

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *JRD No 2 Pty Ltd v Brisbane City Council & Ors* [2020]  
QPEC 4

PARTIES: **JRD NO 2 PTY LTD ACN 618 080 309 AS TRUSTEE  
FOR THE JRD NO 2 PROPERTY TRUST**  
(Appellant)

v

**BRISBANE CITY COUNCIL**  
(Respondent)

AND

**AGAMPODIGE PERMASIRI WEERASEKARA**  
(Fifth Co-Respondent by Election)

AND

**SHANE HOWARD**  
(Seventh Co-Respondent by Election)

AND

**LISA ROBINSON**  
(Eighth Co-Respondent by Election)

AND

**PHILIP MOSS**  
(Ninth Co-Respondent by Election)

AND

**JAVIER PAEZ**  
(Tenth Co-Respondent by Election)

AND

**SILVIU RISCO**  
(Eleventh Co-Respondent by Election)

FILE NO/S: 2832 of 2018

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING  
COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 25 February 2020

DELIVERED AT: Brisbane

HEARING DATE: 23 – 27 and 30 September 2019 and 15 November 2019 and further documents received on 18 November 2019

JUDGE: Kefford DCJ

ORDER: **I order:**

- (a) **by 4pm on 11 March 2020, the Respondent is to deliver a draft suite of conditions to the other parties; and**
- (b) **the appeal be listed for review at 9.15 am on 18 March 2020 either for the purpose of making final orders in the appeal or, failing agreement between the parties, for the purpose of making directions to facilitate the resolution of any dispute with respect to the suite of conditions of approval.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal against refusal of a development application seeking a development permit for material change of use for a retirement facility in a Low density residential zone – whether the proposed development is of an appropriate height – whether there is inconsistency between a zone code and neighbourhood plan code and, if so, which prevails – whether there is conflict occasioned by bulk, scale, form and intensity – whether there is a need for the proposed development

LEGISLATION: *Planning Act 2016* (Qld), s 45, s 59, s 60

*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

*Ausco Modular Pty Ltd v Western Downs Regional Council* [2017] QPEC 58; [2018] QPELR 80, approved

*Australian Alliance Assurance Co Ltd v Attorney-General of Queensland* [1916] St R Qd 135, applied

*Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16, approved

*Bell v Brisbane City Council & Anor* [2018] QCA 84; (2018) 230 LGERA 374, followed

*Bell & Anor v Noosa Shire Council & Ors* [1983] QPLR 311, approved

*Bilinga Beach Holdings Pty Ltd v Western Downs Regional Council & Anor* [2018] QPEC 34; [2018] QPELR 1102, approved

*Intrafield Pty Ltd v Redland City Council* [2001] QCA 116; (2001) 116 LGERA 350, followed

*Isgro v Gold Coast City Council* [2003] QPEC 2; [2003] QPELR 414, approved

*Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, applied

*Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46, approved

*Purcell v Electricity Commission of New South Wales* [1985] HCA 54; (1985) 60 ALR 652, cited

*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, applied

*Reseck v Federal Commissioner of Taxation* [1975] HCA 38; [1975] 133 CLR 45, cited

*Walters & Ors v Brisbane City Council & Anor* [2019] QPEC 3; [2019] QPELR 487, approved

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

COUNSEL:	C L Hughes QC and M Batty for the Appellant R Traves QC and N Loos for the Respondent
SOLICITORS:	Broadly Rees Hogan for the Appellants Brisbane City Legal Practice for the Respondent No appearance for the Fifth and Tenth Co-Respondents by Election Each of the Seventh, Eighth, Ninth and Eleventh Co-Respondents by Election were self represented

## TABLE OF CONTENTS

Introduction .....	5
The decision framework.....	6
What are the relevant assessment benchmarks?.....	7
What assessment benchmarks does the Council rely on to contend for refusal? .....	8
Is the proposed development of an appropriate height?.....	9
What does the Forest Lake Neighbourhood plan code require?.....	9
Does overall outcome (5)(a) support approval of the proposed development?.....	10
Does overall outcome (5)(b) support approval of the proposed development? .....	11
Do overall outcomes (3)(a) and (b) support approval of the proposed development? ....	12
How is the tension between overall outcome (4)(d) of the Low density residential zone code and the Forest Lake neighbourhood plan code resolved? .....	13
Conclusion regarding the appropriateness of the height .....	19

Is the proposed development of an appropriate bulk, scale, form, and intensity having regard to the character, location, and street context of the subject land?.....	19
Does the proposed development comply with overall outcome (2)(e) of the Multiple dwelling code?.....	19
<i>What is the existing neighbourhood structure and the relevant location and street context of the subject land? .....</i>	<i>20</i>
<i>What is the intended neighbourhood structure?.....</i>	<i>22</i>
<i>What was the evidence about the appropriateness of the proposed development in terms of neighbourhood structure, location and street context?.....</i>	<i>24</i>
<i>Is the proposed development appropriate having regard to the neighbourhood structure, location and street context?.....</i>	<i>29</i>
Does the proposed development comply with overall outcome (2)(i) of the Multiple dwelling code?.....	35
Does the proposed development comply with performance outcome PO6 of the Multiple dwelling code?.....	38
Conclusion regarding the proposed development’s bulk, scale, form, and intensity .....	39
Does the proposed development comply with overall outcome (3)(d) of the Forest Lake neighbourhood plan code? .....	39
Is the proposed development consistent with the most recent planning for the area? .....	40
Does the proposed development comply with overall outcome (2)(c) of the Retirement and residential care facility code? .....	41
Does the proposed development comply with overall outcome (2)(j) of the Retirement and residential care facility code? .....	41
Does the proposed development comply with performance outcome PO5(a) of the Retirement and residential care facility code?.....	43
Does the proposed development comply with performance outcome PO8(a) of the Retirement and residential care facility code?.....	44
Does the proposed development comply with overall outcome (4)(d) of the Low density residential zone code?.....	46
Conclusion regarding whether the proposed development is consistent with the most recent planning for the area .....	46
What are the relevant matters that JRD rely on to support approval of the proposed development? .....	49
Is there an economic, town planning and community need for the proposed development sufficient to support approval of the proposed development? .....	49
Is there a need for the proposed development? .....	50
Relevance of need.....	58
Do the other relevant matters support approval? .....	59
Should the development application for the proposed development be approved in the exercise of the planning discretion? .....	59
Conclusion.....	61

## Introduction

- [1] The land at 5 The Esplanade, Forest Lake (*“the subject land”*) sits vacant. In the past, a two-storey building and associated structures on the subject land provided an accommodation facility for the nearby Forest Lake International College. Historically, other non-residential uses, including sales office and education facility, have also occurred on the subject land.
- [2] The subject land is within the District business centre precinct in the Forest Lake neighbourhood plan under Brisbane City Plan 2014 (*“City Plan”*). That precinct comprises an area of land bounded by Forest Lake and the open space that immediately adjoins the lake, and the four lane divided carriageways of Forest Lake Boulevard and Grand Avenue.
- [3] The precinct includes two lots in the Low density residential zone. They are the subject land and the adjoining land to the east. The adjoining lot to the east is located on the corner of The Esplanade and Forest Lake Boulevard. It is improved by a two-storey commercial development that contains a vet, professional offices, and a food and drink outlet.
- [4] The Forest Lake Shopping Centre and other land immediately adjacent the shopping centre is also in the District business centre precinct. That land is in the District Centre zone.
- [5] The precinct otherwise comprises all of the land that is north and west of the shopping centre and which is in the Medium density residential zone. That land contains large houses of two storeys on individual lots. Redevelopment of the precinct for medium density residential uses, as encouraged by City Plan, is yet to occur.
- [6] JRD No 2 Pty Ltd (*“JRD”*) wants to develop the subject land for a retirement facility containing 30 independent living units across six habitable levels. It made a development application to facilitate that. Brisbane City Council (*“the Council”*) refused the application. The Council contends that the proposed development would be a radical and inappropriate departure from the current character of the area and should not be approved.
- [7] The Seventh, Eighth, Ninth and Eleventh Co-Respondents by Election are residents of Forest Lake. They support the Council’s position. There was no appearance for the Fifth and Tenth Co-Respondents by Election.
- [8] The issues for me to decide are:
  - (a) whether the proposed development complies with the assessment benchmarks that applied at the time the application was made, particularly with respect to its height, bulk, scale, form and intensity;
  - (b) whether the proposed development is consistent with the most recent assessment benchmarks;
  - (c) whether there are relevant matters that support approval of the proposed development; and

- (d) ultimately, whether, in the exercise of the planning discretion, the development application for the proposed development should be approved.

### The decision framework

- [9] The statutory framework in the *Planning and Environment Court Act 2016* (Qld) and the *Planning Act 2016* (Qld) applies. 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>1</sup>
- [10] The appeal proceeds by way of hearing anew.<sup>2</sup> JRD bears the onus.<sup>3</sup>
- [11] JRD 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 the proposed retirement facility. The proposed development is to comprise 30 independent living units generally in accordance with the design reflected in the plans provided as Exhibit 3.
- [12] There is a broad discretion in determining this 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 City Plan version 9 to the extent relevant;<sup>6</sup>
    - (ii) having regard to, relevantly, any development approval for, and any lawful use of, the premises or adjacent premises;
  - (b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances (financial or otherwise);
  - (c) may give weight considered appropriate in the circumstances to City Plan version 16.
- [13] It was common ground between the parties that His Honour Judge Williamson QC comprehensively, and correctly, analysed how impact assessable development applications are to be assessed and decided in *Ashvan Investments Unit Trust v Brisbane City Council*<sup>7</sup>. I agree. 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 & Anor*.<sup>8</sup>

---

<sup>1</sup> *Planning and Environment Court Act 2016*, s 47.

<sup>2</sup> *Planning and Environment Court Act 2016*, s 43.

<sup>3</sup> *Planning and Environment Court Act 2016*, s 45.

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

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

<sup>6</sup> It is common ground that version 9 of Brisbane City Plan 2014 was the categorising instrument for the development in effect when JRD's application was properly made.

<sup>7</sup> [2019] QPEC 16, [35]-[86].

<sup>8</sup> [2019] QPEC 46, [12]-[22].

### What are the relevant assessment benchmarks?

- [14] Like many planning schemes that apply throughout Queensland, City Plan is a voluminous document. It comprises numerous components, including a strategic framework; zones and precincts (with associated zone codes); neighbourhood plans and neighbourhood plan precincts and sub-precincts (with associated neighbourhood plan codes); mapping overlays and overlay codes; relevant prescribed codes as specified in the schedules of the *Planning Regulation 2017*; and use and other development codes. Each of these components contains provisions that may form part of the assessment benchmarks for a particular development application.
- [15] The combination of assessment benchmarks that applies to development of any particular parcel of land can vary significantly. This is so even where the development applications are in the same locality or where they are for the same type of development but in different localities. Under City Plan, the integers that inform the combination of assessment benchmarks that apply to any particular proposed development are:
- (a) the type of development sought, i.e. whether the application is for carrying out building work, carrying out operational work, reconfiguring a lot or making a material change of use of premises;
  - (b) the category of development, i.e. whether the application is for accepted development or assessable development;
  - (c) the category of assessment, i.e. whether the application is code assessable or impact assessable;
  - (d) the zone and, if applicable, the precinct of the zone in which the land is located;
  - (e) whether the land is located in a particular neighbourhood plan area and a precinct or sub-precinct of a neighbourhood plan area;
  - (f) whether the land is affected by one or more overlays, such as a biodiversity areas overlay; and
  - (g) the types of uses and works involved.
- [16] Here, the land is located in the Low density residential zone under City Plan.<sup>9</sup> An application for material change of use for a retirement facility is impact assessable. It is to be assessed against the entire planning scheme, to the extent relevant.<sup>10</sup> This includes relevant assessment benchmarks in:
- (a) the Strategic framework;
  - (b) the Low density residential zone code;

---

<sup>9</sup> Any reference to City Plan in these Reasons for Judgment should be understood to be a reference to City Plan 2014 version 9 unless expressly stated otherwise or unless otherwise apparent from the context.

<sup>10</sup> See s 5.3.3(5) of City Plan.

- (c) the Forest Lake neighbourhood plan code, including any relevant to the District business centre precinct (Forest Lake neighbourhood plan/NPP-002) in which the subject land is located;
- (d) the Multiple dwelling code;
- (e) the Stormwater code; and
- (f) the Transport, access, parking and servicing code.

[17] In this case, it is unnecessary to consider all of these assessment benchmarks as the parties accept that whether the development is appropriate turns on a much more confined consideration of the assessment benchmarks.

**What assessment benchmarks does the Council rely on to contend for refusal?**

[18] The Council alleges that JRD's proposed development does not comply with provisions of City Plan that guide the height, scale, form, and intensity of retirement facilities on the subject land. By the end of the hearing,<sup>11</sup> the Council's allegations were limited to non-compliance with overall outcome (4)(d) of the Low density residential zone code, overall outcome (3)(d) of the Forest Lake neighbourhood plan code, and overall outcomes (2)(e) and (i) and performance outcome PO6 of the Multiple dwelling code.<sup>12</sup> Although the Co-respondents by Election addressed a more extensive list of provisions in their written submissions, they confirmed that the only allegations of non-compliance they maintain are those relied on by the Council.

[19] As is evident from the Council's final particularised list of issues for determination,<sup>13</sup> the Council's position that the proposed development is an inappropriate height, bulk, scale, form, and intensity is underpinned by three fundamental propositions.

---

<sup>11</sup> While the issues were confined by the end of the hearing, the evidence addressed a more extensive suite of planning scheme provisions. On 5 April 2019, the Council provided amended grounds of refusal in which it identified 72 provisions of City Plan as relevant assessment benchmarks. These were maintained until after the appeal was listed for hearing. The town planners addressed the extensive list of planning scheme provisions in the Joint Expert Report – Town Planning. JRD also retained an economist, a retirement and aged care specialist, a visual amenity expert, an architecture and landscape expert, a traffic engineer, a stormwater expert, and an expert on noise and wind impacts to address the assessment benchmarks relied on by the Council. Each of those experts prepared a report to address the issues raised by the Council. Ultimately, it was not necessary to receive the reports of the stormwater expert or the expert on noise and wind impacts and they were not required for cross-examination. The expert reports on traffic were also not relevant in the end. This is because, shortly prior to the commencement of the hearing, the Council amended its list of issues to reduce the number of provisions it identified as relevant. Nevertheless, the Court was burdened with extensive town planning and architectural reports that extended far beyond the real issues requiring determination. The number of days allocated to the hearing also reflected the more extensive issues maintained by the Council until close to the start of the trial

<sup>12</sup> After the appeal was set down for hearing, the Council amended its issues several times. It did so following reviews of the matter on 6 September 2019 and 17 September 2019. The Council again amended its position at the commencement of the hearing on 23 September 2019, during oral submissions on 30 September 2019 and in a further document provided on 18 November 2019. It is appropriate that the Council ultimately relied on only those issues that reflected the real issues in dispute. It is regrettable that it did not adopt such an approach sooner. This is particularly so given some of the Council's allegations were not arguable, such as its allegation that the proposed five-storey building conflicted with a provision (performance outcome PO16 of the Multiple dwelling code) that applied only to an eight-storey building.

<sup>13</sup> Exhibit 37.

First, the Low density residential zone code stipulates a height of one or two storeys for a retirement village in that zone. The Council says that reflects the intended height and intensity of development for the subject land, even taking account of the Forest Lake neighbourhood plan code. Second, the proposed development is not of an appropriate bulk, scale, form and intensity as it is not consistent with the existing character, location and street context of the subject land. The Council says the proposed development does not accord with the present two-storey character of the area, which it says is of paramount importance given the absence of any redevelopment of the area. Third, there is no demonstrated community need and economic need for the proposed development that would permit greater height than that stipulated in the Low density residential zone code.

- [20] JRD does not accept that the intended height, scale and form of development on its land is limited to two storeys, nor that it is necessary to demonstrate both a community need and an economic need for the development to justify the additional height over two storeys. JRD also contends that there is, in any event, a demonstrated community need and economic need for the development.
- [21] The assessment benchmarks call for consideration of three issues, namely:
- (a) whether the proposed development is of an appropriate height;
  - (b) whether the proposed development is appropriate having regard to considerations of character, location and street context; and
  - (c) whether it is necessary to demonstrate community need and economic need for the proposed development.

### **Is the proposed development of an appropriate height?**

- [22] The Council contends that the intended height and intensity of development for the land is stipulated by overall outcome (4)(d) of the Low density residential zone code. It states:

“Development for other housing types, being a residential care facility or retirement facility, which provides housing diversity and enables people to remain within their local neighbourhood throughout their life cycle, may be accommodated at appropriate locations where height is no greater than 1 or 2 storeys.”

