

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Shun Pty Ltd v Logan City Council & Anor* [2020] QPEC 31

PARTIES: **SHUN PTY LTD ACN 113 114 324 AS TRUSTEE  
UNDER INSTRUMENT 712735276**  
(Appellant)

v

**LOGAN CITY COUNCIL**  
(Respondent)

AND

**CENTA UNDERWOOD PTY LTD ATF BRISBANE  
UNDERWOOD TRUST**  
(Co-respondent)

FILE NO/S: 3076 of 2017

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING  
COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 15 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 10 and 24–28 February 2020 and further exhibit and written  
submissions received 28 May 2020

JUDGE: Kefford DCJ

ORDER: **I order the appeal be allowed and the development  
application refused.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPLICATION –  
applications in pending proceeding – where the substantive  
proceeding involves an appeal by a submitter against the  
Council’s decision to approve a mixed use development that  
includes a supermarket – where the economic analysis lodged  
with the development application indicated an intention to  
seek a supermarket or variety store and that a prospective  
operator might be an Asian/Chinese supermarket and variety  
store – where the appeal was part-heard when the application  
was made – whether the co-respondent’s proposed change is  
a minor change – whether the co-respondent should be  
permitted to change its application

PLANNING AND ENVIRONMENT – APPEAL – submitter  
appeal against Council approval of a development application

seeking a development permit for material change of use for a mixed use development involving 198 multiple dwellings on top of a new shopping centre in the specialised centre zone – whether the proposed development is would complement the existing district centre, whether the proposed development would undermine the viability of the existing district centre – whether the proposed development accords with the planning strategy for new or expanded centres – whether there is a demonstrated community and economic need for the proposed development – whether the planning strategy for new or expanded centres operates as an exception to the planning policy that supermarkets are not to locate in a specialised centre – whether the proposed development could be appropriately conditioned to limit it to use for an “*Asian themed*” supermarket – whether the proposed development should be approved in the exercise of the planning discretion

- LEGISLATION: *Planning Act 2016* (Qld), s 45, s 59, s 60, s 65, s 66
- Planning and Environment Court Act 2016* (Qld), s 43, s 45, s 47
- CASES: *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2013] 1 Qd R 1, applied
- Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16; [2019] QPELR 793, approved
- Australian Capital Holdings Pty Ltd v Mackay City Council & Ors* [2008] QCA 157, applied
- Gaven Development Pty Ltd v Scenic Rim Regional Council* [2010] QPEC 51; [2010] QPELR 750, cited
- Intrafield Pty Ltd v Redland City Council* [2001] QCA 116; (2001) 116 LGERA 350, approved
- Intrapac Parkridge Pty Ltd v Logan City Council* [2014] QPEC 48; [2015] QPELR 49, approved
- Isgro v Gold Coast City Council* [2003] QPEC 2; [2003] QPELR 414, approved
- JRD No 2 Pty Ltd v Brisbane City Council & Ors* [2020] QPEC 4, approved
- Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46, approved
- Navara Back Right Wheel Pty Ltd v Logan City Council & Ors; Wilhelm v Logan City Council & Ors* [2019] QPEC 67, approved
- Parmac Investments Pty Ltd v Brisbane City Council & Ors* [2008] QPEC 7; [2008] QPELR 480, approved

*Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53; [2019] QPELR 247, approved

*Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QCA 147; [2014] QPELR 686, applied

COUNSEL: D Gore QC and J Lyons for the Appellant  
M Batty for the Respondent  
R Traves QC and H Stephanos for the Co-respondent

SOLICITORS: Connor O’Meara Solicitors for the Appellant  
King & Company Solicitors for the Respondent  
Holding Redlich for the Co-respondent

## TABLE OF CONTENTS

Introduction .....	4
The decision framework.....	5
Should the appeal proceed based on further proposed changes? .....	6
Is the proposed change a minor change? .....	6
Should Centa be permitted to change its development application? .....	9
What are the issues to be determined? .....	10
What are the relevant assessment benchmarks?.....	10
Does the proposed development involve an unacceptable departure from the planning strategy for specialised centres?.....	10
What are the relevant requirements for specialised centres?.....	11
Are the proposed uses contemplated in the Specialised centres zone? .....	14
Would the proposed development complement the existing district centre? .....	16
Would the proposed development undermine the viability of the Underwood district centre or centres hierarchy?.....	22
Is the design of the built form appropriate?.....	24
Conclusion regarding the planning strategy for specialised centres.....	24
Does the proposed development involve an unacceptable departure from the planning strategy for new or expanded centres? .....	24
Does s 3.5.8.1 apply to the proposed development? .....	27
Is there a demonstrated community need and economic need for the proposed uses? ...	28
Are the proposed uses of a compatible scale as required by s 3.5.8.1(1)(b)(ii)?.....	30
Has Centa demonstrated that the use will not have an unacceptable adverse effect on any existing or planned centre? .....	30
Has Centa demonstrated that the use is appropriately located in accordance with s 3.5.8.1(1)(b)(iv)?.....	30
Does compliance with s 3.5.8.1(1)(b) operate as an exception to s 3.5.7.1(1)(d)? .....	32

Conclusion regarding compliance with the planning strategy for new or expanded centres .....	33
Does the proposed development involve an unacceptable departure from the centres hierarchy planning strategy? .....	33
Are there relevant matters that support approval of the proposed development? .....	34
Is there an economic, community and planning need for the proposed retail and commercial uses? .....	35
Does the subject land's configuration and location lend support to approval? .....	36
Does the proposed development meet an economic need absent any unacceptable impacts? .....	36
Would the proposed development consolidate rather than fragment the Underwood district centre? .....	37
Is the proposed development compatible with the role and function of the Underwood district centre? .....	37
Is the proposed development a complementary land use that cannot be reasonably located within the Underwood district centre? .....	37
Would approval of the proposed development prejudice the orderly and balanced planning of the area or result in any other adverse planning consequences? .....	37
Is the condition proposed by Centa lawful or appropriate? .....	38
Is it necessary to impose a condition? .....	38
Is it appropriate to impose a condition to limit the use to that sought by Centa? .....	39
Conclusions regarding the condition .....	40
Should the development application for the proposed development be approved in the exercise of the planning discretion? .....	40
Conclusion .....	41

## Introduction

- [1] Tucked away behind a former Bunnings Warehouse, out of sight from Kingston Road, Underwood is a vacant area of land of approximately 8 911 square metres (*“the subject land”*). It forms part of a larger parcel on which Underwood Central Shopping Centre is built. That part of the lot on which the shopping centre is located is in the District centre zone under the Logan Planning Scheme 2015 (*“Planning Scheme”*). The vacant portion of the lot is in the Specialised centre zone. It has a street address of 11-21 Kingston Road, Underwood.
- [2] Centa Underwood Pty Ltd (*“Centa”*) wants to develop the vacant portion of the land for a mixed use development involving 198 multiple dwellings on top of a new shopping centre. Logan City Council (*“the Council”*) approved the development application made by Centa Underwood to facilitate that goal but Shun Pty Ltd (*“Shun”*) has appealed that decision.
- [3] At the heart of the issues raised by Shun is the appropriateness of the retail and commercial aspects of Centa's proposed development. The issue for me to determine is whether the proposed development should be approved or refused.

### The decision framework

- [4] The statutory framework in the *Planning and Environment Court Act 2016* (Qld) and the *Planning Act 2016* (Qld) applies.
- [5] The appeal proceeds by way of hearing anew.<sup>1</sup> Centa bears the onus.<sup>2</sup>
- [6] Centa seeks a development permit to authorise it to carry out a material change of use of the subject land from its presently vacant state to use for multiple dwellings (198 units), food and drink outlets, function facility, offices, health care services, shops and shopping centre generally in accordance with the design reflected in the plans provided as Exhibit 4.
- [7] In deciding the appeal, the Court must confirm the decision appealed against, change the decision appealed against, or set it aside and either make a decision replacing it or return the matter to the Council with directions the Court considers appropriate.<sup>3</sup>
- [8] There is a broad discretion in determining the appeal.<sup>4</sup> The exercise of the discretion must be based on an assessment that:<sup>5</sup>
- (a) must be carried out:
    - (i) against the assessment benchmarks in the Planning Scheme to the extent relevant;<sup>6</sup>
    - (ii) having regard to any matters prescribed by the *Planning Regulation 2017* (Qld);<sup>7</sup>
  - (b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances (financial or otherwise); and
  - (c) may give the weight the Court considers appropriate to any amendments to the Planning Scheme. (Although there were amendments to the Planning Scheme following the lodgement of the development application, the town planning experts agree that there are no significant differences in policy intent between the versions. None of the parties contended otherwise. As such, it is unnecessary to consider any amendments.)
- [9] His Honour Judge Williamson QC comprehensively, and in my view correctly, analysed how impact assessable development applications are to be assessed and decided in *Ashvan Investments Unit Trust v Brisbane City Council*.<sup>8</sup> I have also further considered the approach in *Murphy v Moreton Bay Regional Council & Anor*; *Australian National Homes Pty Ltd v Moreton Bay Regional Council &*

---

<sup>1</sup> *Planning and Environment Court Act 2016*, s 43.

<sup>2</sup> *Planning and Environment Court Act 2016*, s 45.

<sup>3</sup> *Planning and Environment Court Act 2016*, s 47.

<sup>4</sup> *Planning and Environment Court Act 2016*, s 47; *Planning Act 2016*, s 60(3).

<sup>5</sup> *Planning Act 2016*, s 59 and s 45(5).

<sup>6</sup> Version 2.1 of the Logan Planning Scheme 2015 was the categorising instrument for the development in effect when Centa's application was properly made. Any reference to the Planning Scheme is a reference to version 2.1 unless expressly stated otherwise or unless otherwise apparent from the context.

<sup>7</sup> None of the parties asserts that there are any such matters of particular relevance in this case.

<sup>8</sup> [2019] QPEC 16; [2019] QPELR 793, 803-13 [35]-[86].

*Anor.*<sup>9</sup> All of the parties contend that the approach referred to in those judgments is the correct one.

**Should the appeal proceed based on further proposed changes?**

- [10] Centa wants the appeal decided based on a changed development application. It made an application in pending proceeding on 26 February 2020 seeking orders to facilitate the change.
- [11] Pursuant to s 43 of the *Planning and Environment Court Act 2016*, the appeal is to be conducted by way of hearing anew. However, pursuant to s 46(3) of the *Planning and Environment Court Act 2016*, the court cannot consider a change to the development application unless the change is only a minor change.

***Is the proposed change a minor change?***

- [12] A “*minor change*”, for a development application, means a change that:<sup>10</sup>
- “(i) does not result in substantially different development; and
  - (ii) if the application, including the change, were made when the change was made— would not cause—
    - (A) the inclusion of prohibited development in the application; or
    - (B) referral to a referral agency if there were no referral agencies for the development application; or
    - (C) referral to extra referral agencies; or
    - (D) a referral agency to assess the application against, or have regard to, matters prescribed by regulation under section 55(2), other than matters the referral agency must have assessed the application against, or have had regard to, when the application was made; or
    - (E) public notification if public notification was not required for the development application;”
- [13] There is no dispute about the satisfaction of sub-paragraph (ii) of the definition of minor change. However, Shun contends that the proposed change is not a minor change on the basis that it would result in a substantially different development.
- [14] The legislation does not define “*substantially different development*”. Whether a proposed change would result in substantially different development depends on the individual circumstances of the development.
- [15] The starting point is a consideration of the development application. Only limited parts of the development application were put before me. I do not have the benefit of the IDAS forms, nor all of the common material that was available during public notification of the development application. The available material that shows the

---

<sup>9</sup> [2019] QPEC 46, [12]-[22].

<sup>10</sup> See s 3 and schedule 1 of the *Planning and Environment Court Act 2016* and s 6 and schedule 2 of the *Planning Act 2016*.

nature of the original development application are extracts from the development assessment report prepared by Jensen Bowers, a report prepared by Urban Economics dated July 2016 that accompanied the development application and a report prepared by Urban Economics dated November 2016 that was lodged in response to an information request from the Council.

