in the Eastern Beaches locality is as follows:

> "ss) For the **Open Space Conservation Zone—**natural environmental values of high order and warranting conservation status are—
>
> i. protected for their importance in contributing to *ecological sustainability* including maintenance of water quality and provision of habitat and open space linkages; and
>
> ii. appropriately managed to the general exclusion of development or any further subdivision of freehold lots."

[140] It was submitted that the Court should take head of the zoning, which has work to do, and adopt an approach which achieves harmonious goals. Mr Cumming thought that the "duplicity" of the planning provisions and specific code outcomes which apply to the site should be acknowledged and that "nuances in vegetation interpretation" should not hold sway on a site zoned for housing development.[173] He pointed out that land in the Detached Housing Zone, without environmental constraints, typically yields 10 to 15 dwellings per hectare.[174]

[141] None of that leads to a conclusion that the proposal satisfies objective O2, the meaning of which is plain. The zoning of the site does not prevail over the overlay, but nor are the two necessarily in conflict. The zoning, whilst contemplating development for single detached housing, does not provide a right to the achievement of a given number of lots on a given parcel of land in an Environmental Protection Area. The specific outcome, on the other hand, does not deny the use of the site for its zoned purpose. It merely creates criteria for the

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171 Exhibit 4 p 7.
172 Exhibit 4 p 10.
173 Exhibit 9, para 139.
174 Exhibit 9, para 141.

creation of new lots by subdivision. The site is currently a single lot with about 2000m^2 of cleared area and there is potential (and an existing but unexercised approval) for some subdivision. The objective is not to be approached on the assumption that the proposed number or area of lots must be somehow accommodated on the land because of its zoning. Reasonable expectations concerning development of the subject site must take account of the significance of the overlay. The subject site has areas where development would involve no or relatively little fragmentation or vegetation removal, but the proposal goes well beyond those areas. A conclusion of compliance is not justified by any need to achieve harmony.

[142] Specific outcome O3 is as follows:

O3 Clearing vegetation only occurs where— a) no other suitable cleared or partially cleared area is available on the premises; b) the development minimises the total footprint within which all activities, buildings, structures, driveways and other works are contained; and c) the development is located in areas of low ecological value over other areas to the greatest extent practicable …	***S3.1*** No solution provided

[143] The proposal does not develop vegetated areas in preference to suitable cleared or partially cleared areas. It develops all of the latter and some of the former. If the proposed development in terms of the number and size of lots is taken as a given, then its design, which concentrates the built form together may be said to minimise its total footprint. Non-compliance would still arise however, with sub-paragraph (c). It was conceded[175] that the proposal does not confine development to areas of low ecological value. It was submitted however, that because the requirement is for development to be located in such areas over other areas "to the greatest extent practicable" there is sufficient flexibility such that no plainly identified non-compliance arises. I do not agree.

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175 T5-47.

[144] The ordinary meaning[176] of 'practicable' is capable of being put into practice, done or effected, especially with the available means or with reason or prudence; feasible. Its use does not introduce a very great deal of flexibility. The evidence of Dr Watson satisfies me that far from locating development in areas of low ecological value to the greatest extent practicable, the location of the proposed development is insensitive to the distribution of areas of ecological value across the site and more so than could be said of the 2016 Approval, which Dr Watson was prepared to accept. There is non-compliance

[145] Specific outcome O8 provides as follows:

Open space networks & ecological linkages ***O8*** Open space networks and ecological linkages are maintained and enhanced to provide for safe movement of fauna and viable connectivity between ecologically importance areas by protecting and replanting vegetation of local origin— a) along and around *watercourses*, wetlands, *drainage lines* and ridgelines; and b) as linkages between areas of remnant *vegetation*, including— i. across property boundaries; ii. to areas of national park, conservation park, State forest or reserve; and iii. into adjoining local government areas. …	***S8.1*** *Vegetation* and ecological linkages are enhanced through revegetation, rehabilitation and vegetation maintenance in areas indicated in Schedule 5 on Map 4 – Open Space Networks in such a way as to— a) ensure protection of wildlife refuges; b) facilitate the dispersal and movement of native wildlife; and c) maintain vegetation in patches of the greatest possible size and with the smallest possible edge-to-area ratio. AND ***S8.2*** Development is sited and designed to— a) maximise the ecological connectivity of vegetation within the site and to adjacent sites; b) to avoid creating physical barriers and safety hazards (such as roads, pedestrian access and in-stream structures) to the movement of fauna along and within the ecological linkage; and c) provide mitigation measures such as wildlife movement infrastructure, fauna exclusion and directional fencing, underpasses, overpasses and traffic calming devices, signage and lighting.