- [23] It is the Council’s position that this provision justifies refusal of the proposed development. That has initial attraction given the proposed development is for a retirement facility of five storeys<sup>14</sup> in the Low density residential zone. However, closer consideration reveals that reference only to those provisions relied on by the Council presents a distorted picture of the requirements of City Plan with respect to the appropriate height, scale, form, and intensity of any development on the subject land. The assessment benchmarks relied on by the Council do not include relevant provisions of the Forest Lake neighbourhood plan code.<sup>15</sup>

### What does the Forest Lake Neighbourhood plan code require?

- [24] The subject land is in the District business precinct (Forest Lake neighbourhood plan/NPP-002) of the Forest Lake neighbourhood plan area.

---

<sup>14</sup> By definition, although there are six habitable levels.

<sup>15</sup> See s 7.2.6.3.1 and the note that follows it.

- [25] The Forest Lake neighbourhood plan code contains two overall outcomes that apply specifically to the District business centre precinct, namely overall outcomes (5)(a) and (b). They state:<sup>16</sup>
- “(a) Development provides for a multipurpose centre and medium density residential development.
  - (b) Adjacent to the lake and at the periphery of the precinct, development for medium density residential development is encouraged which is intended to accommodate housing at a higher density than that provided for within the Residential precinct in order to promote efficiency in terms of access to centre facilities and public transport services and optimise lakefront views.”
- [26] The Forest Lake neighbourhood plan code also contains overall outcomes that are of general application throughout the neighbourhood plan area, including overall outcomes (3)(a), (b) and (d) of the Forest Lake neighbourhood plan code.<sup>17</sup> They state:
- “(a) The urban structure uses land efficiently and provides high levels of pedestrian, bicycle and vehicle accessibility to shopping and commercial facilities, open space, recreational opportunities and community facilities.
  - (b) A comprehensive range of housing types and lots is available to meet the needs of a wide cross-section of the population.
  - ...
  - (d) Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development.”
- [27] The Council alleges the proposed development does not comply with overall outcome (3)(d). It otherwise placed no weight on the overall outcomes of the Forest Lake neighbourhood plan code. It resists JRD’s case that these provisions are supportive of approval of the proposed development.

Does overall outcome (5)(a) support approval of the proposed development?

- [28] JRD contends that overall outcome (5)(a) of the Forest Lake neighbourhood plan code supports approval of the proposed development. The Council disagrees. The Council accepts that the proposed development would provide for medium density residential development. However, it submits overall outcome (5)(a) recognises the predominant, not the exclusive, purpose for land within the precinct.
- [29] The Court of Appeal confirmed in *Zappala v Brisbane City Council*<sup>18</sup> and *AAD Design Pty Ltd v Brisbane City Council*<sup>19</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>20</sup> it is not unduly pedantic to begin with an assumption that words mean what they say.

<sup>16</sup> See s 7.2.6.3.2(5) of the Forest Lake neighbourhood plan code.

<sup>17</sup> See s 7.2.6.3.2(3) of the Forest Lake neighbourhood plan code.

<sup>18</sup> [2014] QCA 147; [2014] QPELR 686, 698 [52].

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

<sup>20</sup> [2012] QCA 44; [2013] 1 Qd R 1, 1-2 [37], citing *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 304-5.

- [30] Here, overall outcome (5)(a) of the Forest Lake neighbourhood plan code requires development in the District business centre precinct to provide for multipurpose centre and medium density residential development. There is no reference to low density residential development. A literal reading of the provision supports approval of the proposed development.
- [31] The expressed requirement to develop land in the precinct for the higher intensity uses of multipurpose centre and medium density residential development is also consistent with the planning goal associated with efficient use of land contained in overall outcome (3)(a) of the Forest Lake neighbourhood plan code.<sup>21</sup> That overall outcome reflects a policy position that it is not desirable, from a planning perspective, to permit underutilisation of land in the District business centre precinct.
- [32] Performance outcome PO1 of the Forest Lake neighbourhood plan code also supports a construction that overall outcome (5)(a) requires land in the District business precinct to be developed for medium density residential development.<sup>22</sup> Performance outcome PO1 applies to the neighbourhood plan area generally. It requires development to be of a height, scale and form that achieves the intended outcome for the precinct. As I have already mentioned, there is no suggestion in the overall outcomes that low density residential development is an intended outcome for the District business centre precinct. To the contrary, the intended outcome is a multipurpose centre and medium density residential development.
- [33] For the reasons provided, I am satisfied that overall outcome (5)(a) of the Forest Lake neighbourhood plan code supports approval of the proposed development.

Does overall outcome (5)(b) support approval of the proposed development?

- [34] JRD contends that overall outcome (5)(b) of the Forest Lake neighbourhood plan code is supportive of the proposed development. The Council disputes this.
- [35] As I have already mentioned, the Council accepts that the proposed development involves medium density residential development. It also accepts that the subject land is adjacent to the lake and at the periphery of the precinct, and that the proposed development would “*promote efficiency in terms of access to centre facilities and public transport services and optimise lakefront views.*” The town planners agree that the subject land is located approximately 330 metres from the entrance to the Forest Lake shopping centre. Public transport to the Brisbane central business district is available from a bus stop approximately 400 metres from the subject land. As such, were overall outcome (5)(b) given its plain meaning, it supports approval of the proposed development.
- [36] The Council says that, properly construed, the provision only applies to that land to the west of the subject land that is along the lake’s edge. It says acceptable outcome AO8.2 makes it clear which lots are intended for more intense development. Acceptable outcome AO8.2 envisages that some land located around the lake that is

---

<sup>21</sup> My site inspection of the area with the representatives for the parties on the first day of the hearing assisted me to appreciate the evidence of the town planners and Figure 2 of the Joint Expert Report – Town Planning about the high level of accessibility enjoyed by the land in this District business centre precinct.

<sup>22</sup> The corresponding acceptable outcome AO1 does not apply as it only stipulates a building height for land in the Medium density residential zone.

in both the District business centre precinct and the Medium density residential zone may be able to be used for high density residential uses. That is not demonstrative of a legislative intent that the plain words of overall outcome (5)(b) should be read down so as to only apply to land at the lake's edge that is in the Medium density residential zone. The planning goal is to encourage higher density<sup>23</sup> than that intended within the residential precinct. Medium density residential development would achieve that goal.<sup>24</sup> The potential for land that is in both the District business centre precinct and the Medium density residential zone to achieve an even higher density is consistent with overall outcome (5)(b) and acceptable outcome AO8.2. However, it is not necessary to read down the effect of overall outcome (5)(b) to give effect to acceptable outcome AO8.2, nor to avoid an inconsistency between them.

[37] For the reasons provided above, I am satisfied that overall outcome (5)(b) of the Forest Lake neighbourhood plan code supports approval of the proposed development.

Do overall outcomes (3)(a) and (b) support approval of the proposed development?

[38] Overall outcomes (3)(a) and (5)(a) and (b) indicate an intention by the local planning authority to intervene and change the structure of development occurring in the neighbourhood plan area on land that has high levels of accessibility to shopping and commercial facilities, open space, recreational opportunities and community facilities. I accept the evidence of Mr Buckley, the town planner retained by JRD, that the planning goals in these overall outcomes are consistent with the imperatives and drivers for land use structure that come from the State government. They demonstrate that Brisbane, as a planning authority, has embraced the State's approach.

[39] These overall outcomes are supportive of the proposed development. I accept the evidence of the town planners that the proposed development would involve an efficient use of land by providing a more intensive form of development on land that has a high level of accessibility to the Forest Lake Shopping Centre, Forest Lake itself and the associated recreational facilities. It is certainly a more efficient use of land than the predominant form of development encouraged in the Low density residential zone, being a single dwelling house.<sup>25</sup>

[40] Further, for reasons that I will address in more detail later, the proposed development would meet a need for further accommodation to be provided for senior members of the community. As such, its approval is supported by overall outcome (3)(b) of the Forest Lake neighbourhood plan code.

[41] The issue of compliance with overall outcome (3)(d) of the Forest Lake neighbourhood plan code requires consideration of broader issues of amenity, character impacts and community expectations. I will deal with it later when considering those issues.

---

<sup>23</sup> But not necessarily at a "high density".

<sup>24</sup> See those provisions that specifically relate to the Residential precinct, including overall outcome (4)(a) and performance outcomes PO3 to PO5.

<sup>25</sup> See s 6.2.1.1(4)(a) of the Forest Lake neighbourhood plan code. This is a provision that the Council initially relied on in support of its decision to refuse the proposed development.

How is the tension between overall outcome (4)(d) of the Low density residential zone code and the Forest Lake neighbourhood plan code resolved?

[42] There is a tension between the provisions of the Forest Lake neighbourhood plan code and overall outcome (4)(d) of the Low density residential zone code in their application to the subject land. A retirement facility of no greater than two storeys on the subject land would satisfy overall outcome (4)(d) of the Low density residential zone code but would not comply with the requirements of the Forest Lake neighbourhood plan code.

[43] The proper approach to the resolution of potential inconsistency (or conflict) within a statute was considered in *Project Blue Sky Inc v Australian Broadcasting Authority*.<sup>26</sup> McHugh, Gummow, Kirby and Hayne JJ said:

“*Conflicting statutory provisions should be reconciled so far as is possible*

[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole”. In *Commissioner for Railways (NSW) v Agalinos*, Dixon CJ pointed out that “the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed”. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

[70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court “to determine which is the leading provision and which the subordinate provision, and which must give way to the other”. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

[71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was “a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent”.”

(footnotes omitted)

[44] The authorities cited by their Honours included *Australian Alliance Assurance Co Ltd v Attorney-General of Queensland*,<sup>27</sup> where Cooper CJ of the Full Court of the Supreme Court of Queensland said:

“... I think I am bound by the well-recognized rule of construction which this Court followed in *The King v. The Licensing Justices of Nanango, Ex parte Watson*—viz.,

<sup>26</sup> [1998] HCA 28; (1998) 194 CLR 355, 381-2.

<sup>27</sup> [1916] St R Qd 135, 161.

that the sections of a statute must be construed so as to make the statute a consistent and harmonious whole; and, “if after all, it turns out that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail”.”

(footnotes omitted)

- [45] Their Honours also referred to *Minister for Resources v Dover Fisheries Pty Ltd*,<sup>28</sup> where Gummow J said:

“...In dealing with an apparent conundrum such as that presented by par (a) in O 79 and O 80, the Court should strive to avoid a capricious or irrational result and seek to give each provision a field of operation. In *AMP Inc v Utilux Pty Ltd* [1972] RPC 103 at 109, Lord Reid said that, it being improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect, one should look to see whether any other meaning produces a more reasonable result.”

- [46] The Council submits that consistent with these orthodox principles, this Court should attempt to read the Low density residential zone code together with the Forest Lake neighbourhood plan code. It says such an approach would assume, as a matter of principle, that overall outcome 5(a) of the Forest Lake neighbourhood plan code was promulgated with knowledge of the zoning within the precinct. The Council submits that it follows that the Court should not conclude that the requirement for development to provide for “*multipurpose centre and medium density residential development*” is to the exclusion of low density residential development. The Council says the overall outcome should be construed as recognising the predominant, although not exclusive, purpose for land within the precinct. The Council’s construction would involve reading the word “*predominantly*” into the provision.
- [47] Assuming the Forest Lake neighbourhood plan code was promulgated with knowledge of the zoning within the precinct, it does not follow that the word “*predominantly*” should be read into overall outcome (5)(a). Reference to other provisions in City Plan do not support this approach. To the contrary, it shows the City Plan expressly includes the word “*predominantly*” where the planning strategy calls for a predominance only of a particular intensity of development.<sup>29</sup> I also do not accept the Council’s submissions for the reasons provided in paragraphs [29] to [32] above.
- [48] The Council further submits that unless overall outcome (5)(a) is construed as calling only for a predominance of medium density residential development, no effect would be given to the Low density residential zoning for the subject land. I do not accept this as a basis for adopting the Council’s construction for six reasons.
- [49] First, as I noted in paragraph [15] above, the combination of assessment benchmarks that applies to development of any particular parcel of land can vary significantly. There are only two parcels of land that are both in the Low density residential zone and the District business centre precinct of the Forest Lake neighbourhood plan area. They are the subject land and the adjoining land. The adjoining land is already developed for a multipurpose centre.

---

<sup>28</sup> (1993) 43 FCR 565, 574.

<sup>29</sup> See, for example, overall outcome (4)(a) of the Low density residential zone code.

[50] Second, as Mr Buckley explained, Brisbane has many layers of planning and sometimes there is inherent tension between the layers. In town planning practice, it is an appropriate planning outcome to take the neighbourhood plan as providing a strong indication of the intended planning outcome. Mr Buckley says such an approach is consistent with the general town planning principle that specific analysis for a particular area should prevail over general provisions that apply across the whole city. That approach is also consistent with a practical reading of City Plan. In terms of the practicalities of promulgation of planning schemes, Mr Buckley explained that even where a neighbourhood plan is promulgated with knowledge of an inconsistent underlying zone, it is not unusual for isolated parcels of land to be maintained in that zone, particularly for a planning entity the size of Brisbane. I accept the evidence of Mr Buckley and consider it relevant to this issue. As was noted by Morrison JA in *Zappala v Brisbane City Council*:<sup>30</sup>

“The fact that planning documents are to be construed precisely in the same way as statutes still allows for the expressed view that such documents need to be read in a way which is practical, and read as a whole and as intending to achieve balance between outcomes.”

[51] Third, Mr Buckley’s practical approach to the reading of City Plan is supported by a reading of City Plan as a whole. Section 7.1(1) of City Plan explains that Neighbourhood plans “*address matters at the local or district level and may provide more detailed planning for the zones.*” In the Forest Lake neighbourhood plan, s 7.2.6.3.2(1) confirms that this particular neighbourhood plan provides finer-grained planning at a local level for the Forest Lake district neighbourhood plan area. As such, the planning outcomes recorded in the Forest Lake neighbourhood plan code represent a closer consideration of the intended planning outcomes for the locality than that provided by the applicable zone codes. Both Mr Buckley and Mr Gaskell (the town planner retained by the Council) acknowledge this.

[52] The more refined planning is evident in:

- (a) the Forest Lake neighbourhood plan map, which divides the neighbourhood plan area into one of four precincts, namely:
  - (i) the Residential precinct (Forest Lake neighbourhood plan/NPP-001);
  - (ii) the District business centre precinct (Forest Lake neighbourhood plan/NPP-002);
  - (iii) the Blunder Creek environmental and open space precinct (Forest Lake neighbourhood plan/NPP-003); and
  - (iv) the Parkland lots precinct (Forest Lake neighbourhood plan/NPP-004);
- (b) the identification of particular points of interest on the Forest Lake neighbourhood plan map;

---

<sup>30</sup> [2014] QCA 147; [2014] QPELR 686, 700 [56] citing *Westfield Management Ltd v Pine Rivers Shire Council* [2005] QPEC 15; [2004] QPELR 337, 342.

- (c) the overall outcomes, which includes some overall outcomes that apply to the neighbourhood plan area generally,<sup>31</sup> as well as distinct overall outcomes for each precinct;<sup>32</sup> and
- (d) Table 7.2.6.3.3.A – Performance outcomes and acceptable outcomes, which includes performance outcomes and acceptable outcomes that are of general application to land in the neighbourhood plan area,<sup>33</sup> as well as some performance outcomes that apply to particular precincts,<sup>34</sup> or even particularly zoned land in a particular precinct.<sup>35</sup>

[53] Section 7.2.6.3.1 of City Plan explains the application of the Forest Lake neighbourhood plan code. In particular, s 7.2.6.3.1(3) states that when using the code, reference should be made to s 1.5, s 5.3.2 and s 5.3.3 of City Plan.

[54] Section 1.5 of City Plan states:

“Where there is inconsistency between provisions in the planning scheme, the following rules apply:

- (a) the strategic framework prevails over all other components, to the extent of the inconsistency for impact assessment;
- (b) relevant codes as specified in Schedules 6 and 10 of the Regulation prevail over all other components, to the extent of the inconsistency;
- (c) overlays prevail over all other components (other than the matters mentioned in (a) and (b), to the extent of the inconsistency;
- (d) **neighbourhood plan codes prevail over zone codes**, use codes and other development codes, **to the extent of the inconsistency**;
- (e) zone codes prevail over use codes and other development codes, to the extent of the inconsistency;
- (f) provisions of Part 10 may override any of the above.”