- [16] The extracts from the development assessment report prepared by Jensen Bowers describes the proposal as seeking a 3 000 square metre supermarket. It also says:

“In summary, the proposal seeks to establish 5736sqm (25%) non-residential uses as follows:

- Commercial (including office, function facility) – 1557sqm (6.9%)
- Medical centre 244sqm (1.1%)
- Food and Drink Outlets – 389sqm (1.7%)
- Retail – 3546sqm (15.7%)”

- [17] The executive summary to the report prepared by Urban Economics dated July 2016 states:

“The Applicant proposes the introduction of a supermarket such as an Asian supermarket, together with a range of dining and restaurant options including Yum Cha restaurant within the Specialised Centre precinct in Underwood, as part of a mixed use development including some 199 apartments and townhouses.”

- [18] In section 2.2 of the report, the proposed mix of uses is described as including “a 3,000m<sup>2</sup> supermarket”. The report also notes:

“We have been advised that the owners are in discussions with a number of prospective operators for the proposed supermarket, including an Asian/Chinese supermarket and variety store operation. An Asian supermarket/variety store would introduce a new operator and choice in shopping destination for the local community and would position the retail mix within the development differently to the existing mix of more traditional retailing within the Underwood District Centre.”

- [19] On 1 September 2016, the Council made a request for further information about the development application. Paragraph 9.4 of the request states:

“The economic report appears to place heavy emphasis on a need for an Asian/ethnic supermarket, however it is understood the applicant seeks approval for a general, non-specific supermarket. The applicant is requested to revise the report to demonstrate there is a need for a general supermarket within the trade area.”

- [20] A report by Urban Economics dated November 2016 responded to that information request. The executive summary to the report states:

“The Applicant proposes the introduction of a supermarket such as a full-line supermarket or an Asian supermarket, together with a range of dining and restaurant options including Yum Cha restaurant within the Specialised Centre precinct in Underwood, as part of a mixed use development including some 199 apartments and townhouses.”

- [21] In section 2.2 of the report, the proposed mix of uses was still described as including “a 3,000m<sup>2</sup> supermarket”. The report also notes:

“We have been advised that the owners have received expressions of interest for the supermarket tenant from a full-line supermarket operator and from an Asian supermarket/variety operation, both of which would introduce a new operator to Underwood.”

- [22] The Council had the economic need report peer reviewed. The comments it received included:

“**1 Understanding the Proposal** – the proposed development scheme represents a mixed use concept that is outside contemporary expectations in terms of design and location. Furthermore, the location of a supermarket which may be either ‘Asian themed’ or a traditional major chain operator means that understanding the merits and implications of the proposal are more difficult.”

- [23] On the development application material that has been put before me, it seems that the development application sought approval for a supermarket and that it may be operated either as “*Asian themed*” or by a traditional major chain operator.

- [24] Centa seeks to change its development application by, in effect, abandoning the option for a supermarket operated by a traditional major chain operator such as Coles or Woolworths. It seeks to change the description of one of the uses in its development application from “*Shops*” to “*Shops (including Asian themed supermarket)*”. It also wishes to change the Level 1 floor plan to show “*Asian themed supermarket*” in place of the current notation of “*Supermarket*”.

- [25] Shun submits that the proposed change would result in a substantially different development as the change seeks approval for a different form of supermarket development as compared to what was applied for which was either a “*traditional*” full-line supermarket or an “*Asian Supermarket*”. It submits that each of these forms of supermarkets has different impacts.

- [26] To the extent that each of the forms of supermarkets have different impacts, that was the case when Centa made its development application applying for the possibility of either option. The proposed change does not have the effect of providing for something not otherwise contemplated. I am satisfied that the election to only pursue an “*Asian themed supermarket*” does not result in a substantially different development. The proposed change is only a minor change.

***Should Centa be permitted to change its development application?***

- [27] As I have already noted in paragraph [11] above, pursuant to s 46(3) of the *Planning and Environment Court Act 2016*, the Court cannot consider a change to the development application unless the change is only a minor change. Although the legislation precludes the Court from considering a change to the application unless it is only a minor change, it does not require the Court to permit an appeal to proceed based on a minor change. The Court retains a residual discretion.
- [28] Here, Shun submits that, in the exercise of the Court's discretion, Centa's application should be refused for five reasons. First, it says there is a disconnect between the conditions proposed by Shun to limit the operation of the supermarket and the changes to the plan. The condition proposed by Shun focuses on countries in East, South, or Southeast Asia whereas the changes to the plan appear to refer only to the supermarket being "*Asian themed*" which would incorporate Asia more broadly. Second, it says the notion of a supermarket being "*Asian themed*" is vague and uncertain and changing the plans to include these words has no real regulatory force or impact unless accompanied by conditions which can be enforced, which it says is not the case here. Third, Shun submits that the fact that the change would only result in further uncertainty (about the nature of an "*Asian themed*" supermarket) is a discretionary reason as to why the Court should decline to allow the appeal to proceed based on the minor change. Fourth, Shun submits that the proposed change is actually seeking to change the operation of use definitions within the Planning Scheme by restricting the effect of the use definition for a "*shop*". It says there is a genuine legal question as to whether the Court can grant a development approval that has the effect of altering the definition of uses found within a statutory instrument absent an application to vary the effect of the Planning Scheme. The fifth reason advanced is that the request for the change was made very late in the proceeding. The first four reasons advanced by Shun are all matters that it also relies on to say the development application (if changed) should be refused.
- [29] Here, the application to change the development application is very late. However, there is no material prejudice occasioned by the late application. The expert evidence in the proceeding focussed in large measure on the potential operation of the supermarket as an "*Asian themed*" supermarket. The proposed change caused no disruption to the hearing, nor did it necessitate any further evidence. As such, I would not refuse the application on that basis.
- [30] I am not satisfied that the other reasons advanced by Shun warrant refusal of Centa's application in pending proceeding. They relate to the merits of the changed development application and they are more appropriately considered in that context.
- [31] In the circumstances, I am satisfied that it is appropriate to permit Centra to proceed on its changed development application. I will determine the appeal on that basis.

**What are the issues to be determined?**

- [32] The parties have distilled the issues to be determined into five questions.<sup>11</sup>
1. Does the proposed development involve an unacceptable departure from the planning strategy for specialised centres?
  2. Does the proposed development involve an unacceptable departure from the planning strategy for new or expanded centres?
  3. Does the proposed development involve an unacceptable departure from the centre hierarchy planning strategy?
  4. Are there relevant matters that support approval of the proposed development?
  5. Is the condition proposed by Centa lawful or appropriate?

- [33] The first three questions reflect the real issues that arise between the parties in relation to the assessment of the proposed development against the relevant assessment benchmarks.

**What are the relevant assessment benchmarks?**

- [34] Section 5.3.3 of the Planning Scheme requires impact assessable development to be assessed against the whole Planning Scheme, to the extent relevant. Here, the parties are to be commended for confining the list of relevant Planning Scheme provisions to those which reflect the real issues between the parties and on which the outcome of the appeal will likely turn, namely:
- (a) s 3.5.1(1)(c) and (f), 3.5.7.1(a), (b), (c) and (d) and s 3.5.8.1(1)(a) and (b) of the Strategic framework; and
  - (b) s 6.2.15.2(2)(a) and (b), s 6.2.15.2(3)(a)(iv) and (h)(i) and (ii), and performance outcomes PO1 and PO2 of the Specialised Centre Zone Code.
- [35] The parties disagree about the proper construction of these provisions, and about whether the proposed development complies with them.

**Does the proposed development involve an unacceptable departure from the planning strategy for specialised centres?**

- [36] Shun alleges that the proposed development involves an unacceptable departure from the planning strategy for specialised centres. It says that is evident when the proposed development is assessed against:
- (a) s 3.5.7.1(1)(a), (b), (c) and (d) of the Strategic framework; and
  - (b) s 6.2.15.2(2)(a) and (b), s 6.2.15.2(3)(a)(iv) and (h)(i) and (ii), and performance outcomes PO1 and PO2 of the Specialised Centre Zone Code.

---

<sup>11</sup> The parties are to be commended for their approach in distilling the issues. They confined the issues in a manner that required the Court to assess the proposed development only against those small number of Planning Scheme provisions on which the outcome of the appeal would turn.

***What are the relevant requirements for specialised centres?***

- [37] The Strategic framework sets the policy direction for the Planning Scheme. It forms the basis for ensuring appropriate development occurs in the Planning Scheme area for the life of the Planning Scheme.
- [38] The Strategic framework includes provisions that explain the city-wide strategic intent. It also sets out strategic outcomes, collected under 11 themes, which collectively represent the policy intent of the Planning Scheme.
- [39] With respect to centres, the strategic intent is to have a hierarchy and network of interrelated centres; and centres are intended to be vibrant, accessible, and integrated places.<sup>12</sup> This strategic intent is reiterated in the strategic outcome for the Centres Theme in s 3.5.1. The hierarchy aspect is dealt with in s 3.5.1(1), which provides:
- “(1) Logan has a hierarchy and network of interrelated centres comprising:
- (a) principal centres, being Beenleigh and Springwood that are the dominant centres in Logan;
- (b) major centres, being Browns Plains, Jimboomba, Logan Central, and Shailer Park that complement and are subordinate to the principal centres;
- (c) district centres, being Marsden, Meadowbrook, Park Ridge, and Underwood that complement and are subordinate to the principal centres and major centres;
- (d) local centres that complement and are subordinate to the principal centres, major centres and district centres;
- (e) neighbourhood centres that complement and are subordinate to the principal centres, major centres, district centres and local centres;
- (f) specialised centres that complement principal centres, major centres and district centres.”
- [40] This strategic outcome is refined and further described by specific outcomes that relate to each of the Elements for the Theme. Each of s 3.5.2, s 3.5.3, s 3.5.4, s 3.5.5, s 3.5.6, and s 3.5.7 adopts a similar structure. They contain the specific outcomes for the Elements of Principal centre, Major centre, District centre, Local centre, Neighbourhood centre, and Specialised centre respectively.
- [41] Sub-paragraph (1)(a) in each of those provisions defines the role of the centre as compared to other centres in the hierarchy. For example, s 3.5.2.1(1)(a) stipulates that principal centres at Beenleigh and Springwood are vibrant, accessible and integrated centres that are the dominant centres in Logan. In a similar vein, s 3.5.3.1(1)(a) states that major centres at Browns Plains, Jimboomba, Logan Central and Shailer Park are vibrant, accessible and integrated centres that are

---

<sup>12</sup> See s 3.2.3 of the Planning Scheme.

subordinate to principal centres. Relevantly, specialised centres complement principal centres, major centres and district centres.

[42] The intended function of each centre, in terms of the uses each type of centre is to accommodate, is outlined in sub-paragraph (1)(c) of the respective sections. The principal centres, major centres, district centres, local centres, and neighbourhood centres are to accommodate principal centre activities, major centre activities, district centre activities, local centre activities and neighbourhood centre activities respectively. Section 3.5.7.1(1)(c) stipulates that the specialised centres are to accommodate “*a specific range of uses*”. Section 3.5.7.1(1)(d) states specialised centres “*do not accommodate supermarkets or other convenience Retail activities*”.

[43] From those parts of the Planning Scheme that were tendered, it is apparent that the applicable zone code provides further guidance about those uses that are anticipated in each centre and their intended scale. For all types of centres other than a specialised centre, the Centre zone code provides the relevant guidance. In relation to a specialised centre, relevant guidance is in the Specialised centre zone code.<sup>13</sup>

[44] The Specialised centre zone code is a relevant assessment benchmark for almost every development application seeking a development approval to make a material change of use of land in the Specialised centre zone.<sup>14</sup> Sections 6.2.15.2(1) and (2) record the purpose of the Specialised centre zone code. They state:

“(1) The purpose of the Specialised centre zone code provides for one (or more) specialised uses.