[146] The site is, as Dr Robertson recognised, part of two habitat corridors (the coastal corridor and Burgess Creek catchment). It provides ecological linkages across the site as pointed out by Dr Watson. The proposal would preserve the reasonably small part of the site within the Burgess Creek catchment and would improve, by weeding and supplementary planting, the condition of the on-site environment covenant

176 Macquarie Dictionary.

areas and the off-site offset area. It would however, reduce the width of the coastal corridor at this location and prejudice[177] linkages across the site as referred to by Dr Watson. Whilst Dr Robertson expressed the view that open space and fauna habitat connectivity would not be "significantly impacted"[178] and that the development and would not cause a "major severance"[179] of habitat connectivity, it is difficult to accept that the proposal passes the test of maintaining and enhancing the ecological linkage. The evidence of Dr Watson persuades me that it does not. It should be acknowledged however, that as has already been observed, not only would opportunities for fauna movement in the broader area remain but that the 2016 Approval, if exercised, would also have had an impact on the opportunities for movement across the site, My ultimate decision in this appeal is not dependent on non-compliance with this specific outcome.

[147] Specific outcome O11 provides as follows:

Habitat trees ***O11*** Habitat trees (including dead trees) and recruitment habitat trees are protected for native fauna habitat, where practicable.	***S11.1*** No clearing of *koala habitat trees* greater than 4m in height or with a diameter greater than 100mm at 1.3m above the ground; AND ***S11.2*** No clearing of other *habitat trees* or *recruitment habitat trees*.

[148] It was submitted, for the appellant, that the words "where practicable" "allows latitude" and that the provision should be construed giving due recognition to the zoning. I have already dealt with those matters in the context of other objectives. Whether there is compliance with O11 requires an identification of the relevant trees and an examination of whether they could, in practice, be protected for native fauna habitat.

[149] Habitat trees are defined to mean:

> "***habitat tree*** means a tree whether living or dead that
>
> a) has 1 or more hollows, pipes or splits which are located more than 2m above ground level; or
>
> b) hosts epiphytes or termite mounds; or

177 Reducing the north/south link and removing the east/west link.
178 Exhibit 7B – commentary 08.
179 Exhibit 7B – commentary 08.

c) is a koala habitat tree."

[150] Recruitment habitat trees are defined to mean:

> "***recruitment habitat tree*** means a tree selected for its potential to become a *habitat tree* and exhibiting two or more of the following characteristics—
>
> a) large dominant or co-dominant characteristics; or
>
> b) damaged, branchy, open crowned or with multiple leaders; or
>
> c) containing hollows, pipes or splits; or
>
> d) known to develop hollows early and to live a relatively long time (ie. Eucalyptus, Corymbia and Angophora species); or
>
> e) hosting epiphytes or termite mounds."

[151] There was relatively little attention to this issue in the case. The tree survey[180] did not identify which, if any, trees are habitat trees or recruitment habitat trees. In the course of oral submissions Job QC referred the Court to the following passage from Dr Robertson's comments on O11 in the first joint report as follows:

> "Mature trees will be retained on site and will be protected within covenanted areas. I have shown this within Figure C7, Appendix C, and provided data within the body of the main report.
>
> The proposal will result in the removal of some dead trees, none of which have well developed tree hollows likely to be of importance to native fauna.
>
> As part of the proposed habitat enhancement works within the Covenant Areas a variety of nesting boxes will be established for potential use by native fauna.
>
> Whilst a [sic] mature trees exist on the subject site (especially along the west and north of the site), there is no evidence of use by Koala (EBAR, Appendix E-Biodiversity Overlay Code Compliance Assessment).
>
> Habitat trees will be able to be recruited in future within the covenanted areas proposed along David Low Way and along the north of the subject site."

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180 Exhibit 7A, Figure C7.