(emphasis added)

[55] Given the innumerable potential combinations of assessment benchmarks that could apply to development throughout Brisbane depending on the nature of the development and its locality, s 1.5 of City Plan recognises the potential for inconsistencies between provisions in City Plan. It prescribes how any such inconsistency is to be resolved. The prospect of inconsistency between neighbourhood plans and zones is also recognised in s 5.3.2(8) of City Plan, which stipulates that a category of development or assessment in a neighbourhood plan overrides a category of development or assessment in a zone. Further, that neighbourhood plan codes prevail over zone codes is explicable given they provide more detailed planning for the particular parts of the city to which they apply.

---

<sup>31</sup> See s 7.2.6.3.2(3) of City Plan.

<sup>32</sup> See s 7.2.6.3.2(4), (5), (6) and (7) of City Plan.

<sup>33</sup> See performance outcomes PO1 and PO2 and the corresponding acceptable outcomes.

<sup>34</sup> See, for example, performance outcomes PO3 to PO5 and the corresponding acceptable outcomes.

<sup>35</sup> See, performance outcomes PO6 and PO7 and corresponding acceptable outcomes, which only apply to development in the District business centre precinct that is also in the centre zones category or the Mixed use zone and performance outcome PO8 and corresponding acceptable outcomes, which only apply to development in the District business centre precinct that is also in the Medium density residential zone.

- [56] Fourth, I do not accept the Council’s submission that a finding that overall outcome (5)(a) of the Forest Lake neighbourhood plan is supportive of the proposed development would involve giving no effect to the Low density residential zoning for the subject land. There are other provisions of the Low density residential zone code that still have application, such as overall outcome (5)(f). That overall outcome requires development to respond to land constraints, mitigate any adverse impact on environmental values and address other specific characteristics, as identified by overlays affecting the site or in codes applicable to the development. Overall outcome (3)(d) of the Low density residential zone code will also continue to have application to the many other parcels of land in the Low density residential zone that are not otherwise in the District business centre precinct of the Forest Lake neighbourhood plan area.
- [57] Fifth, I accept the Council’s submission that the canon of construction that provisions of general application give way to specific provisions when in conflict should only be called in aid “*where there are two inconsistent provisions which cannot be reconciled as a matter of ordinary interpretation*”<sup>36</sup> or “*where contrariety is manifest*”.<sup>37</sup> Here, giving effect to s 1.5 of City Plan and the other provisions that expressly recognise the primacy of the neighbourhood plans over zones does not involve the application of the general maxim. Rather, it involves giving effect to the words of City Plan itself.
- [58] Sixth, I do not accept that, as a matter of ordinary interpretation, the planning goal reflected in overall outcome (4)(d) of the Low density residential zone code can be reconciled with that in overall outcome (5)(a) of the Forest Lake neighbourhood plan code (and the other provisions of that code such as overall outcome (3)(a) and performance outcome PO1). This is particularly so if, as the Council submits, its effect is to be taken as setting a development intensity for the subject land that is consistent only with the land’s Low density residential zoning.<sup>38</sup> The effect of that approach is to give no effect to the mapping of the land as within the District business centre precinct.<sup>39</sup> That approach is unattractive, particularly given City Plan recognises the potential for inconsistent provisions and stipulates how to resolve such inconsistencies.<sup>40</sup> The Council’s approach would also suggest that overall outcome (3)(a) of the Forest Lake neighbourhood plan code would have little, if any, operation for the subject land.

---

<sup>36</sup> *Purcell v Electricity Commission of New South Wales* [1985] HCA 54; (1985) 60 ALR 652, 657.

<sup>37</sup> *Reseck v Federal Commissioner of Taxation* [1975] HCA 38; [1975] 133 CLR 45, 53.

<sup>38</sup> The Council did proffer an alternative position, namely one that would permit three-storey development. The basis for that position appears to be no more than an approach that splits the difference.

<sup>39</sup> It is hard to accept the mapping is inadvertent given there is other land in the Low density residential zone in the discrete area bounded by Forest Lake Boulevard, Grand Avenue and The Esplanade that is equally proximate to Forest Lake Shopping Centre but which was included in the Residential precinct rather than the District business centre precinct. These are the seven lots on Catalina Circuit that are in the Low density residential zone.

<sup>40</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 382 [70].

- [59] The Council advances an alternative position that the building height of residential development on the subject land should be limited to three storeys. It relies on the approach taken by Mr Gaskell in this respect, which it submits purports to give effect both to the designation of the land in the District business centre precinct and to its Low density residential zoning. Mr Gaskell reasons:
- (a) the Medium density residential zone code includes building heights between three and five storeys (based on overall outcome (5)(b) in section 6.2.1.3 of the Medium density residential zone code);
  - (b) where land is included within the Medium density residential zone, the height of development is affected by acceptable outcome AO1 of the Forest Lake neighbourhood plan code, which provides for a height of four storeys;
  - (c) the “*Residential precinct*” referred to in overall outcome (5)(b) of the Forest Lake neighbourhood plan code is Residential precinct NPP-001 (being land predominantly included in the Low density residential zone); and
  - (d) in effect, the height for development for the subject land, in the Low density residential zone and unaffected by the effect of acceptable outcome AO1, should be read at the lower end of the three to five storey medium density residential height range, i.e. as intending development of three storeys.
- [60] I do not accept Mr Gaskell’s approach. It appears to involve little more than a numerical compromise. It places significant reliance on acceptable outcome AO1 of the Forest Lake neighbourhood plan code. This ignores that, as the Council conceded in oral submissions, there is no obligation for any development to comply with the acceptable outcome. Mr Gaskell’s approach also ignores the provisions of City Plan referred to in paragraphs [51], [53] and [54] above.
- [61] The Council further submits that its construction would give effect to overall outcome 3(d) of the Forest Lake neighbourhood plan code. That provision states:
- “Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precincts or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development.”
- [62] The provision is of general application to all land in the Forest Lake neighbourhood plan area. It does not indicate that the development of the subject land is to be of a particular height and intensity. Rather, it contemplates that the intended height, scale, and form of development will be ascertained by reference to provisions specific to the relevant precinct that the land is within or provisions that relate to the site itself. As such, overall outcome 3(d) can be given full effect regardless of whether overall outcome (5)(a) of the Forest Lake neighbourhood plan is construed as requiring development to be predominantly for a multipurpose centre and medium density residential development or only for that purpose.
- [63] For the reasons provided above, I am satisfied that, to the extent it is necessary to resolve an inconsistency between overall outcome (4)(d) of the Low density residential zone code and the provisions of the Forest Lake neighbourhood plan code, it is appropriate to give primacy to the outcomes sought in the Forest Lake neighbourhood plan code. That is not to say that the non-compliance with the

height stipulation in overall outcome (4)(d) of the Low density residential zone code is to be ignored. However, the non-compliance with a single assessment benchmark is not assumed to have primacy in the exercise of the planning discretion such that the non-compliance alone warrants refusal of the proposed development.<sup>41</sup> The non-compliance is to be considered in light of other relevant matters, which includes that an approval is consistent with the finer-grained planning reflected in the Forest Lake neighbourhood plan code.

#### Conclusion regarding the appropriateness of the height

- [64] The proposed development does not comply with the height requirement in overall outcome (4)(d) of the Low density residential zone code. However, for the reasons set out above, this does not compromise the planning goals for the locality. To the contrary, the planning goals are achieved by compliance with the finer-grained planning expressed in overall outcomes (3)(a) and (b) and (5)(a) and (b) of the Forest Lake neighbourhood plan code. Those provisions encourage development of the type proposed.

#### **Is the proposed development of an appropriate bulk, scale, form, and intensity having regard to the character, location, and street context of the subject land?**

- [65] The Council alleges that the proposed development is not of an appropriate bulk, scale, form and intensity having regard to an assessment of the proposed development against the Multiple dwelling code.
- [66] The Multiple dwelling code is a code of general application that, in version 9 of City Plan, applied to all development applications for multiple dwellings across Brisbane City. (In the most recent version of City Plan 2014, version 16, it no longer applies to development applications for retirement facilities. Retirement facilities are now subject to assessment against the Retirement and residential care facility code instead.)
- [67] The Council alleges the proposed development does not comply with overall outcomes (2)(e) and (i) and performance outcome PO6 of the Multiple dwelling code.

#### Does the proposed development comply with overall outcome (2)(e) of the Multiple dwelling code?

- [68] Overall outcome (2)(e) of the Multiple dwelling code states:

“Development has a bulk, scale, form and intensity that integrates with the existing and intended neighbourhood structure for the area as expressed by the zone, zone precinct and neighbourhood plan outcomes, and is consistent with:

- (i) the location and street context of the site;
- (ii) its proximity to an activity centre, higher capacity public transport services, or other community facilities;
- (iii) the capacity of infrastructure.”

---

<sup>41</sup> *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16, [50]. Incidentally, s 326 of the *Sustainable Planning Act 2009* (Qld) also recognised that development could be approved in conflict with a provision of a planning scheme if the conflict arose because of a conflict between two or more aspects of the planning scheme and the decision was one that best achieved the purposes of the planning scheme.

- [69] The Council alleges the proposed development is not of a bulk, scale, form, and intensity that integrates with the existing and intended neighbourhood structure for the area as expressed by zone, zone precinct, and neighbourhood plan outcomes. It also alleges the proposed development is not consistent with the location and street context of the subject land. The Council accepts that the proposed development is consistent with its proximity to an activity centre, higher capacity public transport services and other community facilities such as the open space associated with the Lake. It also does not dispute that the proposed development is consistent with the capacity of infrastructure.
- [70] The Council's submissions were of little assistance in appreciating the basis for its allegations and the evidence it relies on to substantiate them. The submissions note the self-evident propositions that "*bulk*" is referred to in connection with "*scale, form and intensity*" and that the provision refers to "*existing*" and "*intended*" neighbourhood structure. The Council did not articulate what it says is the "*existing*" or "*intended*" neighbourhood structure, nor point to any evidence that it says the Court should consider in making the necessary factual determination. In addition, the Council did not identify the area that it says constitutes the relevant "*location*", nor articulate what it says is the "*street context of the site*". It did not point to any evidence that it says the Court should consider with respect to those concepts. The Council did not explain why it says the proposed development is not consistent with the location and street context of the site. Its submissions about the alleged non-compliance were as follows:
- “67. Mr Buckley relied on building bulk being counter-balanced by the proposal having no residential neighbours. The Appellant seeks to rely on that opinion and make much of the fact that the land adjoins a commercial development and a car park. That is true, but properly viewed what the development does is to borrow those spaces and also the park space to justify its own bulk and scale. That is not a sound justification for a bulky building with high site cover.<sup>42</sup>
68. The proposal does not in its bulk, scale, form and intensity integrate with the existing neighbourhood structure. The Respondent submits that the proper application of this overall outcome requires consideration of both the present and intended form and character of the local area. In doing so, it is relevant to bring to account the likely pace of any transition to a higher form of development. To do so would be consistent with the approach of Mr Gaskell and Mr Buckley.”
- [71] I do not accept the submission that Mr Buckley endorsed an approach that places weight on the likely pace of transition to a higher form of development. In its written submissions, the Council did not identify the evidence it relied on to support the submission. In oral submissions, it identified one answer provided by Mr Buckley during cross-examination. The question Mr Buckley was asked to answer was premised on an assumption that there would be no medium rise development in the medium density zone for the next 10 years. His answer is of no assistance as the assumption calls for speculation about future events about which there is no evidence.

---

<sup>42</sup> Mr Gaskell calculated the site cover of the proposed development at approximately 66 per cent.

*What is the existing neighbourhood structure and the relevant location and street context of the subject land?*

- [72] Mr Curtis, the visual amenity, architecture and landscape expert retained by the Appellant, is of the opinion that the locality most relevant to an assessment of the proposed development is the District business centre precinct of the Forest Lake neighbourhood plan area. It is on the western side of Forest Lake Boulevard. Mr Curtis explains that the precinct is a distinct area. Two prominent features separate it from the broader locality. One is Forest Lake Boulevard. It bisects the suburb and forms the principal organisational spine for the local settlement pattern. Forest Lake Boulevard also acts as a boundary to this distinct area because, for most of its length, the adjoining houses are disengaged from and have little or no connectivity to it. The rear elevations of the houses are setback from Forest Lake Boulevard behind high fences and landscaping. Access to the houses is from local streets within the residential estate, and the principal facades of the houses address those streets. The other defining feature is the public recreation area associated with and including the lake.
- [73] Mr Curtis opines that, within the District business centre precinct, the existing neighbourhood structure and street context consists of three legible character areas. Mr Curtis describes them as the “*commercial sub-precinct*”, the “*residential sub-precinct*” and the “*lakeside sub-precinct*”. The boundaries of his nominated character areas are delineated on Figure 36 of his report. The “*commercial sub-precinct*” comprises that area within the District centre zone. It is characterised by its commercial building typology (including the height and bulk of the structures) and the size and prominence of the areas dedicated to car parking. Mr Curtis’ “*residential sub-precinct*” is coincident with the land in the Medium density residential zone. He also refers to it as the “*Jetty Walk residential village*”. It is presently characterised by one and two storey houses in a relatively typical southeast Queensland suburban setting. The area described by Mr Curtis as the “*lakeside sub-precinct*” comprises the two lots in the Low density residential zone and the carpark and recreation land to the west of the subject land.
- [74] Mr Curtis explains that two features of the local landscape reinforce the legibility and differentiation of his “*lakeside sub-precinct*” from the adjoining “*residential sub-precinct*” and characterise The Esplanade’s streetscape. The first is the contiguous boundary fence and landscaping that characterises Forest Lake Boulevard and extends around the corner to continue along the southern side of The Esplanade. It provides a bounding edge that encapsulates the existing residential development to the south of The Esplanade. The development behind is comprised of two-storey detached houses elevated up to approximately 1.5 metres above the road frontage on a terrace that is retained by a low stone retaining wall and a vegetated sloping verge. The houses do not have direct access to The Esplanade. They have only limited ground level visual connectivity to the street. They appear disconnected from the street and look to be located within a “*private estate*” that is accessed via the gateway structures that provide an entry statement at the western end of The Esplanade. Mr Curtis says that the growth of the young Norfolk Pines along the southern side of The Esplanade will likely strengthen the legibility of this edge over time. The second feature is the location of gateway structures that provide an entrance statement that defines and separates the “*residential sub-precinct*” from the “*lakeside sub-precinct*”. There are similar entry statements throughout the suburb of Forest Lake, which is comprised of various neighbourhoods or “*villages*”.

- [75] Along the northern side of The Esplanade, Mr Curtis opines that four features inform the current streetscape character of the “*lakeside sub-precinct*”. The first is the relatively prominent two-storey commercial building on the corner of Forest Lake Boulevard. The building is of masonry construction with a multi-hipped tile roof. It is setback from the corner, and sits on an angle behind on-grade car parking. The second is the subject land’s vacant state. It has a benched landform that falls towards the lake to the north and is partially screened from the frontage by a low hedge. The third is the on-grade carpark to the west of the subject land. It extends along the frontage. It slopes down to the west and sits below the adjoining road frontage. It terminates adjacent to the gateway structures that form the entry statement to the Jetty Walk residential village at the western end of The Esplanade. Fourth, the lakeside and open setting of tall trees provide a backdrop with fragmented views through to the open space associated with the lake to the north. The tall trees also increase the topographical scale on the northern side of The Esplanade.
- [76] I accept this unchallenged evidence of Mr Curtis. Mr Curtis supported his opinions with cogent explanations and by reference to photographs of the area. The photographs accord with what I viewed during a site inspection. The site inspection also assisted me to understand Mr Curtis’ evidence about how the location of the subject land within its broader context influences a person’s understanding and impressions of the local context, allowing them to appreciate the variations and differences in character and the relationships that contribute to each area’s legibility and amenity.

*What is the intended neighbourhood structure?*

- [77] I have already considered the intended neighbourhood structure for the area as expressed by the zone, zone precinct and neighbourhood plan outcomes in paragraphs [22] to [64] above.
- [78] The existing neighbourhood structure that Mr Curtis describes as the “*residential sub-precinct*” or the “*Jetty walk residential village*” does not accord with the intended neighbourhood structure. That area is presently characterised by a predominance of two-storey, detached houses. City Plan intends that it be redeveloped for medium density residential development. This may include multiple dwellings with building heights of up to four storeys (as an acceptable outcome) and possibly higher. Acceptable outcome AO8.2 of the Forest Lake neighbourhood plan code admits of potential development of high-density residential development, such as multiple dwellings of up to eight storeys, on land around the lake and in the Medium density residential zone.
- [79] The Council submits that a development will be less likely to satisfy the intent of a provision that calls for consideration of existing and intended character in circumstances where “*if built, the development will be non-compliant with the present context for a long time, perhaps an indefinite time*”. It says that is the situation here. It says the opportunity has been present for medium density residential development in this locality since the commencement of City Plan 2000 and that no four-storey development has occurred in that time.
- [80] Leaving aside the subject development application, there has been no sign of imminent redevelopment of land in the District business centre precinct for medium

density residential development. Mr Curtis acknowledged this. Mr Buckley also accepted that the only four-storey development that has happened during that period has been the apartments in the District centre zone. He was not aware of any current evidence of any proposals or applications or public notification to build medium density residential development in the Medium density residential zone. He acknowledged that the houses in the area were not old and that might mean that the time that it would take to redevelop might be longer. However, this does not demonstrate that, if built, the development will be non-compliant with the present context “*for a long time*” or that the opportunity for medium density residential development has existed since 2000.