(2) The local government purpose of the Specialised centre zone code is to:

(a) compliment principal centres, major centres and district centres;

(b) provide:

(i) a specific range of principal centre activities; or

(ii) a specific function.”

[45] Section 6.2.15.2(3) stipulates that the purpose of the Specialised centre zone code will be achieved through the overall outcomes. There are common design overall outcomes for all of the built form in the Specialised centre zone. Across all precincts, s 6.2.15.2(3)(a)(iv) requires the design of the built form be able to “*accommodate a range of tenancy sizes that facilitates the zone functioning as a business incubator*”. The uses that are anticipated to provide the business incubator function, and the intended scale of those uses, differ across the six identified precincts that make up the Specialised centre zone.

---

<sup>13</sup> It is not clear whether there is also guidance elsewhere in the Planning Scheme as a copy of the relevant version of the Planning Scheme was not tendered. I would have expected that either Centa (as the party with the onus) or the Council (as the responsible local government authority) would have placed the relevant document before the Court. I invited further submissions about how the Planning Scheme should be construed in absence of the entire document. On 28 May 2020, Centa elected to tender further limited extracts of the Planning Scheme.

<sup>14</sup> Its application is identified in s 6.2.15.1 of the Planning Scheme. It is determined by reference to the Tables of Assessment in Part 5. It is not listed as an applicable code for Home based business or Sales office.

[46] Here, the subject land is in the Underwood business precinct of the Specialised centre zone. That precinct is dealt with by the overall outcome in s 6.2.15.2(3)(h), which states:

- “(h) in the Underwood business precinct:
- (i) land uses comprise:
    - (A) Adult store, Agricultural supplies store, Bar, Car wash, Caretaker’s accommodation, Child care centre, Club, Community care centre, Community use, Educational establishment, Emergency services, Food and drink outlet, Function facility, Funeral parlour, Garden centre, Hardware and trade supplies, Health care services, Home based business, Hospital, Hotel, Indoor sport and recreation, Low impact industry, Multiple dwelling being an apartment, Outdoor sales, Parking station, Place of worship, Retirement Facility, Sales office, Service industry, Service station, small-scale Shop, Showroom, Short-term accommodation, Veterinary services or Warehouse;
  - (ii) a Shop does not undermine the viability of a nearby centre or the centre hierarchy;
  - (iii) Low impact industry, being vehicle repairs is an incidental use to Outdoor sales or Showroom.”

[47] Performance outcome PO1 also contains requirements for land uses in the Specialised centre zone. It requires a use in the Specialised centre to be for “*uses identified in section 6.2.15.2(3)(h)(i) overall outcomes for the Underwood business precinct*”. Acceptable outcome AO1 is framed in identical terms.

[48] Where the proposed use is a shop, that use is further regulated by performance outcome PO2, which states:

- “Other than in the Old Chatswood Road precinct, a Shop
- (a) is small scale;
  - (b) does not undermine the viability of a nearby centre.”

[49] Acceptable outcome AO2 states:

- “Other than in the Old Chatswood Road precinct, a Shop:
- (a) has a maximum gross floor area of 200m<sup>2</sup> per tenancy;
  - (b) is not within 800 metres of another Shop.”

[50] The issue of compliance with these provisions calls for consideration of four questions.

1. Are the proposed uses contemplated in the Specialised centres zone?

2. Would the proposed development complement the existing district centre?
3. Would the proposed development undermine the viability of the Underwood district centre or centres hierarchy?
4. Is the design of the built form appropriate?

***Are the proposed uses contemplated in the Specialised centres zone?***

- [51] The proposed development seeks to establish multiple dwellings, food and drink outlets, function facility, offices, health care services, shops and shopping centre as each of those terms are defined in the Planning Scheme. The proposed “*Asian themed*” supermarket fits within the definition for a “*Shop*”, which is defined as “*premises used for the display, sale or hire of goods or the provision of personal services or betting to the public*”. Further, supermarket is one of the listed examples in the definition for shop.
- [52] Centa and the Council concede that the office and shopping centre components of the proposed development are not uses contemplated in the Specialised centre zone. The concession is appropriate. Those components of the proposed development do not comply with the planning strategy reflected in s 3.5.7.1(1)(c) of the Strategic framework or s 6.2.15.2(2)(b), s 6.2.15.2(3)(h)(i), and performance outcome PO1 of the Specialised centre zone code. The proposed supermarket is also discordant with the planning policy in s 3.5.7.1(1)(d) of the Strategic framework, which makes it clear that it is not the function of specialised centres to accommodate supermarkets and other convenience retail activities.
- [53] The Council submits that the proposed shops, other than the supermarket, are contemplated in the Specialised centre zone because s 6.2.15.2(3)(h)(i) and performance outcome PO1 of the Specialised centre zone code permit small-scale shops. Further, it says that in circumstances where the proposed supermarket (and the proposed development as a whole) would have no unacceptable impact on the viability of nearby centres or the centres’ hierarchy generally, the proposed supermarket is a use permitted by s 6.2.15.2(3)(h)(ii). It submits that, consequently, it is of no moment that it is not contemplated by s 6.2.15.2(3)(h)(i). In addition, the Council says the non-compliance with performance outcomes PO1 and PO2 of the Specialised centre zone code occasioned by the proposed supermarket is of limited relevance because, pursuant to s 5.3.3 of the Planning Scheme, non-compliance with a performance outcome does not necessarily equate to non-compliance with the code as a whole.
- [54] There is no definition of “*small-scale*” in the Planning Scheme. It should be given its ordinary meaning consistent with the context in which it appears. Here, there are two relevant contextual matters. First, acceptable outcome AO2 of the Specialised centre zone code permits a shop that has a maximum gross floor area of 200 square metres per tenancy. This provision provides guidance because s 5.3.3 of the Planning Scheme indicates that development that complies with the purpose and overall outcomes of a code complies with the code, and that development that complies with the performance or acceptable outcomes complies with the purpose and overall outcomes of the code. Second, in the Table of Assessment for the Specialised centre zone, a gross floor area of 200 square metres is used as a measure that determines whether a development application for a shop (other than in the Old

Chatswood Road precinct) will require code assessment or impact assessment. An application will be code assessable if the gross floor area is 200 square metres or less, and otherwise it will be impact assessable.

- [55] The kiosk of 13 square metres and the two shop areas on level 1 having areas of 67 square metres and 153 square metres could fairly be described as small-scale shops in light of the Planning Scheme context referred to above. I am not satisfied that the supermarket and the largest of the three shops, which has an area of 337 square metres, are small-scale. Despite that, I do not regard any of those components of the proposed development as compliant with s 6.2.15.2(3)(h)(i) and performance outcome PO1 of the Specialised centre zone code. This is because they are properly regarded as part of the “*shopping centre*” use. This outcome would be equally likely if the 337 square metre “*Shop*” was divided into tenancies of less than 200 square metres, as Mr Schomburgk suggested it might be.
- [56] The Planning Scheme defines “*Shopping centre*” as:
- “premises comprising two or more individual tenancies that is comprised primarily of shops and that function as an integrated complex”.
- [57] This definition is apt to describe the use depicted on the plan for level 1 of the proposed development. The plan shows that the proposed “*Asian themed*” supermarket of 3 002 square metres will be co-located with three other spaces that are designated for use as “*shops*”, a central kiosk and toilet facilities. The architectural perspectives depicting the proposed development show that level 1 comprises two or more individual tenancies that are primarily shops. The perspectives present them as an integrated complex.
- [58] For the reasons provided in paragraphs [55] to [57] above, I do not accept the uses on level 1 are appropriately regarded as shop uses, nor are they permitted pursuant to s 6.2.15.2(3)(h)(ii). They comprise the shopping centre sought by the development application.
- [59] Further, s 6.2.15.2(3)(h)(ii) does not open the door to land uses not otherwise listed in s 6.2.15.2(3)(h)(i). Properly construed, the requirements in s 6.2.15.2(3)(h)(i) and (ii) are cumulative. This is made clear by s 1.3.31(1) of the Planning Scheme, which stipulates that a word followed by “;” is considered to be “*and*”. As such, a land use must comprise one of the listed uses, which includes a “*small-scale shop*” but not a “*shop*”, and a “*shop*” must not undermine the viability of a nearby centre or the centre hierarchy.
- [60] This construction is consistent with the use of the word “*comprise*” (being a word of limitation) at the commencement of s 6.2.15.2(3)(h)(i) and the absence of the words “*Land uses comprise*” at the commencement of s 6.2.15.2(3)(h)(ii).
- [61] The performance outcomes and acceptable outcomes in the code also support this construction. Performance outcome PO1 and acceptable outcome AO1 each require a use in the Underwood business precinct of the specialised centre to be one of those uses identified in s 6.2.15.2(3)(h)(i): they do not refer to those uses listed s 6.2.15.2(3)(h)(ii) as an exception or as uses to be permitted.

- [62] In addition, performance outcome PO2, which relates to shops, similarly contains two cumulative requirements. It requires that a shop is small scale and does not undermine the viability of a nearby centre.
- [63] Acceptable outcome AO2 does not contain a requirement about the viability of a nearby centre, but it does require a shop to have a maximum gross floor area of 200 square metres per tenancy. It also stipulates that a shop is not within 800 metres of another shop. The separation requirement would minimise the prospect that a series of independent shops of less than 200 square metres might locate in close proximity and thereby undermine the viability of a nearby centre. As such, the acceptable outcome also supports construing s 6.2.15.2(3)(h)(i) and (ii) as containing cumulative requirements.
- [64] For the reasons provided above, the office use and the shopping centre use (comprising the supermarket, shops and kiosk on level 1 of the proposed development) are not uses contemplated in the Specialised centres zone.

***Would the proposed development complement the existing district centre?***

- [65] The requirement for Specialised centres to “*complement*” principal centres, major centre and district centres is a consistent theme that appears in the Strategic framework’s strategic outcomes for Centres generally, the specific outcomes for the Specialised centre element and in the purpose for the Specialised centre zone code.<sup>15</sup>
- [66] The Planning Scheme does not define “*complement*”. The Macquarie dictionary defines “*complement*” as “*something that completes or makes perfect*”.
- [67] Although the requirement to “*complement*” should be given its ordinary meaning, the meaning should also be consistent with the context in which it appears. Here, it is apparent from the context that complementarity is intended to be achieved by the provision of uses of a particular nature and by ensuring that, where the uses include a shop, the shop is not a supermarket and the shop does not undermine the viability of a nearby centre.
- [68] The list of uses encouraged in the Specialised centre zone varies (depending on the precinct in which the land is located). However, there are certain uses that are not contemplated in any precinct of the Specialised centre zone. They are Air services, Animal husbandry, Animal keeping, Aquaculture, Brothel, Bulk landscape supplies, Cemetery, Community residence, Detention facility, Dual occupancy, Dwelling house, Dwelling unit, Extractive industry, High impact industry, Intensive animal industry, Intensive horticulture, Major electricity infrastructure, Medium impact industry, Motor sport facility, Nightclub entertainment facility, Non-resident workforce accommodation, Outstation, Park, Permanent plantation, Relocatable home park, Residential care facility, Roadside stall, Rooming accommodation, Rural industry, Shopping centre, Special industry, Substation, Telecommunications facility, Transport depot, and Utility installation. Uses of this character are unlikely, by their nature, to complement other centres in the Centre hierarchy. This includes shopping centres as the provision of a shopping centre in a Specialised centre zone

---

<sup>15</sup> Having regard to the context in which it appears and the other provisions, I am satisfied that the reference to “*compliment*” in the purpose of the Specialised centre zone code should be a reference to “*complement*”.

has the potential to undermine the Centre hierarchy rather than improve or complete it.