[152] As Job QC ultimately conceded,[181] that passage does not assert that there would be no living habitat trees on site which would be removed by the development, far less assert that the protection of such trees was not practicable. It may be noted that the report in support of the development application, to which Dr Robertson refers, but the author of which was not called, itself recognised that there are at least some koala habitat trees on site any such clearing of which the author said would be offset.[182]

[153] Dr Watson's comments on O11 were, on the other hand, as follows:

> "*S11.1* and *S11.2* restrict the clearing of koala habitat trees and recruitment habitat trees.
>
> The proposed development will result in the removal of both koala habitat trees and recruitment habitat trees.
>
> The few large trees on the site will be removed (refer discussion previously).
>
> The development design has not attempted to avoid these features."

[154] The first sentence of those comments suggests that Dr Watson may have overlooked that the provision relates not just to koala habitat trees and recruitment habitat trees. Dr Watson does not say whether the large trees, to which he refers, are habitat trees or recruitment habitat trees. There is however, no reason not to accept his evidence so far as it goes. The appellant failed to establish compliance with O11. The evidence of Dr Watson is to the effect that O11 is not satisfied. The evidence however, does not enable findings as to which particular trees are those which ought to be protected where practicable or why protection was practicable. I am therefore unable to assess the gravity of non-compliance. My ultimate decision does not depend upon my finding in relation to this specific outcome.

[155] Specific outcome O16 relates to replanting and rehabilitation. It provides as follows:

Replanting and rehabilitation ***O16*** Development provides for ecologically important areas to be restored and enhanced through the following measures— a) siting *landscaped areas* to complement and enhance existing	***S16.1*** Landscaping and rehabilitation complements and supports ecologically important habitats by— a) utilising native plants of *local origin*; b) utilising suitable plant species identified in PSP3 – Landscaping Plants and Guidelines;

181 T6-66.
182 Exhibit 3 p 172.

vegetation; b) removal of all species likely to displace native flora species or degrade fauna habitat; c) replanting and rehabilitating[16] degraded habitat; and d) replacing any vegetation removed with suitable replacement vegetation *of local origin.*	c) replicating adjacent remnant habitats, including understorey vegetation; d) creating or enhancing linkages between existing habitats; e) avoiding the use of *undesirable plant species* listed in Table 9.1 of PSP3 Landscaping Plants and Guidelines; and f) planting *riparian zones* to filter stormwater run-off and provide for wildlife habitat; AND ***S16.2*** *Vegetation* removed is replaced with— a) plantings of equivalent area that replicate the floristic structure of the vegetation removed; or b) where this is not possible due to the characteristics of the site and the development, plantings twice the number of the removed trees and plants of local origin.

[16] Revegetation and rehabilitation works are to be carried out in accordance with an approved Revegetation and Rehabilitation Management Plan, as referred to in *PSP18 Ecological Assessment Guidelines*

[156] The outcome relates to the restoration and enhancement of "ecologically important areas", which are defined as follows:

> "***ecologically important areas*** means—
>
> a) a natural *waterway* or *wetland*;
>
> b) *riparian vegetation*;
>
> c) an area of remnant or non-remnant native *vegetation* identified on Biodiversity Overlay Maps OM1.1 to OM1.9; or
>
> d) an area which otherwise—
>
> i contains or is likely habitat for scheduled species under the *Nature Conservation (Wildlife) Regulation (Qld) 2006*;
>
> ii contains or is likely to contain listed threatened species and/or ecological communities, protected habitat or listed migratory species as defined by the Environmental Protection and Biodiversity Conservation (Cth) Act 1999;

iii contains a spring as defined under the Water Act (Qld) 2000;

iv contains habitat for flora and/or fauna species of local ecological significance; or

v legally secured offset areas."

[157] The definition is not without some difficulty. Sub-paragraph (c) contains a typographical error in that the reference to map OM1.9 should be a reference to OM9.1. Further, the Biodiversity Map does not map areas as remnant or non-remnant vegetation.[183] It was however, common ground that the site has or is within an ecologically important area.[184]

[158] It was submitted, for the appellant, that this specific outcome supports and encourages the proposal with its offset. Reference was made to probable solution S16.2 which contemplates that, in some circumstances, there may be replacement planting of species which are of local origin but which do not replicate the floristic structure of the vegetation removed. Senior Counsel for the appellant confirmed however,[185] in the course of oral submissions, that reliance was not placed on S16.2.