- [81] The Council was unable to point to any evidence that the opportunity for medium density residential development has existed since 2000.<sup>43</sup> At the time that City Plan 2000 commenced in October 2000, the land that is now in the Medium density zone and the District business centre precinct was in the Low-medium Density Residential Area. Under City Plan 2000 (at the time of its commencement), the stated intent for such land was as follows:

“The Low-medium Density Residential Area will contain a mix of houses up to 2 storeys and 2 and 3 storey multi-unit dwellings and single unit dwellings. Land in this Area is located in those parts of the City that are close to public transport networks or centres.

During the life of this plan, a relatively small proportion of land in this area will be redeveloped for multi-unit residential. New development must therefore be designed to co-exist comfortably with neighbouring houses. This will be reflected in the intensity and scale of development and a strict adherence to a maximum gross floor area of 50% or 60%, if in close proximity of public transport or on arterial roads.”

- [82] The development in the District business centre precinct is reflective of this planning intent. There is no evidence about when the zoning of the land was changed to the Medium density residential zone.

- [83] On the issue of the likely pace of transition, the Council submits:

“Mr Gaskell identified the issue as being a matter of town planning principle that the slow development of higher intensity developments in Forest Lake meant that the proposal would be unusual in its context.”

- [84] I do not accept that the rate of development of a particular part of Brisbane, namely Forest Lake, and the advent of a particular development in that area can be “*a matter of town planning principle*”.

- [85] The tenor of the Council case is that little weight should be afforded to compliance with the intended structure of the District business centre precinct because the area has been slow to redevelop. Leaving aside the absence of evidence to substantiate the Council’s position that there has been a long afforded, but unrealised, opportunity for development at a medium density, the difficulty with the Council’s approach is that it calls for speculation about when development will proceed in accordance with the Council’s planning in City Plan. Overall outcome (2)(e) does

---

<sup>43</sup> In its written submissions, the Council sought to rely on the contents of the 1987 Development Control Plan. During oral submissions the Council accepted it did not have evidence to support the submission. The designation in the Development Control Plan, being a document equivalent to the neighbourhood plan, did not demonstrate the zone that applied under the 1987 Brisbane Town Plan.

not call for such speculation, nor a weighting of existing character against intended character by reference to the historical rate of redevelopment of the area.<sup>44</sup> It requires the proposed development to integrate with the existing neighbourhood structure and the intended neighbourhood structure and to be consistent with the location and street context of the site.

*What was the evidence about the appropriateness of the proposed development in terms of neighbourhood structure, location and street context?*

- [86] As would be apparent from my observations in paragraphs [2] to [5] and [72] to [78] above, the District business centre precinct of the Forest Lake neighbourhood plan area does not have a homogenous neighbourhood structure. Mr Curtis recognises this in his careful and considered analysis of the subject land and its surrounds in section 4 of his report. The appropriateness of the height, bulk, scale, form, intensity and site cover of the proposed development was also the subject of detailed consideration by Mr Curtis. His evidence was, in large measure, unchallenged. Despite this, the Council submits that there were aspects of Mr Curtis' work that was poorly reasoned or improperly supported. Before addressing the specific criticisms of Mr Curtis' evidence levelled by the Council, it is necessary to provide an extensive summary of the evidence so that the Council's allegations can be understood by reference to Mr Curtis' evidence overall.
- [87] In section 5 of his report, Mr Curtis provides a detailed analysis of the architecture and landscape design of the proposed development by reference to elements evident on the site plan, each of the floor plans, and in the elevations and sections. He opines that the proposed development has a relatively understated contemporary appearance, articulated by a layering of architectural elements and finishes that provide visual interest and an understanding of the building's use and operation. The articulation provides a balance between each facade's vertical and horizontal proportions and a legible base and cap to the building. The fenestration and balconies animate, activate, and provide depth to the facades to fragment and mitigate the proposed development's bulk. Mr Curtis explains that the interface with adjoining public spaces is activated by social spaces. The pedestrian and vehicle access locations are clearly legible, without being intrusive. None of Mr Curtis' opinions about the architectural and design elements and their impact on the visual mass were challenged.
- [88] In section 6.1, Mr Curtis explains that the visual impacts of a development's height and bulk are contingent upon the modulation and articulation of its form and appearance, and its relationship to its surroundings. He explains that, in general, factors that mediate the visual impact of a building's height and bulk may include:
- (a) the overall distribution of the development's volume in space vertically and horizontally (for example, the bulk might be distributed between podium and tower components);
  - (b) the modelling of the volume to create a more complex form with varying proportions (for example, the building volume might have an envelope that is

---

<sup>44</sup> By way of contrast, the intent for the Low-density Residential Area in City Plan 2000 (set out in paragraph [81] above) required designs that comfortably co-existed with the present due to the small likelihood of redevelopment.

modulated by varying setbacks and/or projections or the form has a “*sculptural*” shape);

- (c) the visual articulation of surfaces so as to avoid a homogenous appearance. This can be achieved by introducing a variety of materials, colours, and/or smaller elements that reflect the human scale. This combination of smaller elements may enhance the building’s visual interest and reinforce its appearance as an aggregation of parts as opposed to a monolithic form;
- (d) the extent of open space that surrounds the development (for example, a building located on a corner site will be viewed in a more open setting where the size of the adjoining “*borrowed*” open space balances the size of the building’s volume);
- (e) the absence of a cumulative effect of building bulk that may arise from buildings being viewed in close proximity to each other. If a building is viewed obliquely along a street in relation to other buildings, with one in front of the other, it can create the appearance of a contiguous “*wall*” of aggregated bulk; and
- (f) the appearance of surrounding development. This provides a visual frame of reference within which individual developments may be considered. A comparison with surrounding development may result in one building appearing more or less “*bulky*” than another.

[89] Mr Curtis explains that these factors are qualitative considerations that assist to describe an aggregation of elements and relationships that can characterise the visual mass of a development, as opposed to its empirically defined bulk.

[90] In relation to the proposed development, Mr Curtis explains that the bulk is accommodated within a rectangular cuboid form comprised of stacked floor plates with rounded corners. Apart from the void located in the proposed development’s lower south-west corner and the difference in the proposed development’s height relative to the north and south boundaries, its form is of a generally consistent and regular shape. The proposed development’s appearance is generally characterised by a similar compositional strategy that is utilised for all four of its facades. This strategy employs the use of a white coloured overlay of projecting elements (including walls, slab edges, columns, balustrades, parapet etc.) contrasted against a darker coloured, recessed background (the main external walls). The darker recessive background accentuates the depth of each facade and allows the white overlay of finer elements to be more visually prominent. Mr Curtis opines that this assists to mitigate each facade’s overall visual bulk.

[91] With respect to the principle south (Esplanade) and north (Lake) facing facades, Mr Curtis explains that the design incorporates a multi-level vertical void at the centre of each facade. Each void is “*framed*” by thin vertical columns on each of its sides and by the continuation of the balconies (or roof parapet) above and below the void across the width of each facade. Mr Curtis opines that the void and its framing reinforce the symmetrical composition of each facade and highlights the visual focus provided by the two centrally located and vertically aligned feature trees located in each of the northern and southern facades. The stacked balconies that flank the voids have bronze glass balustrades that will provide a visual contrast to the white and dark walls, while still providing a degree of transparency that

provides depth to the facade. Mr Curtis notes that the depth of the balconies increases at the corners of the building, where the external walls are set further back. He explains how this additional depth “erodes” the corners of the building form, which further mitigates the visual impact of the development’s bulk. The solid balustrade on level two extends across the width of the southern facade. It assists to differentiate the ground level and level one from the levels above. Mr Curtis opines that this creates a “base” to the facade that provides a transition to the ground and a human scale to the building. It also provides a visual reference to the height of the existing adjoining commercial building to the east and the existing development opposite the subject land on the southern side of The Esplanade. Similarly, the solid ground level balustrade and adjoining arbour that extend across the width of the northern facade assist to differentiate the lower ground level from the levels above. This also creates a “base” to the facade that provides a transition to the ground and a human scale. Both the north and south facade are “capped” by the depth of the roof parapet, which completes the traditional tri-partite and symmetrical composition of the two facades.

- [92] Mr Curtis explains that the east and west facades are essentially similar in appearance, with the exception of the void located at the southern end of the west facade (above the vehicle service area and basement ramp). Both facades are characterised by the two white vertical walls that flank the central balconies and reinforce the symmetrical appearance of each facade. The balustrades to the central balconies that extend between the vertical white walls are largely solid in appearance, which contrast with the bronze glass balustrades at each end of the elevation and the dark coloured, recessed wall behind. The contrasting recessed, dark wall accentuates the visual depth of the facades to mitigate their visual mass. Like the north and south facades, the depth of the balconies increases at the corners of the building, where the external walls are set further back. Again, this additional depth “erodes” the corners of the building form and further mitigates the visual impact of the proposed development’s bulk. Like the north and south facades, both facades are “capped” by the depth of the roof parapet to complete the traditional tri-partite and symmetrical composition of the two facades.
- [93] Mr Curtis’ unchallenged explanation of the visual attributes of the design and their impact on its visual mass accords with what is depicted in the plans and elevations. His opinions about the visual impact of those design elements accord with the depiction of the proposed development in the photomontages.
- [94] In section 6.2 of his report, Mr Curtis analysed the visibility of the proposed development. Mr Curtis explains that a person’s visual field has a vertical angle of approximately 30 degrees up and down and a horizontal angle of between approximately 100 to 180 degrees. The horizontal overlap of the bi-focal image is within an angle of approximately 130 degrees. What might be visible to a person from a particular location (that is, a viewpoint) is typically referred to as a view shed. What might be visible from a combination of viewpoints and view sheds in relation to a defined setting is typically referred to as a visual catchment. As was explained by Mr Curtis, view sheds are therefore more relevant to a person when stationary. A visual catchment is more relevant to a person when they are moving and the view sheds are continually changing, which is more often the case as a person travels along the paths of a city between locations. When travelling along a path, a person looks ahead. The line of sight to the elements along the path will generally be at an oblique angle with one element viewed behind another.

Accordingly, elements are partially obstructed by their neighbours, and the separation between elements might not be apparent. Individual building and landscape forms can often merge into a contiguous visual mass. The photomontages are representative of a viewpoint only. Mr Curtis explains that he selected the viewpoints for the photomontages as locations where the proposed development's visual impact was most visible and likely to be relevant to the locality's existing visual amenity.

- [95] The photomontage from viewpoint VP01 provides a view of the proposed development looking northwest along The Esplanade from near the corner with Forest Lake Boulevard. Mr Curtis explains in his report that the image shows what a person turning into The Esplanade or passing The Esplanade while heading north along Forest Lake Boulevard will see. As is apparent from the photomontage, the proposed development will appear in close proximity to the adjoining commercial building. Mr Curtis opines that together they will appear as a cluster of more intensive development that is separate and distinct from the Jetty Walk residential village. Mr Curtis further says that the height of the proposed development is greater than, but not incompatible with, that of the adjoining commercial building. This evidence accords with the depiction in the photomontage. The photomontage shows how the pitched roof of the two-storey commercial building accentuates its height, thereby assisting in a compatible appearance with the proposed five-storey development. The photomontage also demonstrates how the vegetation will form a visually prominent aspect of the streetscape and will partially screen the built form that sits behind it.
- [96] Viewpoint VP02 provides a view of the proposed development looking northeast along The Esplanade towards the corner with Forest Lake Boulevard. The image conveys what a person will see when leaving the Jetty Walk residential village and walking along The Esplanade. The photomontage demonstrates how the width of The Esplanade reinforces the separation of the "*lakeside sub-precinct*" from the Jetty Walk residential village. It also demonstrates how the articulation, fenestration, balconies, and colours erode the visual bulk of the proposed development.
- [97] Viewpoint VP03 provides a view of the proposed development looking southwest from the lakeside boardwalk adjacent to the public open space and amphitheatre on the northern side of The Esplanade. The photomontage conveys what a person will see when walking along the boardwalk through the open space or attending a performance at the amphitheatre. Mr Curtis notes that the proposed development is well setback from the amphitheatre behind the on-grade car park that separates the two. It is largely screened by the existing tall trees that are scattered through the public open space. The trees provide a different topographical scale through their height and visual prominence and provide a dynamic contrast to the horizontality of the lake and the open turf area. The proposed development's height falls below the height of the trees. Mr Curtis opines that this diminishes the development's prominence in relation to the setting. The vegetation at the base of the proposed development adjoining the car park provides a buffer and transition in height to the car park from the proposed development. The photomontage again demonstrates that the articulation and depth provided to the proposed building form fragments its bulk and provides human scale references within the facade.

[98] Viewpoint VP04 provides a view of the proposed development looking south across the lake from the pavilion within the public open space on the northern side of the lake. The image conveys what a person will see when passing through or recreating within the open space on the northern side of the lake. The proposed development is setback from the lake and is largely screened by the visually dominant, tall trees that characterise the lakeside open space on the southern side of the lake. The proposed development's height falls below the line of the consistent height of the trees. Mr Curtis opines that this is a key aspect of the trees' relationship and significance to the visual character of the open space. Where visible, the proposed development has a primary relationship to the adjoining existing two-storey commercial building. The prominent, pitched, tile roof accentuates the height of this existing building. The relationship of the two buildings' heights provides a gradation towards the east and the adjoining space. Mr Curtis notes that the proposed development's fenestration and balconies visually reinforce the horizontal proportion of the facade, which assists to mitigate the appearance of its height and reinforces its visual relationship to the horizontal proportion of the adjoining commercial building and the lake and its shoreline.

[99] In section 6.3 of his report, Mr Curtis explained that the visual impact of a development is appreciated by a spectrum of experiential scale that is typically structured by the street, neighbourhood and city contexts. He regards the "*street context*" as referring to situations where a person's engagement with elements and their relationship to each other are experienced in close proximity. The level of a person's engagement is largely influenced by the elements' compatibility with the human scale. In his view, the human scale is the physical scale of a human being in terms of their size or the things they might wear or hold, things they use (such as a doorway or a chair), or the comfortable separation between two people when interacting in a conversation. He regards the visual catchments at ground level when in close proximity to the subject land's frontages to be most relevant to the proposed development's relationship to the street context. His evidence about those catchments is outlined in paragraphs [72] to [75] above. In addition, during cross-examination, Mr Curtis further explained how the proposed development is consistent with the streetscape. He said it adds to the spatial definition of the street by providing a frontage treatment that enhances the cohesiveness of the street by providing an edge on the northern side that is consistent with the existing edge on the southern side.

[100] Mr Curtis explains that typical, pedestrian-scale considerations include:

- (a) the proposed development's compatibility with the human scale including the mitigation of impacts arising from the proposed development's bulk;
- (b) the proposed development's contribution to the appearance and spatial character of the street and/or adjoining public space;
- (c) the degree of animation and activation provided by the proposed development's interface with adjoining pedestrian spaces through its visual interest and permeability;
- (d) the proposed development's obstruction to any significant views available from adjoining public spaces; and

- (e) the impact on the amenity of neighbouring property with respect to privacy and solar access.

- [101] In his view, the proposed development responds favourably with respect to each of these considerations. He opines that the facades are adequately articulated by architectural elements and variations in colours and setbacks to effectively fragment the proposed development's visual mass, to not appear as a monolithic form. The architectural elements reflect the human scale. He considers that the north and south facades provide a novel landscape focus that contributes to the visual interest and identity of the appearance when viewed from the street and adjoining public space. The differentiation of the lower storeys creates a legible base to the built form to visually transition the height and bulk to ground level, where it is complemented by landscape elements that establish a human scale edge to the adjoining areas. For reasons noted in paragraph [87] above, Mr Curtis is of the view that the ground level interface will be animated and activated and will contribute to landscape amenity. The proposed development will not obstruct any significant views from the public realm. Its separation from residential development ensures it will not impact privacy and solar access.
- [102] With respect to neighbourhood context, Mr Curtis explains that this relates to the visual relationship between a larger assemblage of topographical elements within a broader visual context where elements are not necessarily available to view at the same time. As such, people have greater recourse to memory. The consistency, compatibility and legibility of elements within the neighbourhood context influences a neighbourhood's memorability and local character. The view catchment that he considers capture the proposed development's relationship to the neighbourhood context are primarily those from Forest Lake Boulevard, The Esplanade and from the public open space adjoining the subject land and from across the lake. His evidence about the impact of the proposed development on that context is described in paragraphs [95] and [98] above.
- [103] In section 7 of his report, Mr Curtis further explains how his analysis informed his opinion with respect to each of the issues the Council had raised as reasons warranting refusal of the proposed development.