- [69] The proposed office use and the proposed shopping centre use (comprising the supermarket, shops and kiosk on level 1 of the proposed development) are not uses contemplated in the Specialised centres zone. As such, the proposed development does not accord with the planning intent that specialised centres “*complement*” principal centres, major centre and district centres. In paragraphs [99] to [107] below, I consider whether the proposed development will undermine the viability of the nearby centre Underwood district centre.
- [70] Even if the requirement for complementarity was not to be construed in the manner identified in paragraph [67] above, I am not otherwise persuaded that the proposed development complements the existing Underwood district centre for the reasons that follow.
- [71] The Underwood district centre comprises the Underwood Central shopping centre (also known as the Homemaker HQ Centre), a childcare centre, the Underwood Marketplace shopping centre, and Hotel HQ.
- [72] The Underwood Central shopping centre presently improves that part of Lot 1 on SP 257567 that is not the subject of the development application. It is a single storey development with a gross floor area of approximately 5 600 square metres. It includes an Aldi supermarket, Hanaro Mart (an Asian grocery store), medical centre, pharmacy, a Beacon lighting outlet, and a number of cafes and food outlets. The childcare centre is also located on Lot 1.
- [73] The Underwood Marketplace shopping centre is located at the intersection of Logan Road and Kingston Road and adjoins the northern boundary of Lot 1. It is a shopping centre anchored by Woolworths and Big W with supporting specialty shops. (Shun is the owner of that centre.)
- [74] Hotel HQ is a tavern located to the east of Lot 1, between the Underwood Central shopping centre and Kingston Road.
- [75] Each of the town planners and economists gave evidence about the proposed development and whether, in their opinion, it would improve the offer available at the existing Underwood district centre.
- [76] Mr Schomburgk, the town planner retained by Centa, opines that the proposed development as a whole will complement the adjoining Underwood district centre. He says it will do so by adding to the mix of retail offerings and providing additional activity and vitality, as well as providing on-site security and safety with permanent residential uses on-site.
- [77] Mr Ovenden, the town planner retained by the Council, opines that the proposed development complements the adjoining District centre zone through its proximity to land in that zone and the opportunity to integrate both physically and functionally. He also notes that a range of residential and commercial uses, such as the office component, health care services and function facility, are not provided in the Underwood district centre.

- [78] Mr Buckley says whether a use complements the Underwood district centre will turn on many provisions of the Planning Scheme. He says the physical proximity of the subject land to the Underwood district centre is of itself insufficient to warrant approval. He says specialised centres are quite different to conventional centres and the intended mix of uses is very different. They are not intended to include a supermarket.
- [79] Ms Meulman, the economist retained by Centa, considers that the proposed development will complement and provide a complementary shopping experience to other existing facilities within the Underwood district centre. She says the proposed development will contain a mix of uses that will enable it to function in a similar manner to Sunnybank and Chatswood. She says that the mix of activities and facilities in centres at Sunnybank and Chatswood demonstrate that a mix of Asian supermarkets, grocery and specialty stores complements and is complemented by other more traditional retailing forms, including the Coles and Woolworths supermarkets. For example, Ms Meulman says that the Asian supermarkets and grocery stores in Sunnybank together comprise 5 000 square metres of floor space, providing a diverse array of product lines, departments, experiences and cuisine style that add to the mix otherwise offered by the various specialist fresh food outlets and the Woolworths and Coles supermarkets. In addition, Ms Meulman says the proposed development and its mix of uses including residential population will contribute to the overall viability and vibrancy of the Underwood district centre by contributing both residential and working populations within the centre, as well as attracting expenditure that is otherwise escaping to other centres.
- [80] Mr Stephens, the economist retained by the Council, says that although some limited Asian-based grocery shopping is available at Underwood, this is not of a scale or diversity that is comparable to other nearby centres including Runcorn, Sunnybank and Pinelands. He opines that the proposed development includes retail and commercial functions that represent a sensible extension of the Underwood district centre.
- [81] Mr Duane, the economist retained by Shun, opines that Yuen's Fresh Market, Hanaro Mart and High Fresh Asian Supermarket, which are co-located with the Aldi in the Underwood Central shopping centre, presently cater for the Asian demographic. He says the present offer is sufficient to meet the needs of the residents of the region.
- [82] For the reasons provided in paragraphs [65] to [69] above, I prefer the evidence of Mr Buckley to that of Mr Schomburgk and Mr Ovenden. Further, and in any event, I do not find the opinions of Mr Schomburgk, Mr Ovenden, Ms Meulman and Mr Stephens about the complementary nature of the proposed development to be persuasive for each of the following five reasons.
- [83] First, the opinions expressed by each of Mr Schomburgk, Mr Ovenden and Ms Meulman are premised on their view that the proposed development would add to the mix of retail offerings because it will introduce an "*Asian themed*" supermarket.
- [84] Having regard to Ms Meulman's evidence, I am satisfied that the offer available at retail stores such as Sunlit at Garden City, Hanaromart at Garden City and

Sunnybank, Fresco at Sunnybank, and Hi-Fresh at Sunnybank adds to the range of goods otherwise available to the community through retailers such as Coles and Woolworths. For example, those other operators stock live seafood, and meat cuts such as duck heads and chicken feet. They also stock a significant range of dry goods that Ms Meulman describes as “*Asian branded product lines*”, which are not otherwise available at Coles, Woolworths or Aldi. Nevertheless, I am not persuaded that the proposed development will add to the mix of retail offerings.

- [85] The economists agree that Underwood presently includes a range of specialty and destination food retailers. They include:
- (a) the Halal Butcher in Underwood Marketplace shopping centre;
  - (b) Yuen’s Fresh Market, Hanaro Mart and Hi-Fresh Asian supermarket in the Underwood Central shopping centre;
  - (c) retailers fronting Logan Road in the Specialised Centre and Mixed Use zones, including Big Gun Wholesale Meats, Underwood Seafood Market, Big Gun Growers Market, World of Lollies and Global Convenience; and
  - (d) Shiv Shakti Indian supermarket at 2800 Logan Road, Underwood.
- [86] Hanaro Mart in the Underwood Central shopping centre has an area of 839 square metres. The town planners describe it as “*an Asian grocery store*”. The High Fresh Asian Supermarket has an area of 238 square metres.
- [87] The evidence of the economists is consistent with that of Mr Buckley, the town planner retained by Shun. He undertook a site inspection shortly prior to the production of the Second Joint Experts Report – Town Planning. On that site inspection, he observed that within the Underwood Market Place shopping centre there are already food tenancies that respond to the local socio-demographic circumstances of the locality, with the butcher and two of the convenience food outlets highlighting Halal meat preparation. He also notes that there are two “*Asian-themed*” supermarkets at the Underwood Central shopping centre. In addition, there is a Fresha Supermarket across Kingston and Logan Roads in the “*Big Gun*” strip of shops. It contains marked “*Asian product*”. Mr Buckley also notes the presence of the Pakistani/Indian/Sri Lankan/Bangladeshi supermarket (known as “*Shiv Shakti*”) in a strip of shops near the corner of Fermont Road and Logan Road (approximately one kilometre from the subject land).
- [88] This evidence about the present offer available at Underwood does not sit comfortably with the assertions of Mr Shomburgk, Mr Ovenden and Ms Meulman that the proposed development will add to the retail mix. As such, I do not find their opinions to be persuasive. Ms Meulman does not provide any indication of the nature and range of products that are available at the identified “*specialty and destination food retailers*” and the existing “*Asian themed*” supermarkets in order to explain why the offer is sub-optimal, nor does she identify how the proposed development will complement the mix available from those retailers.
- [89] Second, I am not persuaded that the proposed development is necessary to enable the Underwood district centre to function in a similar manner to Sunnybank, that is as a centre with a mix of Asian supermarkets, grocery and specialty stores that complements and is complemented by other more traditional retailing forms. In this respect, both Ms Meulman and Mr Stephens, the economist retained by the Council,

appear to place significant store in the fact that Sunnybank offers about 5 000 square metres of retail space that they regard as “*Asian themed*”.

- [90] I do not accept the evidence of Mr Stephens that the Asian-based grocery shopping available at Underwood is not of a scale or diversity that is comparable to other nearby centres, nor am I prepared to infer that the extent of offer at Underwood is sub-optimal based on the evidence of Ms Meulman and Mr Stephens. Neither Ms Meulman nor Mr Stephens has provided sufficient information to satisfy me of the fundamental soundness of their opinions. As it stands, their analysis appears to lack appropriate rigour. For example, they do not adequately explain why an offer of about 5 000 square metres at Sunnybank across a range of smaller sized stores demonstrates that the present offer at Underwood, that is similarly provided across a number of smaller stores, is inadequate. They do not identify the quantum of the existing offer at Underwood: they have not identified the floor space of many of the retailers that they agree are “*specialty and destination food retailers*”. They also do not provide useful comparative data, such as the relative percentage of “*Asian themed*” grocery retailers to other grocery retailers at Sunnybank, nor analyse how that percentage compares to the relative representation at Underwood. Ms Meulman notes that, in 2016, 20 per cent of the residents of Underwood were Asian born as compared to 35 per cent at Sunnybank. However, neither she nor Mr Stephens provide other data that allows one to assess the comparability of the scenario at Sunnybank, such as information about the overall population numbers in the Sunnybank catchment. As such, I am not persuaded that the extent of the retail offer at Sunnybank, or at other locations referred to by Ms Meulman, provides any useful guide as to the appropriate extent of “*Asian themed*” grocery floor space, let alone supports approval of the proposed development.
- [91] Third, to the extent that Mr Shomburgk, Mr Ovenden, Ms Meulman and Mr Stephens seek to rely on the introduction of a “*full-line Asian supermarket*” to justify their opinions, I do not find their evidence compelling. It does not accord with other evidence that I accept. This includes the observations of the economists that Asian grocery stores or supermarkets are typically between 350 and 700 square metres; the evidence of Ms Meulman that they tend to co-locate with the major supermarket chains; and the evidence of Mr Duane that Asian supermarkets are typically very small in size and usually less than 1 500 square metres. I am not assisted by reference to the experience overseas, particularly absent any comparative analysis in terms of population numbers and demographics.
- [92] I prefer the evidence of Mr Duane on this issue. He notes that there are no examples in Australia of an “*Asian themed*” supermarket in the order of 3 000 square metres. His review of areas with a high proportion of Asian-born residents, such as Hurstville, Chatswood and Eastwood in Sydney, shows that the population levels within a three-kilometre radius of those centres are much higher than within three kilometres of Underwood (being over 30 000 Asian-born residents in each instance versus 12 000 at Underwood). Even those areas that are more highly populated with Asian-born residents do not have an “*Asian themed*” supermarket of greater than 3 000 square metres. That does not demonstrate that, in due course, there will not be a retail entity prepared to operate an “*Asian themed*” supermarket in the order of 3 000 square metres. However, given the absence of such an entity and the already identified inadequacies of the evidence of Ms Meulman and Mr Stephens, it is not clear to me how the proposed “*Asian themed*” supermarket would improve the existing offer at the Underwood district centre.