[159] The provision requires development to provide for ecologically important areas to be both "restored" and enhanced through certain measures. The ordinary meaning of restored is to bring back to the original state. The measures include removal of species likely to displace native flora species or degrade fauna habitat. That is proposed. Another measure is replanting and rehabilitating degraded fauna habitat. The proposal does that for part of the site and for the offset area, but not for the areas to be developed. O16(d) provides the further measure of replacing vegetation removed with suitable replacement vegetation of local origin. Vegetation which replaces is that which takes the place of the vegetation which has been removed. That is not what is proposed. Rather it is proposed to enhance the condition of another existing area of vegetation, predominantly of a different RE vegetation community. Whilst there is some cleared area within the offset area to the east of the site, that is in the area which otherwise features RE 12.2.14. It has been observed that there is insufficient opportunity in the offset area to the north west to replace what is lost of the forest communities. It is not replacing the vegetation

183 T6-31.
184 T6-31 line 46 – T6-32 line 1.
185 T6-36.

removed with suitable replacement planting. There is non-compliance with the specific outcome.

[160] Specific outcome O18(a) provides as follows:

Clearing protected vegetation in the protected vegetation overlay area ***O18*** Clearing protected vegetation does not involve— a) the removal of vegetation in *ecologically important areas;* …	No solution provided

[161] Protected vegetation is defined as follows:

> "***protected vegetation*** means vegetation protected from *clearing* in the *Protected Vegetation Overlay Area* as follows—
>
> a) Category 1, 2 and 3 lots – all vegetation
>
> b) Category 4 lots – vegetation to be retained as part of a *property vegetation management plan*"

[162] The Protected Vegetation Overlay Area applies to the whole of the planning scheme area of the Noosa Plan. Being a freehold lot of more than 0.3 hectares but less than 2 hectares in the Protected Vegetation Overlay Area, the site is a category 2 lot such that all vegetation is protected. The proposal therefore involves clearing protected vegetation. It has already been noted that it is common ground that the site has or is within an ecologically important area. The clearing extends into parts of the site which make it ecologically important. The proposal does not comply with O18(a).

[163] Senior Counsel for the appellant conceded conflict if the provision is read in isolation, but advanced similar arguments to those made in relation to O2. He urged the Court to view the provision in the context of the planning scheme as a whole and in particular, the zoning provisions that, together with the overlays, are intended to have work to do. He suggested that if no further development was possible on the site then it should have been included in the Open Space Conservation Zone. Those matters however, do not, in my view, warrant an approach which strays from the plain meaning of O18(a) or justifies any conclusion other than that the proposal does not comply with it. The provision is one which, by its terms, applies a strong protection to vegetation in ecologically important areas, but that does not warrant construing it as subject to some unexpressed qualification for land included in the

Detached Dwelling House Zone. Further, as has already been noted, the site does have areas which have been cleared in the past.

[164] Reference was made to the Court's decision in *Smout v Brisbane City Council*[186] where, in the context of an impact assessable application, it was said that an application need not be refused because of non-compliance with an assessment benchmark. Discretionary matters are dealt with later. I am conscious that it may be unrealistic to think that development could occur without a breach of O18(a) by the loss of even a single tree. Certainly exercising the 2016 Approval would involve clearing of protected vegetation, as would clearing for fire hazard mitigation. As has been observed however, the proposal would involve significantly greater clearing of such vegetation and, in particular, significantly greater clearing of the forest RE communities.

[165] Specific outcome 19(a) provides as follows:

O19 Clearing protected vegetation does not increase the likelihood of or result in adverse impacts on— a) remnant vegetation of *local origin*, classified as remnant of concern regional ecosystem or remnant endangered regional ecosystem or is vegetation located in a *wetland*; …	No solution provided

[166] The proposal involves clearing of protected vegetation which would result in adverse impacts (namely the loss of areas) on remnant vegetation of local origin classified as remnant "of concern" regional ecosystem, namely RE 12.2.2. I am satisfied, on the evidence of Dr Watson discussed earlier that the impact is significant, adverse and indeed unacceptable. The proposal is in conflict with this objective.