*Is the proposed development appropriate having regard to the neighbourhood structure, location and street context?*

- [104] The Council did not directly challenge many of the opinions expressed by Mr Curtis in his report. In its written submissions the Council acknowledges that the state of the evidence does not support a submission that Mr Curtis' evidence should be discarded entirely. As I mentioned above, despite this, the Council submits that there were aspects of Mr Curtis' work that were poorly reasoned or improperly supported. The Council supports its submission by reference to five matters.
- [105] First, the Council submits Mr Curtis' assessment was based on an outdated factual basis as to the vegetation he said was screening the houses on St Tropez Place and Mauritius Parade whose rear elevation sits on an elevated platform above the street level of The Esplanade. With respect to this criticism, the Council relies on Mr Curtis' acceptance that photographs taken of the southern side of The Esplanade a few days prior to his evidence showed a significant change in the landscaping. The Council does not explain why that reasonable concession by Mr Curtis about

the visual difference in vegetation at two different points of time infects Mr Curtis' assessment. I am not persuaded that it does. When it was suggested to Mr Curtis that the visual relationship between his *lakeside sub-precinct* and his *residential sub-precinct* was more open than that described in his report, Mr Curtis maintained his view about the physical and visual separation between the two. He acknowledged that the current photographs show the landscaping is diminished, consistent with current weather conditions, but explained that there is a clear and distinct edge. He explained that the edge is reinforced by the retaining wall, the change of elevation, the vegetation such that it is in the photographs shown to him, and the various fence types. I accept this evidence of Mr Curtis. The photographs in Mr Curtis' report show how, when the weather is more conducive to lush vegetation, the landscaping atop the retaining wall is an important feature that defines the edge he describes. The more recent photos show that in less conducive weather conditions, the impression of the edge described by Mr Curtis will not be influenced to as great an extent by the vegetation. Nevertheless, the edge is still evident. The poor state of the vegetation simply reveals, in a more pronounced manner, the other elements that create the visual impression of an edge, namely the retaining wall, the various fence types and the elevation that physically and visually disconnects the land to the south of The Esplanade from the street.

[106] Second, the Council submits that Mr Curtis said he had not seen the plans at pages 109 and 110 of his own report and then later said:

“... I was mistaken. It was included and – yeah. I have relied upon these insofar as yes, they were included in the report, but do I rely upon them in terms of an accurate depiction of the scale, the use of the land (indistinct) no, I don't, which is why we requested the photo montages from Mr Elliott.”

[107] The Council does not explain how this evidence demonstrates that Mr Curtis' work was poorly reasoned or improperly supported. The Council's written submission also only extracts part of the evidence provided by Mr Curtis about this issue. A more representative extract of Mr Curtis' evidence on this issue is as follows:

“Perhaps if you go to exhibit 3. Thank you. Exhibit 3, please. If you go to page 7?--- Yes.

Is that the drawing to which you refer?---So that's the image of the front of the building, yes.

Now, does that purport to be its scale?---Yes.

Where is that?---Perspective A3. Yeah. So it's a perspective view, so it's not at scale, no. I stand corrected. Yes.

Do you rely upon this as a depiction of what the development looks like from the esplanade?---Yes.

Does it show the planting, for example?---Does it show what, sorry?

The planting on the left and right of the development?---No, it doesn't.

Well, what else is it missing? And how is it drawn into its context?---This is a relatively crude photo montage, which is why we commission people like Mark Elliot to produce more sophisticated montages. I agree that we don't have one on the front-on view of the building, and in a way this illustrates the reason why, because it doesn't effectively show the building within its context. It's just – it's not much more than just an elevational view of the building.

So it's not a view that the court should rely upon it were it to wish to understand what the development would look like from the front?---I think they can rely upon it to some degree. I mean, any architectural representation, if you take a standard elevation, an orthogonal projection, that is technically correct, it is exact. However, it does not allow you to appreciate the depth and the three-dimensional feeling of the building. Soon as you provide it in a perspective view like this is. That also is subject to some distortion, so it's very difficult to get a 100 per cent exact image of the building.

So whose work is this?---This would be the architects, AAD.

So it's not your work?---It's not my work, no.

And it's not Mr Elliot's work?---No.

It has just sort of been stuck in. Did you verify it?---I've listed in my report the drawings that I've relied upon.

See, just go across the page. Given what we saw yesterday, one could be forgiven for not recognising that as a view from the lake of the subject development?---I had not seen these images before, just by the way."

And, a few minutes later:

"All right. Now, just before I go there, Mr Loos tells me that on an unpaginated part of your report, indeed, the street perspective does appear. Would you like to check your report for me? Unfortunately, we haven't got a paginated copy, so I can't – they're both there. The lake perspective also?---Yeah. I don't have a full copy of my report. Not with the appendices.

It's the seventh sheet in appendix D?---Yes, you're correct. I was mistaken. It was included and – yeah. I have relied upon these insofar as yes, they were included in the report, but do I rely upon them in terms of an accurate depiction of the scale, the use of the land (indistinct) no, I don't, which is why we requested the photomontages from Mr Elliott. I rely upon the orthogonal projections, the plans, the elevations, the sections which are technically correct. Orthogonal projections to scale. The perspectives, as I said, they're produced by the architect and they don't have the level of expertise as Mr Elliott, and so I do not rely upon them in terms of giving an accurate depiction of the building. However, you know, they are useful insofar as they are another depiction of the building, but I don't rely upon them to the ultimate degree. I rely upon Mr Elliott's images."

- [108] Mr Curtis' initial confusion about his reliance on the drawing is understandable when one looks at his report. The body of the report, which contains his analysis and opinions, is 83 pages long. The extent to which he describes urban design, visual amenity, architecture and landscape concepts and exposes how they inform the opinions he formed is exemplary. There is an additional 73 pages of attachments, including 25 pages of architecture drawings in Appendix D. It is apparent from the body of the report that not all of the appendices were afforded equal weight by Mr Curtis in undertaking his assessment. For example, his analysis makes substantive reference to each of the photomontages, which he appends as Appendix F. Mr Curtis analyses each of the photomontages and explains how they inform his opinions. By way of contrast, Appendix D is described as appending the revised architectural drawings. A table appears to list all of the plans prepared by AAD Design for the proposed development. In section 5 of the report, Mr Curtis only analyses those of the plans that contain the floor plan for each level, the elevations and the sections. The report discloses no apparent reliance by Mr Curtis on the perspectives. The evidence of Mr Curtis extracted above reinforces my impression

of the importance of the drawing to Mr Curtis' opinion. I do not accept that this matter demonstrates that his work is poorly reasoned or improperly supported.

[109] Third, the Council submits:

"Mr Curtis included in his report the photograph that appears at page 6 of Ex. 3 (the upper photo). He agreed that the photograph was "*completely inaccurate*". He had not described it in that way in his report.

[110] Each of the sentences in this submission is correct. If accepted at face value as an accurate reflection of the evidence, they are apt to create a false impression. The image at page 6 of Exhibit 3 is not a photograph. It is a perspective prepared by AAD Design. The relevant evidence about it was as follows:

MR TRAVES: Could I ask you to look at exhibit 3, page 6?---Sorry; exhibit 3 is the  
- - -

Yes, it is?--- - - - book of plans?

The book?---Yes.

Thank you, Mr Curtis. You see the upper photo – the other photo there, the view from Forest Lake Boulevard?---Yes, I do.

Now, did you create that?---No, I didn't.

Do you know what it is? And do you agree with me, it's completely inaccurate?---I would agree with you, yes.

And in what way is it inaccurate?---I – the height of the building is not consistent with what you would – we know it to be.

And what about the – all of the trees in front of it, including, apparently, those still in front of its south-western corner?---Sorry, what was that? The - - -

All the trees in front of it. Look at – look at the trees it's behind, on the – on the Esplanade front?---Yes.

And what's that little shed there, do you know?---It's probably from an old photograph, where that was on the site.

But this was in your report?---Yes.

But you didn't describe it as being totally inaccurate then?---I wasn't describing each and every drawing that I have access to. I was – the drawings that were of – useful and – and relevant to my analysis, I refer to in the report.

But that's my point?---I don't – this might have been relied upon in terms of its information, but I don't necessarily accept this as being an accurate depiction of the building.

But surely a reader of your report is entitled to assume that that upon which you rely is accurate. Is that a – not a fair assumption with your report?---Well, that's a presumption that the information – I'm saying, I've relied upon this information, you know, and I've made my judgments from it, and my opinions I've expressed from it. And there's – no way do I refer to this drawing in my report.

So should I ask you to go through your court report and identify that in your report upon which you do not rely? Would that be a useful course?---We could do that, if you think it's helpful. I would say, to summarise, that what I've relied upon in the – in the architectural drawings are the plans, the elevations and the sections. As I said before, those – they're the technically correct orthogonal projections that we know; they are the technical drawings. I've relied upon those, and I did not rely upon any

of the perspective views produced by the architect. What I relied upon was what was requested from Mr Mark Elliott.

But you took me to the perspectives earlier this morning and said, “There’s a depiction.” You took me to the perspectives and relied upon it until I showed why it couldn’t be.

HER HONOUR: Well, he answered a question that you asked him.

MR TRAVES: I forget what it was.

HER HONOUR: Yes, well the question that you asked him was about was there anything that gives us – that shows it from the front, and he took you to that perspective as an indication – from my recollection, as the best indication that we have as to what it looks like from the front. He didn’t wholly adopt as his own, but he was answering the question you asked.

MR TRAVES: I confess I’m not sure that’s my recollection, your Honour, but anyway the - - -?---No, the - - -

HER HONOUR: Well, the transcript will show.

MR TRAVES: - - - transcript will show. I understood that you volunteered it, but - - -?---Thank you, your Honour, but I – no, I didn’t take you to that image. You took me to that image.

Did I?---You asked me what was available in the report and I said, “The elevation”. That’s what I relied upon.

All right. So you did rely upon it or not?---Upon the elevation, yes. And that’s not – what you took me to was not an elevation.

All right. I’m sorry. Just so there’s no confusion, I was speaking of the perspective, to which - - -?---That's correct, yes.

- - - to which you did take me?---I did not take you to that, no.

All right. Yes, I’ll have to check the transcript. You may well be right, Mr Curtis?--- I say - - -

If you are right, I apologise?---I did say you would – the only image we have that I rely upon would be the elevation, as I said.

All right. All right.”

- [111] Consideration of the earlier transcript confirms that Mr Curtis’ recollection was correct. He had not taken Mr Traves to the image as one that he relied on. Throughout his evidence, Mr Curtis consistently maintained that the only architectural drawings that he relied upon to inform his opinions were the plans, elevations and sections. His oral evidence is consistent with the content of his report, particularly in its detailed analysis and explanation of the basis of his opinions. This criticism by the Council is misplaced.

[112] The fourth matter raised by the Council as a basis to conclude Mr Curtis' opinions were poorly reasoned and improperly supported is the absence of imagery, i.e. photomontages or perspectives, from three locations, namely immediately in front of the proposed development, immediately behind it and from the adjoining car park. The Council submits that Mr Curtis accepted that one of the views "*would be a useful view*". This submission again takes Mr Curtis' evidence out of context. His evidence was as follows:

"And could I suggest to you that the view of the site from directly in front is important?---It would have some importance, yes, but any number of views are quite important.

But one important one surely is one standing across the street looking at the development?---Yes. I accept that would be a useful view, yes.

Now, did you ask Mr Elliot to do a photo montage of that view?---No, I didn't, because in my opinion, the value of the photo montage views are to show the building in its context. A photo from straight in front of the building, given the width of the lens – you know, unless you went to the very wide angle lens, which would distort it, would not be particularly helpful.

But it's very reasonable, is it not, for someone like the people next to me here, the resident submitters, to wish to know what the building looks like if you stood in front of it? Don't you think?---Best indication of that are the elevations, I would presume."

[113] I accept Mr Curtis' explanation as to why such imagery, as compared to elevations, is of limited assistance.

[114] The fifth criticism made of Mr Curtis relates to the combined effect of his evidence that the proposed development:

- (a) "*borrow*s the amenity" from the public foreshore landscape space;
- (b) borrows foreshore open space to the north which assists to mitigate the bulk of the building; and
- (c) does not incorporate taller trees along the northern side of the building and within the property that would reduce its visual impact from across the lake.

[115] With respect to that evidence, the Council submits:

"As a matter of planning principle it is a distinctly uncomfortable notion for a development to "borrow" amenity or extra space from neighbouring public land. Particularly neighbouring public land that is a frequently used public space. There being no depiction of the proposal from that public space, Mr Curtis was asked to annotate Ex. 3, page 24. That exercise demonstrated that the perspective of a user of the park standing near the proposal would be overwhelmed by the proposal's height.

[116] This criticism by the Council is also not well founded. The Council provided no authority to support its "*planning principle*", nor did it reference any evidence of a town planner that supports its submission that there is such a planning principle. Even if I were to assume that such a principle exists, Mr Curtis' approach did not offend it. The first observation by Mr Curtis relied on by the Council was made when explaining how the retirement facility would enjoy an attractive outlook. It is unremarkable that a development would seek, as much as possible, to provide a

pleasant outlook to optimise the amenity provided to its occupants. The other two observations by Mr Curtis are equally unremarkable. Mr Curtis made the second observation when explaining why he regarded the proposed development to be of a scale and built form commensurate with the size of the site. In section 6.1 of his report, Mr Curtis provides more detail about how the visual impact of a development's height and bulk are contingent upon its modulation and articulation of its form and appearance and its relationship to its surroundings. His report explains how the visual context of open space or proximate built form can affect the perception of building bulk. His analysis does not inappropriately rely on the adjoining land to justify the bulk of the proposed development, rather it has regard to that context to analyse how the bulk will be perceived. As for the third observation, Mr Curtis' acceptance that there is no landscaping on the northern boundary does not demonstrate an inappropriate reliance on public land to justify the proposed development. I also do not accept the Council's submission about the exercise undertaken with respect to page 24 of Exhibit 3. It does not demonstrate to me that the height of the proposed development would overwhelm a member of the public standing near the proposed development.

- [117] The Co-Respondents by Election expressed concern that the trees relied on by Mr Curtis will likely require removal due to the basement excavations impacting significantly upon their root structures. They refer to the evidence of Mr Gaskell to that effect. Mr Gaskell's curriculum vitae contains no qualifications, nor references any experience, that indicates that he is qualified to express an opinion on the matter. On this issue, I prefer the evidence of Mr Curtis. He is qualified to express opinions about landscape issues. He opined that the trees outside the subject land will remain.
- [118] Although I am not obliged to accept the evidence of Mr Curtis,<sup>45</sup> I have no reservations about doing so in this case. In his report, Mr Curtis provides a comprehensive analysis of the proposed architecture and landscape design. He provides cogent explanations about the basis for his opinions. Those explanations accord with the impressions I have formed having regard to the available photographs and photomontages. Many of his opinions were unchallenged and, for the reasons provided above, I do not accept the Council's criticisms of his evidence.
- [119] Having regard to the evidence of Mr Curtis, I am satisfied that the proposed development complies with overall outcome (2)(e) of the Multiple dwelling code. The evidence of Mr Curtis about the architectural design features and landscape design set out in paragraphs [123] to [128] below further evidences compliance. Integration does not require duplication or replication. The proposed development is consistent with the street context and reinforces the attributes of the existing neighbourhood structure. It also sits comfortably with the intended neighbourhood structure, which contemplates medium residential development. I accept the opinion of Mr Curtis that redevelopment of the locality consistent with the intended neighbourhood structure will contribute to the evolution of his residential sub-precinct and will provide building heights comparable to, or greater than, those of the proposed development.

---

<sup>45</sup> *Bassingthwaite v Roma Town Council* [2010] QPEC 91; [2011] QPELR 63, [63].

Does the proposed development comply with overall outcome (2)(i) of the Multiple dwelling code?