- [93] The lack of clarity is compounded by the absence of an identified operator who might have otherwise explained what the proposed “*Asian themed*” supermarket would offer that was not otherwise available at the Underwood district centre. The evidence of Mr Yuen does not assuage my concerns in this regard.
- [94] Mr Yuen is a director of Centa. He has considerable experience as a developer. He was involved in the development of Chinatown at Fortitude Valley, Market Square Shopping Centre at Sunnybank and Mermaid Waters Shopping Village. I accept that he has experience in repositioning retail centres to provide an “*Asian themed*” retail offer, and that his intentions to provide such an offer through the proposed development is genuine. However, he made it clear that he has no intention of operating the supermarket itself. As such, I do not find his evidence about what the proposed “*Asian themed*” supermarket will offer to be persuasive. To the contrary, having read Mr Yuen’s statement and listened to his oral testimony, I was left with the distinct impression that Centa does not have a clear and committed vision for any of the retail components of the proposed development. My impression in this regard was reinforced by the various reports prepared by Ms Meulman throughout the development application process and the varied way in which they described and analysed the development intended for the subject land.
- [95] The lack of clarity with respect to the offer that will be available at the proposed supermarket as compared to those goods presently available at Underwood also causes me to doubt Ms Meulman’s opinion that the proposed development will attract expenditure that is otherwise escaping to other centres.
- [96] Fourth, the evidence of Mr Ovenden is not compelling. Mr Ovenden does not address the relevant question: his opinion relates to whether the proposed development complements the zone, rather than the existing district centre. Proximity and physical and functional integration increase the likelihood that development of the subject land for uses that add to the present mix and have a synergy with those that exist will result in a development that complements the Underwood district centre. However, whether the proposed uses do complement the existing centre is a question of fact that must be determined having regard to their particular attributes. I have already addressed why I am not persuaded that the proposed development adds to the existing mix of uses.
- [97] Fifth, I accept that the residential population will contribute to the overall viability and vibrancy of the area. This is not of itself sufficient. There is no controversy about the residential component: only about the non-residential component. The vitality and vibrancy added by the introduction of the residents does not demonstrate that the retail component of the proposed development will complement the existing Underwood district centre. The retail component is a significant component of the overall proposed development. For reasons provided in paragraphs [99] to [107] below, it has the potential to detract from any positive support provided by increased vibrancy through the introduction of a residential population.
- [98] For the reasons provided above, I am not satisfied that the proposed development will complement the existing district centre.

***Would the proposed development undermine the viability of the Underwood district centre or centres hierarchy?***

- [99] On the issue of the potential impact on the viability of the existing Underwood district centre, I had the assistance of evidence from the economists.
- [100] In her individual report, Ms Meulman opines that the proposed development will not have an undue level of impact on the performance and role of the Underwood Marketplace shopping centre nor on the Underwood district centre overall. (She does not say that the proposed development would not have an undue level of impact on the Underwood Central shopping centre. She is silent as to the acceptability of the assumed impact on that centre.) One of the key assumptions that informs Ms Meulman's opinion is that the proposed "*Asian themed*" supermarket will result in retaining expenditure in the centre that may otherwise be escaping to other centres. It is apparent from Ms Meulman's individual report that her assumption in this regard is informed by her observations in centres such as Sunnybank and Chatswood. Her opinion is also predicated on her view that the proposed development will not replicate the offer presently available at the Underwood district centre but would introduce a range of facilities and services that would complement those that presently exist.
- [101] Mr Stephens is in broad agreement with Ms Meulman's impact analysis. He opines that if the level of provision of "*Asian themed*" grocery shopping is maintained consistent with the current provision, the Underwood district centre will continue to lose visitation and sales to nearby centres that have a more comprehensive Asian food offer. This proposition assumes that nearby centres have a more comprehensive Asian food offer and that there is a present loss of visitation and sales to those nearby centres for that reason. Mr Stephens also opines that up to 30 per cent of the business for the proposed development would represent a redistribution from the Underwood Marketplace shopping centre and that up to 20 per cent would involve a redistribution for the balance of the Underwood district centre. He considers that this level of impact is in the upper limit of reasonable expectations of traders operating within the Underwood district centre.
- [102] Mr Duane opines that around 55 per cent of centre sales would come from facilities within Underwood. He predicts that there will be an impact of 12.5 per cent on the Underwood Marketplace shopping centre and an impact of 17.5 per cent on the Underwood Central shopping centre. He says these would be high impacts. It involves the redirection of close to \$9.8 million in sales away from Underwood Marketplace shopping centre and close to \$7.3 million in sales away from Underwood Central shopping centre. Mr Duane's opinions reflect his assumptions that the proposed "*Asian themed*" supermarket will compete with the existing Woolworths full-line supermarket and that it will also compete with Yuen's market and the other Asian grocers in the Underwood Central shopping centre. He says the proposed redirection of spending could affect the ongoing viability of some of the existing traders in the District centre zone. For example, he says Hanaro market would likely find it difficult to compete with the proposed development because of the proposed product mix for the "*Asian themed*" supermarket and its proximity to Hanaro market.
- [103] I prefer the evidence of Mr Duane to that of Ms Meulman and Mr Stephens for the reasons that follow.

[104] Ms Meulman and Mr Stephens do not provide sufficient information to satisfy me of the soundness of their assumptions and, accordingly, of their opinions. For example, Ms Meulman does not provide details about the depth and breadth of the offer that is presently available from retailers in the Underwood district centre, nor identify with particularity the manner in which that offer is inadequate or sub-optimal. Similarly, Mr Stephens does not provide information sufficient to allow me to test the soundness of his opinion that nearby centres have a more comprehensive Asian food offer. I also do not accept the opinions of Ms Meulman and Mr Stephens for the reasons provided in paragraphs [82] to [97] above. In addition, I do not accept that a trader who has located in the Underwood district centre should reasonably expect to have up to 20 or 30 per cent of their sales redistributed to a supermarket located in a Specialised centre zone, given the policy position outlined in s 3.5.7.1(1)(d) of the Planning Scheme. I do not hold similar reservations about the evidence of Mr Duane.

[105] Mr Duane's assumption that the proposed supermarket will compete, to some extent, with the existing Woolworths full-line supermarket is reasonable given the condition proposed by Centa to regulate the product mix that might be offered at its proposed "*Asian themed*" supermarket. It is apparent from the condition that it is Centa's intent that the proposed "*Asian themed*" supermarket will be permitted to sell goods that are also available at the existing Woolworths. The condition states:

- “1. The Supermarket on Level 1 of plan SD-101 Revision R dated Jan 2017 must operate as an Asian Themed Supermarket.

Asian Themed Supermarket – means a supermarket carrying packaged stock more than 70% of which bears language from a country in East, South or Southeast Asia. The packaged stock may also bear the English language. Other stock and goods will include frozen and packaged grocery items, dried food (including beans, legumes, seeds, herb spies and preserved condiments), fresh produce, prepared meals and Asian packaged meat products, Asian drinks, Asian baked goods, Asian butcher carrying specific meat cuts (including duck, duck heads, chicken feet, chicken livers, pig kidneys), live and frozen seafood, imported Asian beauty and cosmetic products and a range of imported Asian cookware and homeware items. The Supermarket may also include a speciality Asian bakery, Asian deli, Sushi bar, Chinese BBQ or other Asian food.

2. Prior to the commencement of the use of the Supermarket, a plan showing the supermarket floor layout is to be provided to the Council.
3. Upon the reasonable request from Council, the owner or operator of the Asian Themed Supermarket must provide to Council a stock inventory list and report showing the packaged stock and the percentage of that packaged stock which bears language from a country in East, South or Southeast Asia (whether or not that packaged stock also bears the English language).”

[106] Mr Duane’s assumption about competition with Yuen’s market and the other Asian grocers in the Underwood Central shopping centre is also reasonable. It accords with the evidence of all of the economists that Underwood Central includes a range of specialty and destination food retailers, and the evidence of Mr Stephens that there will be a redistribution of sales from the existing “*Asian themed*” retailers in the Underwood district centre.

[107] For the reasons provided above, Centa has not demonstrated that the retail component of the proposed development would not undermine the viability of a nearby centre. As such, even if my views about the proper construction of s 6.2.15.2(3)(h)(ii) in paragraphs [58] to [63] above are incorrect, Centa has not otherwise demonstrated compliance with that provision.

***Is the design of the built form appropriate?***

[108] Shun submits that while the expression “*business incubator*” is not defined in the Planning Scheme, it is not an invitation to place a supermarket in the Specialised centre zone. This was the extent to which the case raised by Shun relied on s 6.2.15.2(3)(a)(iv). Shun does not allege that the design of the built form of the proposed development is not able to accommodate a range of tenancy sizes that facilitate the zone functioning as a business incubator.

[109] Mr Schomburgk gave evidence that he understands the term “*business incubator*” to mean tenancy sizes that allow small businesses (including retail) to set up and grow such that they might expand and/or relocate over time. Whether or not the business incubator is intended to include retail businesses, I am satisfied that the built form design, as opposed to the uses proposed within that built form, is such that it could accommodate a range of tenancy sizes that would, with appropriate uses, facilitate the zone functioning as a business incubator.

***Conclusion regarding the planning strategy for specialised centres***

[110] For the reasons provided in paragraphs [36] to [109] above, Centa has not demonstrated that its proposed development accords with, or does not involve an unacceptable departure from, the planning strategy for specialised centres.

***Does the proposed development involve an unacceptable departure from the planning strategy for new or expanded centres?***

[111] Shun alleges that the proposed development involves an unacceptable departure from the planning strategy for new or expanded centres. It says that is evident when the proposed development is assessed against s 3.5.8.1(1)(a) and (b) of the Strategic framework.

[112] Section 3.5.8.1 forms part of the Centres theme in the Strategic framework. It states:

### **“3.5.8 Element – New and expanded centres**

#### **3.5.8.1 Specific outcomes**

- (1) Centre activities, other than an Accommodation activity:
  - (a) must be:
    - (i) located in a centre;
    - (ii) consistent with the intent of the centre;
    - (iii) at a scale compatible with the role and function of the centre in the centre hierarchy being:
      - (A) a principal centre, which is a dominant centre in Logan and services a main trade area over 100,000 people;
      - (B) a major centre, which is subordinate to a principal centre and services a main trade area of approximately of 40,000 to 50,000 people;
      - (C) a district centre, which is subordinate to a principal centre and major centre and services a main trade area of approximately 15,000 to 20,000 people;
      - (D) a local centre, which is subordinate to a principal centre, major centre and district centre and services a main trade area of approximately 8,000 to 10,000 people;
      - (E) a neighbourhood centre, which is subordinate to a principal centre, major centre, district centre and local centre and services a main trade area of approximately 3,000 to 4,000 people;
  - (b) unless:
    - (i) there is community need and economic need for the use;
    - (ii) the use is of a scale compatible with its role and function in the centre hierarchy;
    - (iii) the use does not have unacceptable adverse effects on any existing or planned centre;
    - (iv) the use:
      - (A) cannot be located in a principal centre, major centre, district centre, local centre, or neighbourhood centre;

- (B) is located in the specialised centre zone, or in an employment area where it cannot be located in a specialised centre; or
- (C) has a specific locational need requiring its location outside a centre and the use is located in accordance with the specific locational need.

(2) No new principal centre or major centre other than shown on SFM-01.00–Strategic framework map are created.”

[113] Shun alleges that if s 3.5.8.1 is relevant to specialised centres, the proposed development involves centre activities that are not consistent with the intent of the centre. It alleges that s 3.5.8.1(1)(b) does not provide a path to approval as it says:

- (a) there is no community need or economic need for the proposed development;
- (b) the shop (supermarket) use is not of a scale compatible with the shop’s role and function in the centre hierarchy;
- (c) the use will have an unacceptable adverse effect on an existing centre; and
- (d) the objectionable uses, in particular the supermarket, could be located in the Underwood district centre.

[114] Shun further alleges that there is an unacceptable departure from the planning strategy for new or expanded centres as the test in s 3.5.8.1(1)(b) must be read subject to the more specific provision in s 3.5.7.1(1)(d).

[115] The Council contends that s 3.5.8.1(1)(a) is not available to the proposed development but that the proposed development complies with the exception in s 3.5.8.1(1)(b). It says that s 3.5.8.1(1)(b) provides an exception which permits centre activities (in either new or expanded centres) to locate outside nominated centres in the hierarchy. It says the proposed development complies with that exception. Centa adopts a similar position.

[116] In this case, the controversy between the parties about this issue calls for consideration of six questions.