[167] It was submitted, for the appellant, that even if there was non-compliance with the specific outcomes of the Biodiversity Code, compliance with the Code could nonetheless be established by compliance with the overall overcomes. The focal provisions with which the Council alleged non-compliance are as follows:

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186 [2019] QPEC 10.

"b) The terrestrial and aquatic biodiversity of native flora and fauna and their habitats is maintained.

c) Ecologically important areas, wildlife corridors, ecological linkages and riparian vegetation are conserved, managed, enhanced and rehabilitated to ensure the long term ecological viability, integrity and sustainability of native flora and fauna species, and to improve biodiversity, landscape stability, and resilience;

d) Development is managed so as to avoid, or where avoidance is not practicable, minimises or mitigates the impacts upon the Shire's biodiversity values and natural resources, including –

i. ecologically important areas;

…

g) Clearing of protected vegetation only occurs where it is reasonably necessary and in an environmentally sensitive manner that provides for suitable replacement plantings."

[168] Insofar as OO(b) is concerned, the appellant pointed to the extent of land that will be the subject of rehabilitation works in the on-site covenant areas and in the offset area. It referred to the ongoing maintenance obligations for the on-site covenants (which are not presently in place nor specified in the 2016 Approval) and the period of maintenance for the offset area. As Dr Watson pointed out[187] however, the proposal fails to make good the loss of habitat, including the microhabitats resulting from clearing in the forest RE communities on the site. There is non-compliance with the outcome.

[169] It was submitted, for the appellant, that the proposal positively supports OO(c). The provision requires, amongst other things, ecologically important areas, to be "conserved, managed, enhanced and rehabilitated" to ensure certain things. To conserve is to preserve from loss or to keep unimpaired.[188] The proposal does not conserve the ecologically important area, wildlife corridors and ecological linkages. It proposes to conserve, manage, enhance and rehabilitate part thereof as the quid

187 T3-26. See also T3-30.
188 Macquarie Dictionary.

pro quo for the destruction of another part which is of value. That is not what the objective seeks.

[170] Overall outcome (d)(i) is for development to be managed so that, if practicable, it "avoids" impacts upon the Shire's biodiversity and natural resources including ecologically important areas. Dr Robertson contended that the proposal abstains from development in ecologically important areas.[189] That is not so. He also contended that the proposal implements "protective measures" to protect against adverse effects of development. The evidence discussed earlier satisfies me that the clearing and earthworks will not avoid impacting on ecologically important areas.

[171] The provision goes on to contemplate that avoidance may not be practicable, in which case development is to be managed to minimise or mitigate the impacts upon the Shire's biodiversity values and nature resources. As Dr Watson pointed out,[190] it would appear that the proposal makes little attempt to avoid the areas of importance on the site or to minimise impacts upon them.[191] The rehabilitation works do not adequately mitigate the impacts.

[172] Overall outcome (g) provides that clearing of protected vegetation only occurs where:

(a) it is reasonably necessary; and

(b) is carried out in an environmentally sensitive manner that provides for suitable replacement plantings.

[173] The expression reasonably necessary is defined as follows:

> "***reasonably necessary*** means vegetation clearing for a particular purpose where there is no alternative way of achieving the purpose that is prudent and feasible and that would avoid clearing or significantly reduce the extent of vegetation clearing."

[174] The definition calls for an identification of the "particular purpose" for which the clearing is reasonably necessary. If the "particular purpose" is as specific as a residential subdivision of the land for 5 lots of the areas proposed, then clearing of protected vegetation is reasonably necessary. That would however, rob the

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189 Exhibit 7B, Table E1.
190 Exhibit 7A p 99.
191 Exhibit 7A p 99.

provision of any real rigour. If the particular purpose is more generally identified as residential subdivision or residential development, then clearing of protected vegetation, or at least clearing of protected vegetation to the extent proposed, would not be reasonably necessary. It is however, unnecessary for me to express a concluded view on that because, for the reasons previously expressed, I am satisfied that the clearing is not environmentally sensitive in that its location is insensitive to the values of the site and the proposal does not provide for suitable replacement plantings. There is non-compliance with the overall outcome.