[120] Overall outcome (2)(i) of the Multiple dwelling code states:

“Development provides setbacks and separation of buildings that contribute to the amenity of residents within and adjoining the site and to Brisbane’s high-quality subtropical streetscapes and public spaces.”

[121] The Council alleges that the proposed development does not comply with this provision, as it does not demonstrate how the reduced setbacks and building separation contribute to Brisbane’s high-quality public spaces. In particular, it alleges that there is insufficient building separation from the lakeside park. In support of its position, the Council relies on the opinion of Mr Gaskell that the proposed separation from the lakeside park is insufficient because in at least one location on the subject land there is no setback at all between the communal open space area or ramp in the proposed development and the park. The Council also submits that there is no landscaping proposed at the rear of the building.

[122] Overall outcome (2)(i) requires setbacks to the building that, relevantly, contribute to Brisbane’s high-quality public spaces. The basis for Mr Gaskell’s opinion is the lack of separation to the communal open space or ramp, not the building. This focusses on the wrong issue. For reasons explained below, his opinion is unreliable. I also do not accept the Council’s submission that there is no landscaping proposed at the rear of the building. It is inaccurate, as is demonstrated by the evidence referred to below.

[123] In section 5 of his report, Mr Curtis details the building setbacks. He was not challenged about the accuracy of any of this detail. As Mr Curtis records, and demonstrates by reference to extracts from the proposed plans, the proposed lower ground floor is set down below ground level as a basement in relation to the site’s frontage. It is also set down approximately 0.47 metres in relation to its northern boundary, where it is between 6.40 metres and 6.11 metres from the boundary and behind communal open space and the basement car park access ramp. The proposed ground floor is set down approximately 0.69 metres from the subject land’s southern frontage to The Esplanade, where the external wall is a minimum of six metres from the frontage. The vehicle access ramp to the basement is located towards the western end of the frontage. The ramp and the ground floor’s external wall are a minimum of three metres from the subject land’s western boundary. The ground floor’s external wall and balconies are a minimum of three metres from the subject land’s eastern boundary to the commercial property. To the north, the external wall line and balconies are elevated above the lower ground floor, where there are minimum distances of 5.55 metres and 4.55 metres from the northern boundary to the adjoining public space. The floor plans for levels 1 to 4 demonstrate that the proposed development’s setbacks to the east, north and west boundaries are consistent with the setbacks at the ground floor. The external wall to the south is also similar to the ground floor, except that the south facing balcony that extends along the unit’s facade projects into the setback reducing it to 4.5 metres.

[124] The principal south facing facade (to the Esplanade) and north facing facade (to the Lake) are differentiated from the east and west facing facades by the discontinuation of the horizontal slab and balustrade elements across the full width of the facade.

Mr Curtis explains that this discontinuation creates a multi-level vertical “void” in the centre of the white overlay, which is used to “frame” a central focus of feature trees in each facade. The void in the north facade is “capped” by the continuous solid balustrade to the balconies on level 5 (storey 5). The balustrade also accommodates a planter box for a second feature tree above the void, which is vertically aligned with the tree below. The feature trees in each planter box is specified to be *Hibiscus rubra* (Bronze Cottonwood). The size and shape of the facade planter boxes will constrain the growth of the tree, but the trees could still reach a height of six metres in five years. The planter boxes will also be populated by cascading plants including *Pyrostegia venusta* (orange trumpet vine) and *Monstera olbiqua* (swiss cheese vine). Mr Curtis opines that, together, the two trees within the proposed development’s tallest facade, being the one facing the lake, reinforce the proposed development’s “*landscape motif*” as a primary design feature that complements and refers to the existing tall trees in the adjoining public space. He further opines that the combination of the central feature trees and the cascading plants will create a vertical landscape feature that will provide a visual focus within the north and south facing facades. This effect is apparent from the elevations. I accept Mr Curtis’ opinions.

- [125] In addition to incorporating a design feature that complements the tall trees in the adjoining public space, the proposed development incorporates landscaping within the setback to the northern boundary. Mr Curtis details the landscaping in his report. His evidence is summarised in paragraphs [126] to [128] below.
- [126] At the lower ground floor level, the communal open space comprises an area of 114.73 square metres located in the northeast corner of the subject land. It includes a level, turfed area with terraced seating at its western end where it adjoins, and is screened from, the adjoining basement car park access ramp behind a batten partition. The communal open space includes a pedestrian ramp that extends along the subject land’s northern boundary to provide access to the adjacent public open space that adjoins the Lake. A raised planter in the northeast corner of the communal open space will accommodate a feature tree *Hibiscus rubra* (Bronze cottonwood), which could reach a height of approximately six metres in five years and a maximum height of eight to ten metres at maturity. A narrow strip of screening vegetation and a 1.8-metre high fence extends along the subject land’s eastern boundary. In addition, an arbour above the basement ramp forms part of a landscape strategy that integrates climbing plants on the arbour with a strip of deep planting that extends along the full length and width of the building’s three-metre setback to the western boundary. A large feature tree, *Agathis Robusta* (Kauri Pine), is proposed for the northeast corner of the subject land within the deep planting area. At planting, the Kauri Pine is specified to have a 100 litre pot size with a height and spread of 1.8 metres by 1.5 metres. It could reach a height of six metres in five years and up to 15 to 20 metres in 15 years. Three *Grevillia baileyana* (White Oak) trees along the western boundary will complement the Kauri Pine. These trees could grow to a maximum height of approximately ten metres. An understorey of various screening shrubs, grasses, and ground covers will be planted beneath the trees.
- [127] At the upper ground floor level, the vehicle access ramp is three metres from the western boundary, behind deep planting. The setback area will accommodate another Kauri Pine, which could reach a height of six metres in five years and up to 15 to 20 metres in 15 years. There is another area for deep planting in the southeast

corner of the subject land. It is a six-metre wide landscaped area, which extends across the frontage to the subject land's eastern boundary. The deep planting will include another Kauri Pine and two Bronze Cottonwood trees, with an understorey of various screening shrubs, grasses, and ground covers. Mr Curtis opines that this deep planting will be in a visually prominent location and is capable of accommodating significant landscaping where it may best contribute to the streetscape's amenity. The hardstand plaza at the front of the subject land will also use a variety of finishes to articulate its appearance, mitigate any adverse visual impact, and provide an attractive and complementary appearance to the adjoining vegetation.

[128] In section 5.6.2 of his report, having detailed the proposed architectural features and landscape design, Mr Curtis provides his opinion about the overall effect of the landscape design. He says the proposed landscaping along the subject land's southern frontage to The Esplanade effectively combines vegetation and paving to provide a human scale interface with the footpath and transition to the building form. The prominent trees located within the deep planting area located at the eastern and western corners of the frontage will frame the building and reinforce the landscape's contribution to the proposed development's overall visual resolution. Mr Curtis also opines that the three-metre wide strip of deep planting that adjoins the subject land's western boundary will provide a visual buffer between the proposed development and the adjoining public car park, while also connecting the frontage with the public open space that adjoins the subject land to the north. This connectivity, together with the taller trees within the buffer, will assist to integrate the proposed development into the landscape context that characterises the lakeside area on the northern side of The Esplanade. With respect to the northern boundary of the subject land, Mr Curtis explains that the arbour that extends over the carpark ramp that adjoins and extends along that northern boundary will be covered with climbing plants. It will provide an integrated landscape feature, enhanced screening, and a buffer between the ramp and the adjoining communal open space, while also complementing the adjoining public open space to the north. The amenity of the communal open space will benefit from its pleasant outlook, which Mr Curtis says is "*borrowed*" from the adjoining public open space. The narrow strip of landscaping that adjoins and extends along the subject land's common boundary with the commercial development to the east will screen the ground floor of the proposed development from the commercial building's secondary "*service*" facade and provide a landscaped outlook for residents.

[129] The Council did not challenge this evidence of Mr Curtis. I accept it.

[130] Having regard to the building setbacks and the architectural design features and proposed landscaping detailed above, and the opinions of Mr Curtis, I am satisfied that the proposed development contributes visually to the high-quality public spaces it adjoins. It complies with overall outcome (2)(i) of the Multiple dwelling code.

Does the proposed development comply with performance outcome PO6 of the Multiple dwelling code?

[131] Performance outcome PO6 of the Multiple dwelling code states:

**“Development has a building height that is consistent with the streetscape local context and intent for the area having regard to:**

(a) proximity to high-frequency public transport services;

- (b) **the predominant height of existing or approved buildings in the street;**
  - (c) providing appropriate separation and a sensitive transition between houses and higher scale building forms;
  - (d) street conditions such as street width;
  - (e) the topography of the area and site slope;
  - (f) view points and corridors;
  - (g) solar access to key public spaces and adjoining buildings.”
- (emphasis added)

- [132] The Council alleges that the proposed development does not comply with performance outcome PO6 because its height is not consistent with the streetscape local context and intent for the area. It says that is particularly so having regard to the predominant height of existing or approved buildings in the street. The tallest building on The Esplanade is two storeys and there is no approval of anything taller. The Council submits that taking account that taller buildings in the area might be ten years or more away, the building height of the proposed development is inconsistent with the streetscape local context and the intent of the area.
- [133] The Council did not identify any evidence that supports its submission about the timeframe for taller buildings. It is no more than speculation and I do not accept it.
- [134] Mr Curtis opines that the articulation provided by the assemblage of architectural elements and the variations provided by the facades’ colouration fragments the visual bulk of the building form, provides a legible understanding of the building’s residential use and human scale, and provides visual interest that reinforces the landscape feature within its north and south facing facade. Having regard to how the architectural design elements effectively mitigate the visual composition of the proposed development’s visual mass, and the proposed setting within which it is located (as described in paragraph [75] above), Mr Curtis opines that the proposed development’s height is visually compatible with its current streetscape context. I accept his opinion.
- [135] Having regard to that evidence of Mr Curtis, and his evidence and my findings already noted in paragraphs [22] to [130] above, I am satisfied that the proposed development complies with performance outcome PO6 of the Multiple dwelling code.

#### Conclusion regarding the proposed development’s bulk, scale, form, and intensity

- [136] For the reasons outlined above, I am satisfied that the proposed development complies with the applicable assessment benchmarks that seek to regulate the bulk, scale, form, and intensity of development on the subject land.

#### **Does the proposed development comply with overall outcome (3)(d) of the Forest Lake neighbourhood plan code?**

- [137] Overall outcome (3)(d) of the Forest Lake neighbourhood plan code applies generally to the Forest lake neighbourhood plan area. It states:
- “Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precincts **or** site and is only developed at a greater height,

scale and form where there is both a community need and an economic need for the development.”

(emphasis added)

- [138] The Council alleges that the proposed development does not comply with overall outcome (3)(d) in that the development has not demonstrated a height, scale and form consistent with the character and community expectations for development in the Forest Lake area. It also submits that JRD has not demonstrated a community and economic need that justifies development at the proposed height, scale, and form.
- [139] During oral submissions, the Council accepted that in this provision, the word “or” should be given its ordinary meaning. As such, compliance with this provision can be achieved in one of three ways, namely by demonstrating:
- (a) the proposed development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for District business centre precinct of the Forest Lake neighbourhood plan area, being the relevant precinct; or
  - (b) the proposed development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the subject land itself (which would include those related to its zoning); or
  - (c) there is both a community need and an economic need for the development.
- [140] I do not accept the submission of the Co-respondents by election that a document that purports to be a petition signed by signed by 303 (or 76 per cent) of residents/owners within “*Jetty Walk*” put to City Council seeking to have the area in the Medium density residential zone changed to the Low density residential zone evidences reasonable community expectations. Community expectations are derived from the statutory planning controls as a whole. The community must be taken to consider the possibility that development may include that which a local government may permit in an appropriate case.<sup>46</sup> That is the case regardless of the existence of significant community opposition to the development.<sup>47</sup>
- [141] This provision has the same formulation as the provision of the Toowong-Auchenflower neighbourhood plan considered in *Bell v Brisbane City Council & Anor*.<sup>48</sup> There, McMurdo JA analysed the provision at paragraphs [40] to [49]. At paragraph [43], his Honour said:
- “The question is not whether the development would satisfy community and economic needs; it is whether there is a need for this development, or put another way, whether it is necessary to develop their site by buildings of this height.”

---

<sup>46</sup> *Bell & Anor v Noosa Shire Council & Ors* [1983] QPLR 311, 313; *Ausco Modular Pty Ltd v Western Downs Regional Council* [2017] QPEC 58; [2018] QPELR 80, 91 [53].

<sup>47</sup> The Outline of Submissions for the Seventh and Eighth Co-Respondents, Mr Howard and Ms Robinson, notes there was a petition opposing the development that contained over 1 400 signatures and 353 submissions were made to the Council objecting to the proposed development. It should be noted that there has been a change to the form of the proposed development since that time. Amongst other things, its height has been reduced.

<sup>48</sup> [2018] QCA 84;(2018) 230 LGERA 374.

[142] In that case, the proposed development was found to be of excessive height. It could only be approved if the developer could demonstrate that there was both a community need and an economic need for the development. That is not the case here. For the reasons provided in paragraphs [22] to [136] above, I am satisfied that the proposed development is of a height, scale and form that is consistent with the amenity and character and community expectations intended for the relevant precinct, being the District business centre precinct of the Forest Lake neighbourhood plan area. As was acknowledged by Mr Traves for the Council during oral submissions, this is sufficient to demonstrate compliance with overall outcome (3)(d) of the Forest Lake neighbourhood plan code.

**Is the proposed development consistent with the most recent planning for the area?**

[143] Version 16 of City Plan commenced on 31 May 2019. It is common ground between the parties that the amendments to City Plan should be given significant weight in this appeal. The same amendments were given significant weight in *Walters & Ors v Brisbane City Council & Anor.*<sup>49</sup> The history of the amendments outlined in that decision remains accurate, save that the amendments now have force and effect.

[144] Sections 45(7) and (8) of the *Planning Act 2016* require an assessment manager to assess an application against the applicable planning documents in effect at the time the application was properly made, but permit weight to be given to any new, or amended, planning documents. His Honour Judge Williamson QC outlined the mechanism by which such weight ought to be given in *Peach v Brisbane City Council & Anor.*<sup>50</sup> I agree.

[145] The Council alleges that the proposed development does not comply with version 16 of City Plan, in particular:

- (a) overall outcomes (2)(c) and (j) and performance outcomes PO5(a) and PO8(a) of the Retirement and residential care facility code; and
- (b) overall outcome (4)(d) of the Low density residential zone code.

Does the proposed development comply with overall outcome (2)(c) of the Retirement and residential care facility code?

[146] Overall outcome (2)(c) of the Retirement and residential care facility code states:

“Development provides buildings that are designed to integrate with the character of the locality, present as non-institutionalised and provide home-like environments, a sense of belonging, privacy, independence, comfort and safety.”

[147] The Council alleges that the proposed development offends this provision because it does not integrate with the character of the locality.

[148] The Council submits that the outcome of an assessment against this provision is dependent on a consideration of the size, height, and bulk of the proposed development in the context of the locality as described by Mr Curtis. Having regard to the evidence and my findings outlined in paragraphs [72] to [142] above, I am satisfied that the proposed development complies with this overall outcome.

---

<sup>49</sup> [2019] QPEC 3; [2019] QPELR 487, 519-20 [220]-[228].

<sup>50</sup> [2019] QPEC 41, [56]-[65].

Does the proposed development comply with overall outcome (2)(j) of the Retirement and residential care facility code?

[149] Overall outcome (2)(j) of the Retirement and residential care facility code states:

“The proportion of built and natural features, the siting, bulk and scale and design features of buildings, services and infrastructure, and on site open spaces and landscaping achieves:

- (i) a high level of amenity for occupants, visitors and staff and adjoining residents, including access to open and landscaped spaces, natural light, sunlight and breeze to support outdoor subtropical living;
- (ii) a development that is integrated with the local neighbourhood and presents an attractive interface that positively contributes to Brisbane’s character and identity and high quality subtropical streetscapes, public spaces and pedestrian environment;
- (iii) building location and building heights that transition sensitively to adjoining and nearby development;
- (iv) a highly articulated and physically modulated building form, and varied roof form elements;
- (v) generous locations for deep planting.”

[150] The Council alleges that the proposed development does not comply with overall outcome (2)(j)(ii). It says the proportion of the building, the siting, bulk and scale and design features of the building, and the on-site open spaces and landscaping do not achieve a development that is integrated with the local neighbourhood.