1. Does s 3.5.8.1 apply to the proposed development?
2. Is there a demonstrated community need and economic need for the proposed uses?
3. Are the proposed uses of a compatible scale as required by s 3.5.8.1(1)(b)(ii)?
4. Has Centa demonstrated that the use will not have an unacceptable adverse effect on any existing or planned centre?
5. Has Centa demonstrated that the use is appropriately located in accordance with s 3.5.8.1(1)(b)(iv)?
6. Does compliance with s 3.5.8.1(1)(b) operate as an exception to s 3.5.7.1(1)(d)?

***Does s 3.5.8.1 apply to the proposed development?***

- [117] I respectfully adopt the analysis of the centre hierarchy and the applicability of s 3.5.8.1 of the Planning scheme of His Honour Judge Williamson QC in *Navara Back Right Wheel Pty Ltd v Logan City Council & Ors; Wilhelm v Logan City Council & Ors*.<sup>16</sup>
- [118] The proposed development includes a mix of uses that are intended to serve the public's weekly convenience needs and it includes a shopping centre that involves a single supermarket supported by a range of specialty shops. This is consistent with the intended role and function of a local centre.
- [119] There was limited evidence about the extent of integration between the proposed development and the existing Underwood district centre. Mr Ovenden opines that there is physical and functional integration between two developments. He relies on their proximity in this regard. Proximity is a factor that increases the prospect of physical and functional integration between two developments. However, given the unusual configuration of the land, I am not satisfied that integration is achieved by proximity alone. I am also not satisfied that the proposed access arrangements, whereby the proposed development will share an access driveway with the Underwood Central shopping centre, facilitates meaningful integration. To the contrary, I consider that the access road would present a form of physical barrier given it would carry a substantial volume of traffic. Further, I accept the evidence of Mr Buckley that the existing centre is inward focussing and isolated: it does not "talk" to the subject land. As such, I am not satisfied that the design is one that integrates with the existing development in the Underwood district centre.
- [120] Having regard to the matters referred to in paragraphs [118] to [119] above, and the description of the intended role and function of the various centres,<sup>17</sup> I am of the view that the proposed development would involve centre activities that create a new local centre.<sup>18</sup>
- [121] In any event, whether the proposed development involves the creation of a new centre or an expanded centre, it would not comply with s 3.5.8.1(1)(a)(ii). That is because centre activities that result in either the establishment of a new local centre or the expansion of the existing Underwood district centre are not consistent with the planning intent that the subject land be developed as a specialised centre.
- [122] For those reasons, I am satisfied that s 3.5.8.1 has potential application and it is appropriate to consider whether the proviso contained in s 3.5.8.1(1)(b) supports approval of the proposed development.

---

<sup>16</sup> [2019] QPEC 67.

<sup>17</sup> In s 3.5.1 to s 3.5.7 of the Strategic framework and the Centre zone code.

<sup>18</sup> Centa did not direct me to any provisions of the Planning Scheme that indicate otherwise. For example, unlike in *Navara Back Right Wheel Pty Ltd v Logan City Council & Ors; Wilhelm v Logan City Council & Ors* [2019] QPEC 67, Centa did not direct my attention to any provisions of the Planning Scheme that indicate that a shopping centre use or a supermarket use are uses anticipated in a zone other than the Centre zone.

***Is there a demonstrated community need and economic need for the proposed uses?***

- [123] The Council submits that community need relates to the benefits likely to accrue to the surrounding community after taking account of any likely negative impacts or dis-benefits of development. It says economic need relates to the sufficiency of demand to support the proposed development. It notes that s 3.5.8.1(1)(b)(i) does not refer to planning need. I accept the Council's submissions.
- [124] Centa submits the economic and community need is demonstrated by a combination of five factors. First, there is significant and growing Asian-based demographics of the area. Second, there is a resultant increase in demand for retail facilities that reflect the ethno-cultural needs of the Asian born population. Third, there is an absence of any 3 080 square metre Asian supermarket in the trade area, or in South East Queensland, to meet the needs of the local population. It says members of the community currently have to travel to multiple stores at multiple destinations – including to Sunnybank – to satisfy their shopping needs. Fourth, Centa says the Underwood District centre, including Underwood Marketplace, is unable to accommodate the need for the Asian supermarket. Fifth, Centa relies on an alleged absence of any unacceptable adverse impacts that would arise from an approval.
- [125] The evidence supports the first two factors relied on by Centa. The Census data reveals a growth in the percentage of the population that is Asian born. Further, the percentage of Asian born population in the trade area is greater than that for the greater Brisbane area. The data shows that 50.4 per cent of the primary trade area community was born in countries other than Australia, with 26.4 per cent of the primary trade area and 42.4 per cent of the secondary west trade area community at the time of the 2016 census indicating that they had been born in Asian countries. The average across the greater Brisbane area is only 8.7 per cent. The data also demonstrates that the Asian born population in the trade area has more than doubled in the period between 2006 and 2016. This exceeds the total population growth experienced in the trade area during that decade. All of the experts agree that the Asian born population will continue to grow. They also agree that this will result in an increase in demand for retail facilities that cater to their particular ethno-cultural needs.
- [126] Centa has not persuasively demonstrated the other three factors that it relies on. Although there has been growth in the Asian born population within the trade area since 2006, Centa has not persuasively demonstrated that the growth has not been addressed by an increase in the facilities that cater to the ethno-cultural needs of that population. To the contrary, the evidence of Mr Yuen was that since Centa acquired Lot 1 in March 2015, it has redeveloped the Underwood Central shopping centre to convert it from seven large formal retail shops to 30 shops, creating a successful Asian-based food destination that has a high number of customers. Having regard to that evidence, and the inadequacies of the analysis by Ms Meulman and Mr Stephens noted above, I am not persuaded that there is an undersupply of retail facilities to address the ethno-cultural needs of the trade area population. Further, to the extent that a need might exist, it is not apparent to me that it could not be met in the Underwood district centre. There are numerous vacant tenancies in the Underwood Marketplace shopping centre. There is also the possibility that the tenancy currently occupied by Big W in the Underwood Marketplace shopping centre will become available to rent. Although the presently vacant tenancies are

not of sufficient size to accommodate an “*Asian themed*” supermarket of approximately 3 000 square metres, for the reasons already provided above, I am not persuaded that there is a need to accommodate further “*Asian themed*” retail facilities of that magnitude. I am also not persuaded that there will be an absence of any unacceptable adverse impacts that will arise from an approval for the reasons already outlined above.

- [127] The Council submits that the need is also demonstrated by the ability to deliver a supermarket of the size proposed that would be filled with a significant majority of Asian based food products and brands that Coles and Woolworths would be unlikely to stock. It relies on the evidence of Mr Yuen in that regard. As I have already noted in paragraph [94] above, I do not regard Mr Yuen’s evidence to be persuasive and, given the absence of an identified operator who might otherwise explain what the proposed “*Asian themed*” supermarket would offer, I do not accept the Council’s submission.
- [128] I am not persuaded that the difficulties with the sufficiency of the evidence relied on by Centa and the Council to demonstrate need can be bridged by the evidence of Ms Meulman about broader trends locally and internationally. Nor am I persuaded that there is a need by reference to the evidence of Mr Duane that his trade area currently has a population of approximately 48 000 persons and would support 5 to 6 full-line supermarkets if one applied the “*rule of thumb*” of one full-line supermarket for every 8 000 to 9 000 persons. There are presently five full-line supermarkets in the trade area. Further, the grocery offer provided by those supermarkets is being supplemented by the ethnic food stores referred to in the evidence of the economists, Mr Buckely and Mr Yuen to which I have already referred in paragraphs [85] to [87] and [126] above.
- [129] Further, I am not persuaded that the proposed development will result in a net benefit to the surrounding community. It is likely to result in a redistribution of sales from existing facilities in the Underwood district centre. I do not regard the redistribution to be of benefit to the public as the design of the proposed development is not conducive to ease of access by customers. A significant number of the car parks for the proposed supermarket are located on a level that is only accessible by lift and stair access. I do not consider this to be of particular convenience for the target market, being residents seeking to undertake a full-line grocery shop. To my mind, it would present local residents with less convenience than their present option of undertaking their grocery shop across a series of shop tenancies located in close proximity to one another. The proposed development also has a sub-optimal position due to its limited visibility to the surrounding population. To my mind, these dis-benefits, coupled with the economic impact on the existing Underwood district centre, outweigh the benefit to the community associated with the proposed development.
- [130] With respect to the medical facilities, I accept the evidence of Mr Duane there is opportunities for such uses at the Springwood Principal Centre.
- [131] The need for the office component of the proposed development has also not been demonstrated. There is approximately 20 000 square metres of office floor space approved within 2.5 kilometres of the subject development, as well as further land available within the Springwood Principal Centre.

- [132] For the reasons provided above, I am not satisfied that there is a community or economic need for the retail, medical or commercial components of the proposed development. They are important components of the overall development such that, even though the economists agree that there is likely to be ongoing demand for residential development, that is insufficient to persuade me that there is a community and economic need for the proposed development overall. Accordingly, Centa has not demonstrated compliance with s 3.5.8.1(1)(b)(i).

***Are the proposed uses of a compatible scale as required by s 3.5.8.1(1)(b)(ii)?***

- [133] I am not satisfied that the proposed development complies with s 3.5.8.1(1)(b)(ii). I do not accept Centa's submission that the reference to "its" in s 3.5.8.1(1)(b)(ii) is properly construed as a reference to "District centre". Although certain uses do not have a role and function in the centre hierarchy, uses of a particular scale do have a role and function. For example, a shopping centre of a scale that provides a full-line supermarket has a role to play in a local centre. That is apparent from s 3.5.5.1(1)(e). As such, a shopping centre containing a full-line supermarket would be compatible with the intended role and function of a shopping centre use in a local centre. By way of contrast, s 3.5.6.1(1)(e) provides that a neighbourhood centre is only to include a limited-line supermarket and small scale shops.
- [134] Here, the proposed development includes a shop that is a supermarket. That shop is not of a scale that is compatible with the role and function of a shop within a specialised centre in the centre hierarchy. As such, Centa has not demonstrated compliance with s 3.5.8.1(1)(b)(ii).

***Has Centa demonstrated that the use will not have an unacceptable adverse effect on any existing or planned centre?***

- [135] For reasons already addressed in paragraphs [99] to [107] above, I am not persuaded that the use will not have an unacceptable adverse effect on any existing centre, particularly the Underwood Central shopping centre. Centa has not demonstrated compliance with s 3.5.8.1(1)(b)(iii).

***Has Centa demonstrated that the use is appropriately located in accordance with s 3.5.8.1(1)(b)(iv)?***

- [136] In *Gaven Development Pty Ltd v Scenic Rim Regional Council*,<sup>19</sup> Robin QC DCJ observed:

“That alternative sites are available for a development proposal is a response frequently offered by opponents. Alternative site arguments, in the Courts experience, are liable to be problematic because of uncertainty about the availability within a reasonable time or suitability (when there is a present need to satisfy). If likely availability and suitability of some appropriately zoned alternative site(s) be shown, a proposal for out of centre development is highly unlikely to be acceptable, however suitable the site”.

---

<sup>19</sup> [2010] QPEC 51; [2010] QPELR 750, 764 [37].