[175] I have found that the proposal does not comply with the Biodiversity Code. The non-compliance arises, in particular, by reason of the clearing which the proposal entails. I have had regard to the clearing which could occur if the 2016 Approval was exercised as well as that which could occur if the appellant is entitled to carry out fire risk reduction. The clearing and, in particular, the clearing in the forest RE communities associated with the current proposal is however, greater.

Imposition of conditions

[176] I have found that the proposal does not comply with the Biodiversity Overlay Code. I am further satisfied that the non-compliance cannot be remedied by the imposition of conditions. That is because the non-compliance goes to fundamental matters such as the footprint of the proposal and, in particular, its layout relative to the areas of ecological value on the site.

Discretion

[177] It was submitted, for the appellant, that even if its proposal was found not to comply with an assessment benchmark (as is the case), the Court should nevertheless exercise the discretion under s 60(2)(b) to approve the development application.

[178] I am conscious that non-compliance with an assessment benchmark does not inevitably result in refusal of a code assessable application. The non-compliance in this case is with several provisions of the Biodiversity Code, the purpose of which is expressed in the overall outcomes of the Code. They are, as one would expect, directed to ecological matters. I have, in dealing with the focal provisions of the Code, identified some provisions non-compliance with which my ultimate decision to dismiss the appeal does not rely. I can see no reason to adopt a similar position

with respect of any of the other focal provisions with which I have found non-compliance. I have already observed that in considering the proposal's non-compliance, I have also been conscious of the consequences which would flow from exercising the 2016 Approval and from any bushfire risk reduction.

[179] It was submitted that there are three compelling discretionary matters which weight in favour of approval, namely that the proposal would lead to:

(a) considerably enhanced ecological outcomes, including the offset; and

(b) an improvement upon the existing access arrangement which the experts agree is unsatisfactory. In particular it would increase the minimum gap sight distance from about 2.5 seconds to over 5 seconds; it will provide a left hand turn for cars travelling north (which Mr Holland agreed would be a significant benefit) and the width of the driveway would increase to 7 metres from 4 metres (which Mr Holland agreed would be a "meaningful benefit); and

(c) rectification of the existing extreme and very high bushfire risk.

[180] The discretion falls to be considered following the assessment. It has already been observed that code assessment must be carried out 'only' against the assessment benchmarks and having regard to matters prescribed by regulation. Unlike impact assessment, code assessment does not permit consideration of any other "relevant matter". It was not contended, on the Council's behalf, that the matters raised could not properly be taken into account. There is no need me to pause on that because none of them, considered individually or collectively, would cause me to exercise the discretion favourably to the appellant. In that regard:

(a) I have accepted Dr Watson's evidence to the effect that whilst the works proposed in the on-site covenant areas and the off-site offset area would be beneficial, they do not replace or make good the loss of forest RE vegetation communities on site. I do not consider that the benefits of the works justifies the extent of the proposal's disrespect for the areas of value on the site into which it would substantially intrude. It was also submitted, for the Council, that the appellant ought not be permitted to take credit for remedying the

condition of the land for which it was responsible. I have simply assessed the application on its merits as they stand. That includes the benefits of the proposed rehabilitation.

(b) It is unknown to what extent the existing access will be used in the future in the event that this application is refused. The access arrangement will be altered if the 2016 Approval is exercised. Even if it is not, a request could be made of the Council to remove and/or prune vegetation in the road reserve to afford a better sightline. The Council has a policy[192] with respect to considering such requests. In any event, I do not regard the benefit of the proposed access arrangements as outweighing the gravity of the non-compliance with the Biodiversity Code.

(c) The 'rectification' of the existing bushfire risk is the demolition of the existing buildings and the imposition of appropriate requirements on new buildings within the proposal. The 2016 Approval also had requirements for new dwellings. It is unknown whether the existing dwellings with the bushfire risk are to remain on the land in the event this application is refused and are to be occupied so as to expose persons to that risk. There is no evidence of occupation of the northern dwelling and, as has been noted, it would seem that its demolition is contemplated as likely. In any event, even if it is assumed that the buildings are to remain and be occupied so as to create the need, subject to obtaining any necessary approvals, for the abatement of risk that would not lead to clearing which is as problematic, from an ecological perspective, as that which the subject proposal would entail. The reduction of the bushfire risk may be beneficial, but it does not justify the proposal.

Conclusion

[181] For the above reasons the appeal is dismissed.

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192 Exhibit 43.