[151] The Council submits that this provision is expressed in the present tense. As such, it submits that while the local neighbourhood may change over time, the provision requires consideration of the present context. The Council also submits that the “*local neighbourhood*” is a narrower expression of geographic area than “*locality*”. As such, it submits “*local neighbourhood*” is an area less than the business area precinct of Forest Lake. It submits it encompasses the residential and lake area within which the proposed development is sited. Nothing appears to turn on these matters. They do not inform any material differences between the evidence of Mr Curtis and the evidence relied on by the Council to support its allegation of non-compliance. The Council submissions identify four aspects of the evidence upon which it relies.

[152] First, the Council notes that the proposed development has a site cover of 66 per cent. The Council relies on the evidence of Mr Gaskell that such a site cover is a large departure from the expectations of development form in this area. While Mr Gaskell did express such an opinion, in doing so he referenced expectations derived from acceptable outcome AO14 of the Multiple dwelling code in version 9 of City Plan. The Council’s submissions make no reference to that qualification, nor do they explain why Mr Gaskell’s opinion should be accepted as reliably informing expectations of development form in version 16 of City Plan. As I have already noted, under version 16 of City Plan, the Multiple dwelling code does not apply to retirement facilities. The development parameters for that form of development are instead governed by the Retirement and residential care facility code. As such, this opinion expressed by Mr Gaskell is of no assistance in determining compliance with overall outcome (2)(j)(ii) of the Retirement and residential care facility code in version 16 of City Plan.

- [153] Second, the Council notes that the proposed development has a gross floor area of 167 per cent. In its written submissions, the Council refers to the evidence of Mr Gaskell to the effect that the acceptable outcome for gross floor area in the Medium density residential zone is 90 per cent of the site area and that, as such, one would expect a lower gross floor area than 90 per cent. Neither the Council's submissions nor the evidence of Mr Gaskell identifies the acceptable outcome to which they refer. Mr Gaskell's evidence on this issue is within a section of the Joint Expert Report – Town Planning in which he addresses version 9 of City Plan. It is unclear whether the acceptable outcome to which he refers appears in version 16 of City Plan. Mr Gaskell also does not identify how an acceptable outcome for development in the Medium density residential zone informs expectations about a development required to comply with the Retirement and residential care facility code. I do not regard this evidence as reliable evidence of non-compliance with overall outcome (2)(j)(ii) of the Retirement and residential care facility code in version 16 of City Plan.
- [154] Third, the Council refers to the evidence of Mr Gaskell that the excessive building bulk will stand out in Forest Lake as a large footprint on a relatively small site that leaves no room to transition down to lower rise surrounds or to provide sufficient room for landscaping. Again, this opinion was expressed by Mr Gaskell when addressing compliance with provisions of version 9 of City Plan, many of which are no longer in issue. Mr Gaskell does not explain why the site needs to provide room for transition. No such requirement is evident in overall outcome (2)(j)(ii) of the Retirement and residential care facility code in version 16 of City Plan. I also do not accept the evidence of Mr Gaskell that there is insufficient room for landscaping. He does not explain the basis for his opinion. I prefer the evidence of Mr Curtis with respect to landscaping set out in paragraphs [124] to [128] above.
- [155] The fourth aspect of the evidence relied on by the Council are the opinions of Mr Gaskell that:
- (a) the proposed development's five storeys do not create a cohesive streetscape and built form character as intended by performance outcome PO1 of the Forest Lake neighbourhood plan code;
  - (b) is not consistent with the streetscape local context anticipated under performance outcomes PO6 and PO17 of the Multiple dwelling code; and
  - (c) the proposed development does not integrate with the street or surrounding development.
- [156] I do not accept this evidence of Mr Gaskell. To the extent that his opinions relate to the Multiple dwelling code, they are of no assistance. The Multiple dwelling code does not apply to retirement facilities under version 16 of City Plan. Mr Gaskell does not otherwise reveal the foundation for his opinions. I prefer the evidence of Mr Curtis in this regard.
- [157] Having regard to the evidence of Mr Curtis and my findings in paragraphs [72] to [142] above, I am satisfied that the proposed development complies with this overall outcome.

Does the proposed development comply with performance outcome PO5(a) of the Retirement and residential care facility code?

[158] Performance outcome PO5(a) of the Retirement and residential care facility code states:

“Development has a site area and frontage width that is sufficient to:

- (a) accommodate the scale and form of the buildings and transitioning of height;
- (b) deliver useable communal open space areas and private open spaces;
- (c) create suitable separation between buildings on site and adjoining sites to accommodate landscaping buffering;
- (d) achieve viable areas of deep planting and landscaping to retain significant vegetation and protect and establish large subtropical shade trees;
- (e) achieve safe and convenient vehicle access to the site;
- (f) accommodate on site parking and vehicle manoeuvring for residents, visitors and service providers;
- (g) accommodate the location and size requirements of service authorities and site services, including electricity transformers and fire hydrant and boosters assemblies, to minimise adverse visual and amenity impacts on neighbours and the streetscape;
- (h) minimise the impact of new driveways on the streetscape.”

[159] The corresponding acceptable outcome states:

“Development:

- (a) in the Low density residential zone:
  - (i) has a minimum 3,000m<sup>2</sup> site area and 40m frontage width; or
  - (ii) is on the site of an existing residential care facility or retirement facility; or
  - (iii) is extending the site of an existing residential care facility or retirement facility;
- (b) in any other zone has a minimum 800m<sup>2</sup> site area and 20m frontage width.”

[160] The proposed development does not comply with the acceptable outcome. However, as was acknowledged by the Council during oral submissions, compliance with the acceptable outcome is but one way of achieving compliance with the code. It is not to be taken as the preferred way. It is equally acceptable to achieve compliance with a code by complying only with the performance outcome.<sup>51</sup>

[161] The Council does not allege non-compliance with performance outcome PO5(a) insofar as it refers to transitioning of height. Rather, it submits that the proposed development is too big for the subject land. It says that the key features of the proposed development are the lot size of 1 224 square metres, the frontage of 35 metres to The Esplanade, the height of the building, the site cover and the gross floor area.

[162] The Council relies on the evidence of Mr Gaskell that the proposed development is too large for the size of the subject land and that it fails to accommodate a scale and

---

<sup>51</sup> See s 5.3.3 of City Plan.

form of development that would allow for building transitions, building separation and areas of deep planting and landscaping (including by the retention of significant trees). Mr Gaskell did not explain the basis for these opinions. I do not accept them. I prefer the evidence of Mr Curtis (referred to above) about the appropriateness of the scale and form of the buildings and the adequacy of deep planting and landscaping.

[163] Having regard to the evidence of Mr Curtis and my findings in paragraphs [72] to [142] above, I am satisfied that the proposed development complies with this overall outcome.

Does the proposed development comply with performance outcome PO8(a) of the Retirement and residential care facility code?

[164] Performance outcome PO8(a) of the Retirement and residential care facility code states:

“Development height, bulk and scale, siting and layout ensures:

- (a) building height on sites of under 3,000m<sup>2</sup> where outside of the Medium and High density residential zones are consistent with intended form and character of the local area including the predominant height of existing or approved buildings in the street;
- (b) where building height is greater than the predominant height in the local street context, the development sensitively reduces heights towards site boundaries to a compatible scale with the height of buildings on adjoining or opposite premises;
- (c) impacts on residential amenity and privacy from overlooking, visual dominance and overshadowing are minimised and adequate levels of natural light, sunlight and breezes are maintained to a habitable room, balcony and private open space for both the development and residences on adjoining and nearby sites;
- (d) sufficient visual and acoustic privacy between dwellings without reliance on screening;
- (e) the development contributes to the character of the streetscape and landscape and relates to the existing streetscape rhythm and setback pattern;
- (f) there is adequate landscape buffering, the retention of significant vegetation and protection and establishment of large subtropical shade trees in deep planting areas.

Editor’s note-This is demonstrated through the provision of streetscape elevations, site sections and plans showing adjoining and street context, shadow diagrams and landscape plans”

[165] The Council submits that the proposed development does not comply with performance outcome PO8(a). It says the height, bulk, scale, layout and siting of the development does not ensure that building height on sites outside of the Medium and High density residential zones are consistent with intended form and character of the local area including the predominant height of existing or approved buildings in the street.

[166] The Council submits that the intended form and character of the local area should be assessed against the provisions of City Plan 2016 and, in particular, against the intent for the Medium density residential zone to the south of The Esplanade. It

submits that the proper application of this performance outcome requires consideration of both the present and intended form and character of the local area. It says that in doing so, it is relevant to bring to account the likely pace of any transition to a higher form of development.

- [167] With respect to the likely pace of transition, the Council relies on the evidence of Mr Gaskell that the transition to a higher intensity of development was “slow”, which he considers underlines “*the importance of new development integrating with existing development*”. Mr Gaskell’s opinion is founded on the premise that the opportunity for higher intensity residential development in the District business centre precinct has been included in the planning instruments since at least the 1987 City of Brisbane Town Plan. There is no evidence to support this. To the contrary, the evidence referred to in paragraph [81] above suggests Mr Gaskell’s opinion is founded on a false premise. I do not accept his evidence. The Council was unable to identify any reliable evidence to substantiate its position that there has been a slow rate of transition in the face of planning encouragement for medium density development.
- [168] In any event, I do not accept that performance outcome PO8(a) calls for speculation about the future rate of transition, nor a weighting of existing character against intended character by reference to the historical rate of redevelopment of the area. It requires the proposed development to be consistent with the intended form and character of the local area. To the extent that the intended form and character may involve a building height that is greater than the predominant height of existing or approved buildings in the street, the balance of performance outcome PO8 provides guidance on how a development is to reconcile the difference. For example, performance outcome PO8(b) provides that the development is to sensitively reduce heights towards site boundaries to a compatible scale with the height of buildings on adjoining or opposite premises. Performance outcome PO8(c) and (d) also assist by ensuring that amenity and visual and acoustic privacy is not negatively impacted by a development that is consistent with the intended form and character of the local area but greater than the predominant height of existing or approved buildings. There is no allegation of non-compliance with performance outcomes PO8(b), (c) or (d) (or with the remainder of performance outcome PO8).
- [169] Performance outcome PO8(a) of the Retirement and residential care facility code contemplates retirement facilities on sites under 3 000 square metres. Mr Curtis opines that the proposed development is consistent with the neighbourhood’s existing character, identity, and sense of place. To the extent that the proposed development is greater than the predominant height of buildings in the local street context, Mr Curtis opines that the proposed development has an appropriate interface with the streetscape that will positively contribute to its cohesiveness and amenity. The bases of Mr Curtis’ opinions were well explained. I have summarised them already above. I accept this evidence of Mr Curtis.
- [170] For the reasons provided above, I am satisfied that the proposed development is consistent with the intended form and character of the local area.

Does the proposed development comply with overall outcome (4)(d) of the Low density residential zone code?

[171] Overall outcome (4)(d) of the Low density residential zone code in version 16 of City Plan no longer contains a height limit of one to two storeys. It now states:

“Development for other housing types, being a residential care facility or retirement facility together with ancillary convenience activities and allied services (care co-located uses), which provide housing diversity and enable people to remain within their local neighbourhood throughout their life cycle, may be accommodated at appropriate locations where development meets the bulk and building height requirements of the Retirement and residential care facility code.”

[172] The Council alleges that the proposed development does not comply with this overall outcome because it does not meet the bulk and building height requirements of the Retirement and residential care facility code. For the reasons outlined in paragraphs [146] to [170] above, I disagree.

Conclusion regarding whether the proposed development is consistent with the most recent planning for the area

[173] For the reasons provided above, I am satisfied that the proposed development complies with overall outcomes (2)(c) and (j) and performance outcomes PO5(a) and PO8(a) of the Retirement and residential care facility code and overall outcome (4)(d) of the Low density residential zone code in version 16 of City Plan.

[174] Further, as noted below, the proposed development accords with the other planning goals relevant to retirement facilities.

[175] The proposed development will have a pleasant outlook, particularly those units facing the lake. I accept the evidence of Ms Wells, the retirement and aged-care facility expert retained by JRD, that this environment would be enormously beneficial to the well-being of the senior residents. As Ms Wells explained in her evidence in chief, on average people are entering retirement villages at 75 years of age or older. They are becoming frail and it becomes harder to get out and do things. The residents will spend a lot of time inside their apartments. Having the ability to look out, see the lake, and see life outside around you are enormously beneficial for a senior’s wellbeing. Ms Wells says that the ability to go downstairs, walk outside, and live in that sort of an environment would also be enormously beneficial for their wellbeing. It also allows them to see children playing. It allows them to see mothers pushing strollers around, teenagers walking through the park, effectively allowing them to see normal daily life that they would not necessarily see inside a larger village. I also accept the evidence of Mr Curtis that the proposed development will have good access to natural breezes. Having regard to that evidence, I am satisfied that it is designed and sited to achieve a high level of amenity for residents of the facility and will provide a comfortable, stimulating and attractive living environment for residents, as required by overall outcome (2)(a) of the Retirement and residential care facility code.

[176] The proposed development includes indoor recreation space for the residents. There is a library in the waiting lounge. Additional indoor recreation space, of about 138 square metres, includes a cinema and kitchenette/bar. The indoor recreation space connects to the communal open space, which provides an additional approximately 114 square metres of outdoor space for the social interaction between

residents. The communal open space includes a pedestrian ramp that extends along the subject land's northern boundary to provide access to the adjacent public open space that adjoins the lake. This will stimulate social interaction between residents and members of the wider community. The plaza and adjoining visitor meeting area, which activates the frontage of the subject land, will also stimulate that interaction. These design features achieve the planning goal sought in overall outcome (2)(b) of the Retirement and residential care facility code.

[177] Overall outcome (2)(d) of the Retirement and residential care facility code seeks development that promotes a residential environment that is capable of supporting older people to age in place, avoiding or delaying the need for residents to relocate to alternative accommodation as their care needs change.

[178] During her evidence in chief, Ms Wells explained that the proposed development would provide its residents with continuity of lifestyle, continuity of care and continuity of support networks, which is important for the elderly. She says that this ability for an individual to age in his or her own local neighbourhood is key to ageing in place, as familiarity is a very important thing as we age. She says that the proposed development will be a modern retirement facility that through its design permits aging in place. As Ms Wells explained, this includes providing level access, easy access to communal facilities (rather than challenging topography), kitchens that are designed for aging with ovens at a height that does not require bending and drawers instead of cupboards, wider doors and corridors to permit wheelchair access, non-slip wet areas, and an absence of trip hazards. To the extent that such design attributes are not apparent on the plans, their delivery can be ensured through the imposition of conditions.

[179] Ms Wells also gave evidence that while the proposed development may not be of the scale of some larger villages, "*...it's still able to deliver all those services that are very important for ageing in place*". Those services include:

- (a) an on-site retirement village manager;
- (b) directed activities and events;
- (c) an emergency call system;
- (d) technology directed to both enabling social connectedness and provision for remote monitoring and "*telehealth*";
- (e) on call doctor services, providing 24 hour a day, seven days a week support; and
- (f) partnership with an aged care provider, allowing a delivery of a full range of support and care services. (Ms Wells was cross-examined at length about the existence of an approved provider for the proposed development. While she was not aware of any, she was confident that the proposed development could deliver the services. She displayed intimate familiarity with the approved provider regime under the *Aged Care Act 1997 (Cth)*. I accept her evidence.)

- [180] Having regard to this evidence of Ms Wells, I am satisfied that the proposed development complies with overall outcome (2)(d) of the Retirement and residential care facility code.
- [181] Overall outcome (2)(f) of the Retirement and residential care facility code requires retirement facilities to be conveniently located in relation to activity centres, community facilities, services, public spaces and public transport, to enable access to, and active participation and social interaction with, the wider community.
- [182] As was explained by both Ms Wells and Mr Duane, the economist retained by JRD, the land is centrally located in the heart of the Forest Lake master planned community. It is next to and overlooks the central lake and parkland and is very close to the Forest Lake town centre. In the opinion of Ms Wells, *“the location of the site offers excellent proximity to a range of desired and contemporary health and lifestyle amenity to assist the future village residents to “age well in their neighbourhood”*”. Ms Wells also said in her oral evidence that *“...it’s very important to people to be able to age inside their local neighbourhoods and the importance being is that it gives them continuity of lifestyle, that continuity of care, continuity of support networks so they can just continue living their normal daily life, but hopefully in a much better way.”*
- [183] The full range of facilities that are proximate to the subject land include:
- (a) Forest Lake Shopping Centre, which is located within 400 metres of the subject land. It offers supermarkets (Coles, Woolworths and Aldi), 66 specialty stores, banks, post office, pharmacy, medical centre, cafés and restaurants;
  - (b) other smaller centres within two kilometres of the subject land that include other retail offers such as IGA and Foodworks;
  - (c) other entertainment, food and drink facilities and services. Examples include a café and a vet located immediately next door and, within 800 metres, places of worship, a tavern, and fast food facilities;
  - (d) various health services within 400 to 800 metres of the subject land. These services offer access to dental services, medical centres, independent doctors, allied health and pathology services;
  - (e) large areas of greenspace, including walking tracks, picnic areas, parks, kids’ playgrounds (provided not only in the lakeside park but elsewhere); and
  - (f) public transport facilities. Mr Duane noted that buses run along Forest Lake Boulevard in close proximity to the subject land, including routes to the city, Browns Plains, Carole Park, Oxley and to the Goodna Railway Station.
- [184] I accept this evidence and am satisfied that the proposed development complies with overall outcome (2)(f) of the Retirement and residential care facility code.
- [185] It is evident from the provisions of the Retirement and residential care facility code that there has been a significant shift in the manner in which retirement and aged care facilities are dealt with. These new provisions, in version 16 of City Plan, endeavour to make it easier for the development of retirement facilities within

existing neighbourhoods.<sup>52</sup> They emphasise that development is to focus on the reasonable needs, and amenity, of our senior population who will reside in such facilities. The proposed development addresses these new planning goals well.