- [137] This approach is reflected in the policy position adopted in s 3.5.8.1 of the Planning Scheme, which discourages out-of-centre development where the uses could more appropriately be located in a planned centre.
- [138] Centa submits that here the proposed alternative site for the supermarket use, being the Big W tenancy in the Underwood Marketplace shopping centre, is neither suitable nor available.
- [139] With respect to suitability, Centa relies on the evidence of Mr Yuen. He says that an “*Asian themed*” supermarket may not be viable in the Underwood Marketplace shopping centre because of the existing traffic and parking conditions, confined trading hours, and the existing tenancy mix. He says the Underwood Marketplace shopping centre is not an Asian focused centre and does not provide the range of other Asian focused facilities that Mr Yuen proposes to accommodate on the subject land to create an “*Asian hub*”.
- [140] Mr Duane does not share Mr Yuen’s concerns. He opines that there is no reason why a redesign of the Big W box could not incorporate an “*Asian themed*” supermarket and other uses. He explained a number of ways that it could be accommodated. Mr Duane also considers that there would be significant benefits from the co-location of supermarkets at the Underwood Marketplace shopping centre, allowing for cross shopping between Woolworths and any Asian based supermarket. Specialty stores would also stand to benefit from the increased customer patronage at the centre. Mr Duane notes that he understands that Shun is open to accommodating an additional supermarket within the Underwood Marketplace shopping centre, including an “*Asian themed*” supermarket when Big W vacates.
- [141] The evidence from Mr Tree, the Director of Asset Management at the company appointed as centre manager for the Underwood Marketplace shopping centre, supports that of Mr Duane. He provided examples of how the space proximate to Big W could be reconfigured to achieve a suitable design and how additional at grade car parking spaces could be created proximate the Big W space. He says that interest from a trader seeking to establish an “*Asian themed*” supermarket would receive favourable consideration.
- [142] Mr Buckley also gave evidence to similar effect. He notes that shopping centres regularly evolve. He gave numerous examples of his experience in that regard, which included examples of a substantial change to the configuration. For example, Westfield Carindale was reconfigured to accommodate Aldi as a new supermarket in the centre.
- [143] I prefer the evidence of Mr Duane, Mr Tree and Mr Buckley to that of Mr Yuen. Their evidence also accords with the evidence of Ms Meulman, who provides photographs of what she describes as successful new “*Asian themed*” supermarkets that have been retrofitted into existing shopping centres, including centres that are not an “*Asian hub*” such as at Garden City.
- [144] In terms of availability, Centa submits that there is uncertainty around the timing of departure of Big W and about the ability to accommodate a further supermarket given present leasing arrangements. It says it would not be in the public interest to refuse the proposed development and deny the community the benefit of a use that

is needed now based on a hypothetical prospect of completion of a suitable refurbishment of the Big W tenancy.

- [145] The difficulty for Centa is that I am not persuaded that there is any pressing need for a full-line “*Asian themed*” supermarket. In addition, I am not satisfied that approval of its proposed development involves any greater degree of certainty in terms of the delivery of a full-line “*Asian themed*” supermarket. There was no evidence from a retailer indicating a willingness to operate an “*Asian themed*” supermarket of the size proposed in the location proposed. Further, there is no example of such a retail operation of that size in Australia. Although I do not discount entirely the prospect that an operator may be willing to undertake such a venture, there is a significant degree of uncertainty about such matters. On the balance of probabilities, I consider it more likely that a commercial resolution will be reached that overcomes the hurdles to introducing an “*Asian themed*” supermarket at the Underwood Marketplace shopping centre than the hurdles that Centa faces in finding an operator for its proposed supermarket, particularly given the poor design and location of its proposed shopping centre.
- [146] For the reasons provided above, I am not satisfied that the proposed supermarket could not be accommodated in the Underwood district centre. As such, Centa has not demonstrated compliance with s 3.5.8.1(1)(b)(iv). Further, even if Centa were able to demonstrate that the proposed supermarket complies with s 3.5.8.1(1)(b)(i) to (iii) and (iv)(A), for reasons provided in paragraphs [147] to [149] below, properly construed s 3.5.8.1(1)(b)(iv)(B) would direct that use to locate in an employment area, not a specialised centre. Centa has not demonstrated that the proposed development could not be located in such an area.

***Does compliance with s 3.5.8.1(1)(b) operate as an exception to s 3.5.7.1(1)(d)?***

- [147] The Court of Appeal confirmed in *AAD Design Pty Ltd v Brisbane City Council*<sup>20</sup> and *Zappala Family Co Pty Ltd v Brisbane City Council*<sup>21</sup> that the established principles and canons of statutory construction apply to the construction of planning documents. As was recognised by Chesterman JA in *AAD Design Pty Ltd v Brisbane City Council*,<sup>22</sup> it is not unduly pedantic to begin with an assumption that words mean what they say.
- [148] Here, s 3.5.7.1(1)(b) acknowledges that specialised centres are more preferable locations for centre activities than out of centre locations. That is consistent with the policy reflected in s 3.5.8.1(1)(b)(iv). It anticipates that centre activities that satisfy the requirements of s 3.5.8.1(1)(b)(i) to (iii) that cannot be located in a principal centre, major centre, district centre, local centre, or neighbourhood centre should be located in the specialised centre zone unless:
- (a) they cannot be located in a specialised centre, in which case they are to be located in an employment area in compliance with s 3.5.8.1(1)(b)(iv)(B); or
  - (b) they have a specific locational need requiring their location outside a centre and the use is located in accordance with the specific locational need in compliance with s 3.5.8.1(1)(b)(iv)(B).

<sup>20</sup> [2012] QCA 44; [2013] 1 Qd R 1, 19 [73].

<sup>21</sup> [2014] QCA 147; [2014] QPELR 686, 698 [52].

<sup>22</sup> [2012] QCA 44; [2013] 1 Qd R 1, 11-2 [37].

- [149] The exception in s 3.5.8.1(1)(b)(iv)(B) that permits the location of centre activities in an employment area is engaged for supermarket uses. As supermarkets cannot be located in a specialised centre, where a supermarket otherwise meets the requirements in s 3.5.8.1(1)(b), this provision would facilitate its location in an employment area. This construction permits all of the provisions to work harmoniously. It provides operation to the unequivocal statement in s 3.5.7.1(1)(d) that specialised centres do not accommodate supermarkets.

***Conclusion regarding compliance with the planning strategy for new or expanded centres***

- [150] For the reasons outlined above, Centa has not demonstrated compliance with s 3.5.8.1(1)(b)(i), (iii) or (iv)(A). As such, even if my views about the proper construction of s 3.5.8.1(1)(a) and s 3.5.8.1(1)(b)(ii) and operation of s 3.5.7.1(1)(d) and s 3.5.8.1(1)(b) are incorrect, Centa has not demonstrated that it complies with the planning strategy for new or expanded centres.

**Does the proposed development involve an unacceptable departure from the centres hierarchy planning strategy?**

- [151] It was common ground between the parties that a departure from a centres hierarchy planning strategy is a matter of importance. As was acknowledged by Centa in its written submissions, the importance of the hierarchy of retail shopping centres or precincts established by planning schemes is well accepted in this Court. In this respect, Centa referred to the Court of Appeal decision in *Australian Capital Holdings Pty Ltd v Mackay City Council & Ors*,<sup>23</sup> wherein His Honour Justice of Appeal Muir, with whom the others agreed, observed:

“[58] The importance of the hierarchy of retail shopping centres or precincts established by planning schemes and the necessity of not acting so as to prejudice the viability of the established hierarchy has been recognised in a number of planning decisions. In *Lewiac Pty Ltd and ING Real Estate, Joondalup BV v Gold Coast City Council & Ors* Newton DCJ observed:

"[15] It does not appear to be in dispute that the achievement of a sustainable and effective centre hierarchy should be recognised as a good town planning principle for reasons of orderly development, increased accessibility and convenience, greater economic efficiency and investment opportunities.

...

[16] It may be accepted then, that a centre hierarchy is vital to the functioning of a City in order to ensure the efficient, equitable and adequate provision of goods and services to all communities having regard to their needs, size and location."

- [59] Newton DCJ referred with approval to passages from the reasons of Quirk DCJ in *Wilispap Pty Ltd v Mulgrave Shire*

---

<sup>23</sup> [2008] QCA 157.

*Council*<sup>27</sup> and in *Overton & Anor v Redcliffe City Council & Anor*. In *Wilispap* Quirk DCJ, referring to the potential impact of an application, after remarking that it would "prejudice the feasibility of the hierarchy of shopping facilities proposed by the plan" said, "In a matter of this kind, it would, in my view, be entirely inappropriate for this Court to make a decision which runs contrary to such a considered and carefully expressed planning strategy of a local authority." In *Overton* Quirk DCJ drew attention to the fundamental importance of such provisions to "a suitable and order hierarchy of commercial development" and commented that "to ignore these provisions could have fundamental and far-reaching consequences for expectations based on the Strategic Plan as it is presently drawn.""

(references omitted)

- [152] As was noted by Shun in its written submissions, there is a high degree of overlap between this issue and the first two issues raised by Shun. For the reasons already provided in paragraphs [36] to [150] above, I am satisfied that the proposed development involves a departure from the centres hierarchy planning strategy in the Planning Scheme. That does not mean that the proposed development automatically fails. Whether the departure is such as to warrant refusal is a matter that requires consideration of other issues, including those relevant matters that Centa and the Council advance to support approval of the proposed development.

**Are there relevant matters that support approval of the proposed development?**

- [153] Centa and the Council advance seven relevant matters that they say lend support to approval of the proposed development. They require consideration of the following questions.
1. Is there an economic, community and planning need for the proposed retail and commercial uses?
  2. Does the subject land's configuration and location lend support to approval?
  3. Does the proposed development meet an economic need absent any unacceptable impacts?
  4. Would the proposed development consolidate rather than fragment the Underwood district centre?
  5. Is the proposed development compatible with the role and function of the Underwood district centre?
  6. Is the proposed development a complementary land use that cannot be reasonably located within the Underwood district centre?
  7. Would approval of the proposed development prejudice the orderly and balanced planning of the area or result in any other adverse planning consequences?

[154] I address each of these issues below.

**Is there an economic, community and planning need for the proposed retail and commercial uses?**

[155] The general principles that inform and guide an assessment of planning need are well settled. They are conveniently summarised by His Honour Judge Wilson SC (as he then was) in *Isgro v Gold Coast City Council*.<sup>24</sup> As His Honour stated:<sup>25</sup>

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

[156] Other relevant principles referred to in the analysis of the authorities in *Isgro v Gold Coast City Council*<sup>26</sup> include:

- (a) need in the town planning sense does not mean a pressing need or a critical need or even a widespread desire, but relates to the well-being of the community;
- (b) a thing is needed if its provision, taking all things into account, improves the services and facilities available in a locality such that it will improve the ease, comfort, convenience and efficient lifestyle of the community;
- (c) the question whether need is shown to exist is to be decided from the perspective of a community and not that of the applicant, a commercial competitor, or even particular objectors;
- (d) providing competition and choice can be a matter which also provides for a need, in the relevant sense, but of itself the addition of choice to the marketplace does not necessitate a finding of need;<sup>27</sup>
- (e) need is a relative concept to be given a greater or lesser weight depending on all of the circumstances which the planning authority is to take into account; and
- (f) in some instances, public or community need for a service or facility may not be great, and other considerations may be of greater moment.

[157] The proposed development involves the provision of food and groceries, being a basic requirement of the resident population. As was noted by His Honour Judge Wilson SC (as his Honour then was) in *Parmac Investments Pty Ltd v Brisbane City Council & Ors*<sup>28</sup> where the need to be satisfied involves the daily essentials of ordinary life, the bar should not be set too high.

[158] For the reasons provided in paragraphs [36] to [150] above, I am not satisfied that there is a community, economic or planning need for the proposed development.

---

<sup>24</sup> [2003] QPEC 2; [2003] QPELR 414, 417-20 [20]-[30].

<sup>25</sup> [2003] QPEC 2; [2003] QPELR 414, 418 [21].

<sup>26</sup> [2003] QPEC 2; [2003] QPELR 414, 417-20 [20]-[30].

<sup>27</sup> *Intrafield Pty Ltd v Redland City Council* [2001] QCA 116; (2001) 116 LGERA 350, 354 [19]-[21].

<sup>28</sup> [2008] QPEC 7; [2008] QPELR 480, 485 [30].

**Does the subject land's configuration and location lend support to approval?**

- [159] Lot 1 is irregularly shaped and that portion of it that comprises the subject land is wedged between the former Bunnings and Australia post sites, at the back of the Underwood Central shopping centre.
- [160] Centa submits that the proposed development will make efficient use of this unusually configured and located land parcel and existing infrastructure, and will provide an opportunity to integrate physically and functionally with the existing District centre. In that respect, it relies on the evidence of Mr Schomburgk and Mr Ovenden.
- [161] Mr Schomburgk says that the proposed development will fill in a currently-vacant part of a larger site that is landlocked behind the existing centre, thereby making efficient use of that balance area and resulting in orderly and logical development. He also says that the proposed development represents an efficient and logical extension to the existing centre in circumstances where there is a need for additional centre uses.
- [162] Mr Ovenden opines that the proposed development complements the adjoining district centre zone through its proximity to land in that zone and the opportunity to integrate both physically and functionally. He says it does so by providing a range of residential and commercial uses, such as the office component and the health care services and function facilities, which are not provided for in the Underwood district centre. He says the proposed supermarket and office uses will, in effect, integrate with the designated district centre.
- [163] Given the absence of a demonstrated need for the proposed development, I do not accept Mr Schomburgk's opinion that the proposed development represents an efficient and logical extension to the existing centre.
- [164] I also do not accept the opinion of Mr Ovenden. For the reasons provided in paragraph [119] above, I do not accept that the proposed development will integrate with the designated district centre.
- [165] Although the subject land's location lends support to approval of a development designed to complement the existing Underwood district centre, this is not such a development.

**Does the proposed development meet an economic need absent any unacceptable impacts?**

- [166] A relevant matter identified by both the Council and Centa is that the need for the development can be satisfied by the proposal without detrimental impacts upon traffic and amenity.
- [167] For the reasons provided in paragraphs [36] to [150] above, I am not satisfied that there is a community, economic or planning need for the proposed development. By themselves, the absence of unacceptable traffic and amenity impacts provide little support to an approval of the proposed development.

**Would the proposed development consolidate rather than fragment the Underwood district centre?**

- [168] As I have already explained above, I do not accept the evidence of Ms Meulman that the proposed development will consolidate retail expenditure that is currently escaping the trade area. On this issue, I prefer the evidence of Mr Duane, that the proposed development would divert a high volume of sales from the Underwood district centre. As was explained by Mr Duane, this may place the future of tenants in the Underwood district centre in jeopardy. The matters referred to in paragraph [119] above would compound the unacceptable impact occasioned by the diversion of sales.
- [169] For those reasons, I am not satisfied that the proposed development would consolidate rather than fragment the Underwood district centre.

**Is the proposed development compatible with the role and function of the Underwood district centre?**

- [170] For the reasons already provided, I am of the view that the proposed development would compete with, rather than complement, the existing Underwood district centre. As such, I am not satisfied that the proposed development is compatible with the role and function of the Underwood district centre.

**Is the proposed development a complementary land use that cannot be reasonably located within the Underwood district centre?**

- [171] Centa and the Council acknowledge that this “*relevant matter*” raises the same issue raised by s 3.5.8.1(1)(b)(iv)(A). For reasons already provided, Centa has not discharged its onus in that regard.

**Would approval of the proposed development prejudice the orderly and balanced planning of the area or result in any other adverse planning consequences?**

- [172] Centa alleges that an approval will not result in any adverse planning consequences. It relies on this as a relevant matter that it says supports approval. Similarly, the Council alleges that the proposed development will not prejudice the orderly and balanced planning of the area. Centa submits that these allegations are supported by the evidence of Mr Schomburgk and Mr Ovenden that:
- (a) the proposed development will make efficient use of an undeveloped portion of land, part of which already enjoys district centre zoning, and, as such, it represents orderly and logical development; and
  - (b) because the proposed development can be provided without any unacceptable impacts upon the centre’s hierarchy, or otherwise, and does not undermine the planning strategy for centres, the approval does not result in any adverse planning consequences.
- [173] I have already provided detailed reasons above addressing why I do not accept that evidence. This “*relevant matter*” has not been established.

**Is the condition proposed by Centa lawful or appropriate?**

[174] Centa submits that it is not necessary to impose a condition on any approval in order to ensure that the approval is appropriately constrained. In the alternative, it submits that a lawful and appropriate condition could be formulated.

***Is it necessary to impose a condition?***

[175] Centa has changed its development application to seek a development approval for a supermarket that is only an “*Asian themed*” supermarket. Centa says that it is unnecessary to impose a condition to ensure that the development approval is so limited because:

- (a) if the minor change to the development application is granted by the Court, the scope of the supermarket use will be appropriately identified by reference to the approval of “*Shops (including an Asian themed supermarket)*”; and
- (b) even if the minor change is not approved, the evidence demonstrates that:
  - (i) the need evidence supports a further full-line supermarket even if it was not an Asian supermarket; and
  - (ii) there is only one full-line supermarket in the Underwood district centre, which means that an approval of a second full-line supermarket would not be inconsistent with AO2 of the Centre zone code.

[176] I do not accept that the scope of the supermarket use will be appropriately identified by reference to the approval of “*Shops (including an Asian themed supermarket)*”. Absent a condition, approval for “*Shops (including an Asian themed supermarket)*” provides no meaningful control on the proposed shop use. The evidence of Mr Buckley highlights the difficulties with an approval absent a condition. In his individual statement of evidence, Mr Buckley says:

“Even if one was to accept a need can be proven for an “Asian” supermarket of a full line gross floor area size, there are a number of planning considerations which cast doubt on the reasonableness and practicality of allowing an approval that was conditioned to be a tenant of that type. These are:

- a) What does ‘Asian’ mean? – the geographical spread of ‘Asia’ covers approximately 40 sovereign countries from the Ukraine, Turkey and the Arab emirates in the west; to Japan and the Philippines in the east; and from Russia in the north to Indonesia and Timor Leste in the south;
- b) Does marketing the outlet as “Asian” mean what it says? - simply badging an outlet a particular way does not regulate the bona fides of the use;
- c) How could it be sensibly regulated? – it presents significant implementation constraints for a planning authority if it was required to monitor conditions that:
  - restricted the goods sold to those sourced from Asian countries; or

- restricted fresh food to those which may have originally been grown in or be culturally significant for former residents of a given country, but are now produced locally. Most fresh food outlets have a wide range of fruit and vegetables and a planning authority should not be called on to intervene as to whether locally grown (for example) bok choy, spices, or jack fruit, in any quantity, are indeed Asian; or
- invited disputes about what cross-over food lines contributed to (say) European, Polynesian and Asian diets; and
- in the circumstances to which Mr Duane alludes, where the more conventional grocery items often permeate specialised food outlets in any event, how is the line to be drawn as to whether the overall stock still qualifies as ‘Asian’?”

[177] Further, I do not accept that the need evidence supports a further full-line supermarket even if it was not an Asian supermarket. As I note in paragraph [29] above, the analysis by the economists focussed in large measure on the potential operation of the supermarket as an “*Asian-themed*” supermarket. That evidence did not demonstrate a need for either a supermarket so confined or a full-line supermarket that was not so confined.

[178] Centa’s submission with respect to compliance with acceptable outcome AO2 of the Centre zone code is also not supported by the evidence. Acceptable outcome AO2 of the Centre zone code states:

“Development for a Shop being a supermarket or discount department store comprises a maximum of:

- (a) 2 x Shops being supermarkets with a gross floor area of 4000m<sup>2</sup> per shop;
- (b) 1 x Shop being a discount department store with a gross floor area of 8000m<sup>2</sup>.”

[179] This provision does not refer to a “*full-line*” supermarket. As was noted by Mr Duane during cross-examination, the supermarkets in the Underwood district centre include the Woolworths in the Underwood Marketplace shopping centre and the Aldi and Hanaromart in the Underwood Central shopping centre.

[180] For the reasons provided above, I am not persuaded that it is appropriate to grant a development approval absent a condition that limits the use in the manner proposed by Centa. This then raises the issue of whether an approval that appropriately reflects the use sought by Centa should be granted by imposing a condition.

***Is it appropriate to impose a condition to limit the use to that sought by Centa?***

[181] Centa submits that if the Court does not accept Centa’s primary position, it is willing to consent to the proposed condition or another condition that, properly

formulated, can provide sufficient certainty regarding the future operation of the proposed “*Asian themed*” supermarket.

- [182] Section 60(2)(c) of the *Planning Act 2016* provides that an assessment manager may impose development conditions on an approval. The conditions power is constrained by s 65 and s 66 of the *Planning Act 2016*. There is otherwise a broad residual discretion to impose conditions, which discretion should be exercised for a proper planning purpose.<sup>29</sup>
- [183] As I noted in paragraph [105] above, during the hearing Centa advanced an example of the type of condition that it says could be imposed to regulate the product mix that might be offered at its proposed “*Asian themed*” supermarket. The draft condition suffers from many of the difficulties identified by Mr Buckley to which I have already referred in paragraph [176] above.
- [184] I am not satisfied that it is appropriate to approve a development on the basis of a condition that would present significant difficulties in terms of the ease and practicality of its enforcement. Mr Buckley opines that it is unlikely that a sensible suite of conditions could be written that would allow the integrity of an approval limiting the supermarket use in the manner sought by Centa to be easily and practically monitored and sustained over time. His concerns are valid. Centa has not suggested a condition that persuades me otherwise.

### ***Conclusions regarding the condition***

- [185] For the reasons provided in paragraphs [175] to [180] above, I am not satisfied that it is appropriate to approve the proposed development absent a condition that prevents use of the land for a full-line supermarket of an unconfined nature. To do so would grant Centa an approval that is more extensive than that which it seeks. However, for the reasons provided in paragraphs [181] to [184], I am equally unpersuaded that a sensible suite of conditions could be written that would allow the integrity of an approval limiting the supermarket use in the manner sought by Centa to be easily and practically monitored and sustained over time. As such, I am not prepared to exercise my discretion to approve the proposed development subject to a condition of the nature advanced by Centa.

### **Should the development application for the proposed development be approved in the exercise of the planning discretion?**

- [186] As I have noted in paragraph [8] above, there is a broad discretion in determining this appeal. As this Court has previously observed,<sup>30</sup> the discretion is to be exercised based on the assessment carried out under s 45 of the *Planning Act 2016*. Its exercise is not a matter of mere caprice. The decision must withstand scrutiny against the background of the Planning Scheme and proper planning practice. Not every non-compliance will warrant refusal. The extent to which a flexible approach

---

<sup>29</sup> *Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53; [2019] QPELR 247, 253 [24] citing *Intrapac Parkridge Pty Ltd v Logan City Council* [2014] QPEC 48; [2015] QPELR 49 at [24].

<sup>30</sup> *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16; [2019] QPELR 793, 803-13 [35]-[86]; *Murphy v Moreton Bay Regional Council & Anor*; *Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46, [12]-[22]; *JRD No 2 Pty Ltd v Brisbane City Council & Ors* [2020] QPEC 4, [245].

will prevail in the face of any given non-compliance with a planning scheme (or other assessment benchmark) will turn on the facts and circumstances of each case.

[187] Here, Centa's proposed development does not comply with the planning strategy for specialised centres or for the planning strategy for new or expanded centres in the Planning Scheme. It departs from the centre hierarchy planning strategy. The non-compliances are material and weigh heavily in the balance against approval of Centa's development application.

[188] The only relevant matters raised by Centa and the Council that were established on the evidence to support approval of the proposed development were:

- (a) an absence of unacceptable traffic and amenity impacts; and
- (b) that the subject land has a location that lends support to approval of a development designed to complement the existing Underwood district centre (noting however that this is not such a development).

[189] These two considerations do little to justify an approval in this case. The second relates to an attribute of the subject land, rather than the proposed development itself. The first is a matter that one would expect of any development of the subject land.

[190] In the balancing exercise that is required through the development assessment process under the *Planning Act 2016*, I am not persuaded that it is an appropriate planning outcome to approve the proposed development.

[191] Accordingly, Centa's development application should be refused.

### **Conclusion**

[192] For the reasons provided above, Centa has not discharged the onus. The appeal will be allowed and the development application refused.