**What are the relevant matters that JRD rely on to support approval of the proposed development?**

[186] It is JRD's position that although there is some departure from the assessment benchmarks in force at the time the development application was properly made, in the exercise of the planning discretion, the development application should be approved. It says such an exercise of the planning discretion is justified in this case because:

- (a) there is an economic, town planning and community need for the proposed development;
- (b) the subject land is ideally located for retirement residential purposes having regard to its general amenity and aspect and its proximity to facilities;
- (c) the proposed development is aligned with the purpose to be served by the recent amendments to City Plan with respect to retirement and aged care facilities;
- (d) the proposed development would not result in any unacceptable amenity impacts; and
- (e) version 9 of City Plan failed to anticipate a need for a retirement facility on the subject land of the type and form proposed.

[187] The Council and the Co-Respondents by Election dispute that these matters justify an approval.

**Is there an economic, town planning and community need for the proposed development sufficient to support approval of the proposed development?**

[188] JRD submits there is a clear and pressing need for the proposed development. The Council submits that, properly analysed, there is insufficient need for the proposed development to determine the exercise of the planning discretion in favour of approval.

[189] The parties accept that the general principles that inform and guide an assessment of 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>53</sup> Relevant principles 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;

---

<sup>52</sup> This purpose and effect of the amendments is recorded in the notice of adoption of the amendments to City Plan, which was before the Court at page 342 of Exhibit 13.

<sup>53</sup> [2003] QPEC 2; [2003] QPELR 414, 417-20 [20]-[30].

- (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) a need cannot be a contrived one;
- (d) 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;
- (e) 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>54</sup>
- (f) need is a relative concept to be given a greater or lesser weight depending on all of the circumstances which the planning authority was to take into account;
- (g) need is but one of a large number of issues that is required to be considered in an application of this kind and is not, on any view, paramount;
- (h) in some instances, public or community need for a service or facility may not be great, and other considerations may be of greater moment; and
- (i) the basic assumption is that there is a latent unsatisfied demand which is either not being met at all or is not being adequately met.

Is there a need for the proposed development?

- [190] On the issue of need, I had the benefit of expert evidence from Mr Duane and Mr Brown (the economist engaged by the Council) and Ms Wells. Their evidence addressed both the quantitative and qualitative aspects of need.
- [191] In the Joint Economic Report, there was agreement between Mr Duane and Mr Brown about many of the assumptions that underpin their respective quantitative analysis.
- [192] In section 5 of the Joint Economic Need Report, Mr Duane and Mr Brown agree the catchment area is the region from which elderly residents for the proposed development would most likely be drawn. It generally extends around five kilometres from the subject land. The function of the catchment area is to formulate opinions about the supply and demand for retirement facilities. It also allows economists to examine whether there is an adequate range and choice within the relevant catchment area or the relevant preferred area for retirees to relocate.
- [193] The Co-Respondents by election submit that the catchment area would more reasonably be re-framed to exclude the industrial land of Carole Park and Wacol and Heathwood areas. They submit a more reasonable catchment area would include facilities locally accessible following the main traffic routes north and northwest of the Centenary Highway and Blunder Road to Sinnamon Park, and into Oxley/Corinda/Sherwood areas – all facilities within five kilometres of the edges of Forest Lake. This proposition was not accepted by the experts.

---

<sup>54</sup> *Intrafield Pty Ltd v Redland City Council* [2001] QCA 116; (2001) 116 LGERA 350, 354 [19]-[21].

- [194] I accept the catchment area defined by the economists is appropriate. It takes into account the provision of existing facilities throughout the region, regional and local accessibility along major roads and public transport, and significant physical barriers and natural barriers.
- [195] There was agreement between Mr Duane and Mr Brown about the current and projected population of the catchment area. In 2018, the number of persons over 65 in the catchment area was 8 540 or 10.8 per cent of the total population in the catchment area. The economists agree that this age group is projected to increase by 340 persons per year between 2018 and 2021 and by 383 per year between 2021 and 2026. They agree it will more than double over the period to 2036, increasing by 8 061 to a total of 16 601 by 2036. By that time, persons aged over 65 years are projected to represent 15.5 per cent of the total catchment population. The experts agree that this reflects an average annual growth rate of 3.7 per cent to 3.8 per cent over the period to 2036. That compares to a growth rate of the total population between 1.6 per cent and 2.4 per cent.
- [196] Despite the higher level of population growth in the over 65 years of age cohort, Mr Duane opines that the agreed data with respect to dwelling approvals shows a trend to redevelop vacant land in the area for housing for couples with dependent children. His opinion on this issue was well explained and unchallenged. I accept it.
- [197] In section 6 of the Joint Economic Need Report, Mr Duane and Mr Brown undertake a high-level assessment of the market potential for a retirement facility at the subject land. They agree that in the Forest Lake catchment area, there are only three existing retirement villages offering a total of 698 independent living units and 104 serviced apartments. Included in this number is Aveo Durack. The experts agree that it serves a wider area than this catchment. It offers 629 retirement homes and a Commonwealth funded residential aged care site with 123 beds. At this size, Aveo Durack is one of the largest retirement and aged care facilities in Australia. There are also two small facilities in the catchment area. Settlers Forest Lake offers 86 units in a village setting. The Terraces at Forest Lake, run by Lendlease, is a broad acre retirement village offering 87 places.
- [198] In addition to the 802 available independent living units, Mr Brown opines that the supply for the catchment area includes 36 dwellings in a pensioner rental facility called Village Life Inala. He considers that facility is a partial substitute for an independent living unit in a retirement facility. The facility currently has no vacancies.
- [199] The average vacancy rate is 3.2 per cent across the catchment area. Most retirement facilities have 15 or less vacancies. The economic experts describe that as a low vacancy rate, particularly when compared to the national average of 11 per cent. There are no other approvals (or proposals) for retirement facilities in the catchment area.
- [200] In the Joint Economic Report, the experts analysed the demand for independent living units in the catchment area based on available statistics. In their analysis, they assumed an average of 1.3 persons per independent living unit. Applying this assumption to the existing occupancy of the 802 independent living units, it was agreed that there are currently 1 043 people living in retirement facilities within the

catchment area. This indicates that around 12.2 per cent of the “*over 65*” population in the catchment area live in independent living units. This is higher than the Brisbane average of 7.6 per cent. It is likely to be a function of the historical trend to construct retirement villages on the outskirts of major metropolitan areas. The experts agree that the Brisbane average is likely to increase to 9.7 per cent by 2025, due to the ageing population and the provision of retirement facilities for that population.

- [201] The experts agree that assuming (conservatively) that the proportion of residents aged over 65 years residing in independent living units is 10 per cent over the period to 2036, the demand for independent living units would increase to 1 660 by 2036. This is an increase of 806 places over that period. It is an almost doubling in demand for places in the catchment area.
- [202] The quantitative analysis suggests an oversupply of between 145 independent living units (excluding the supply from Village Life Inala) and 181 independent living units (including the supply from Village Life Inala) in 2018. By 2021, the oversupply would reduce to between 67 and 103 independent living units. By 2026, there would be an undersupply of between 45 and 81 independent living units. Based on current supply, the quantitative analysis suggests a shortfall of between 439 and 475 independent living units by 2036. Applying the average size of retirement villages of 110 to 120 independent living units, this equates to a demand for approximately four new retirement villages within the catchment area by 2036. As was acknowledged by Mr Brown during cross-examination, the quantitative analysis demonstrates that the balance between supply and demand will tighten over time.
- [203] Based on this quantitative analysis, the Council submits that there is no unmet demand now and that Mr Duane’s evidence of a need for the proposed development is based only on anticipated future demand and the addition of competition and choice. I do not accept that proposition. As was explained by Mr Duane during cross-examination, the quantitative analysis should not be interpreted literally. It is a conservative analysis. It assumes that all of the independent living units in the Aveo Durack facility are available to serve the demands of the catchment area alone, even though it is known to serve a greater catchment. The analysis also assumes only 10 per cent of persons over 65 within the catchment area will be living in independent living units over the period to 2036, despite the current proportion being 12.2 per cent. The analysis makes no allowance for an increase in the proportion of the population over 65 living in independent living units over that period, contrary to the national trend. In short, the analysis assumes reducing demand and constant supply. On those assumptions, demand will exceed supply by around 2022 or 2023 (excluding consideration of Village Life Inala), or otherwise by 2025.
- [204] In his individual report, Mr Duane demonstrated the conservative nature of the agreed quantitative analysis. He did so by demonstrating the effect on the analysis if one assumes a demand for independent living units in the catchment area based on 12.2 per cent of persons over 65 rather than 10 per cent. With that assumption, there would be an undersupply of between 60 and 96 independent living units by 2021 and between 721 and 757 independent living units by 2036. Mr Duane opines it is reasonable to assume that the average for the catchment area will move to

10 per cent over time, but says in the short term the current trade area average provides a better indication of the level of demand.

- [205] The conservative nature of the demand analysis in the Joint Economic Report is supported by the evidence of Ms Wells. As she explains, as at 30 June 2017, around 39 per cent of the 70 plus population in Australia accessed funded aged care services, with patterns of usage increasing with age. By the age of 85 plus, around 81 per cent of persons were accessing funded aged care services.
- [206] Having regard to the agreed predictions of increasing population in the trade area (including of residents over 65 years), the high proportion of existing population over 65 within independent living units and the low vacancy rates across the existing retirement villages, I accept the evidence of Mr Duane that the quantitative analysis in the Joint Economic Report should not be treated as a numerically precise prediction of demand. I accept that it is a conservative analysis and that the undersupply will be more readily apparent in the short term.
- [207] While there was little disagreement between the economists about the demand for independent living units and existing supply, there was nevertheless divergence in their opinions about whether there is a need for the proposed development. Mr Duane opines that the available data in relation to economic need, referred to above, indicates that there is a need for the subject development. Mr Brown says this is not sufficient to demonstrate a need.
- [208] Mr Brown's opinion that there is no need for the proposed development is premised on two matters. The first is his view that the proposed development exceeds the scale and intensity of development envisaged by City Plan. He says the central need issue is whether "*demand for ILUs only be met by exceeding the scale and intensity of development envisaged by the planning scheme*". During cross-examination, Mr Brown confirmed that he formed his opinion on the basis that there were issues in relation to bulk and scale. He acknowledged that an assumption that the proposed development is inconsistent with City Plan was at the heart of his conclusions with respect to need. For reasons already canvassed, I do not accept that the proposed development is of a bulk and scale that is not envisaged by City Plan. It is difficult to appreciate why Mr Brown made such an assumption given compliance with City Plan requirements with respect to bulk and scale is a key issue to be determined by the court. When queried about it, Mr Brown confirmed that it is possible to undertake an analysis of need without making an assumption either way about compliance with City Plan. That Mr Brown elected instead to place the assumption at the heart of his conclusions causes me to doubt the reliability of his conclusions.
- [209] The second premise on which Mr Brown's opinion is founded is his view that there are numerous alternative sites within the catchment that can accommodate the proposed development without being inconsistent with City Plan. Mr Brown identifies 486 sites in the catchment area that are at least 1 000 square metres in size. He says that the existence of those identified sites demonstrates that there are a range of redevelopment opportunities within the catchment area on varying allotment sizes. Those lots include lots in varying zones, including the Emerging communities zone and a zone he described as "*Large Lot Residential*". Of those 486 sites, Mr Brown nominates 118 sites that he says are vacant or underutilised and that he says can accommodate 30 independent living units. During his oral

evidence, Mr Brown confirmed that he formed this view only by reference to the name of the zone and the anticipated yield for the zone documented in the Local Government Infrastructure Plan.

- [210] There is no evidence of any approval of, or proposal for, other retirement facilities on the 118 sites referred to by Mr Brown, or in the catchment area generally. Mr Brown is not aware of any applications lodged seeking to develop any of the sites for retirement facilities, nor was there other evidence of any application. The 118 sites are located in various zones, including the Emerging communities zone. There is no evidence to demonstrate that development of the 118 sites for a retirement facility is a use encouraged or contemplated in the various zones in which they are located, other than those sites in the Low density residential zone. Further, consideration of only the name of the zone in which the land is located and the yield for land so zoned as documented in the Local Government Infrastructure Plan provides a poor picture of the likelihood that such land could accommodate 30 independent living units. Such a limited consideration would not reveal many potential impediments to development, such as those contained in overlays in City Plan. In addition, should an individual seek to develop any of those sites for a retirement facility, they would need to address compliance with the Retirement and residential care facility code, including overall outcome (2)(f) (referred to in paragraph [181] above). Mr Brown did not consider whether the sites he identified would meet that requirement. Mr Brown's analysis also ignored that a number of the sites are the subject of a development application, a development approval or are under construction for uses other than retirement facilities. This suggests they are unlikely to be developed for retirement facilities. As a consequence of these deficiencies in the analysis, the exercise performed by Mr Brown is little more than speculation. It is of little, if any, probative value.
- [211] For each of the reasons provided in paragraphs [208] and [210], I do not accept the opinions of Mr Brown, nor the Council's submission that the need could be met on a significant amount of available land in the catchment area.
- [212] The Council submits that the need is not an immediate need but a future need. I do not accept the submission. There is a lead time involved in the delivery of any retirement facility. Before any developer can deliver a new retirement facility to house those members of the public who seek such accommodation, it must select a site, prepare a development application to obtain approval for the proposed new use, await assessment of the application by the Council and potentially litigate the outcome in this Court, obtain building approvals, enter building contracts and undertake construction of the facility. I accept the evidence of Mr Buckley that, with respect to delivery of retirement facilities to house that proportion of the population who are over 65, it is important to be "*ahead of the game*". There is no evidence of any other entity proposing a retirement facility in the catchment area. Taking account of such matters, I am satisfied that the need demonstrated by the quantitative analysis about demand is a pressing need.
- [213] With respect to the issue of whether approval of the proposed development relates to the well-being of the community and will improve the services and facilities available in a locality such that it will improve the ease, comfort, convenience and efficient lifestyle of the community, I found the evidence of Ms Wells to be of particular assistance. She has been a consultant in the aged care industry for 30 years.

- [214] Ms Wells says that, with the ageing population, the Government, the aged care industry and the consumers have identified that the previous funded aged care programs are not desirable or sustainable into the future. Ms Wells' explains that because of the issues occasioned by an ageing population and the significant cost associated with delivering residential aged care, the funded aged care industry is in the process of transition. Ms Wells identified a number of major improvements that have been made to date. She also opines that, although there are further reforms that are yet to be delivered, there is clarity about the direction of government policy, the preferences of older Australians, and the necessary features for retirement and aged care products.
- [215] Ms Wells opines that aged care and retirement living is moving towards a single care system. This system will remove the distinction between rigid care at home systems and residential care. Ms Wells says that this trend will result in a greater need for developments such as that proposed, as people elect to access retirement villages as a quality housing option, and then remain there for longer as their care needs increase with age. Ms Wells is of the opinion that this industry and policy direction will result in services being delivered within communities rather than requiring seniors to relocate, particularly into residential aged care. She says, in essence, future services will be located close to or within the communities in which residents have resided over time. This will assist older Australians with their living, family, and social needs.
- [216] Ms Wells' evidence on government policy and industry trends was unchallenged. It further evidences the conservative nature of the agreed quantitative analysis by the economists. It is consistent with the information identified in studies and reports that have been prepared by a variety of government and independent bodies. Mr Duane and Mr Brown reviewed a number of the studies and reports in section 4 of the Joint Economic Need Report.
- [217] Mr Duane and Mr Brown record that the Council's 2008 Lord Mayor's Task Force into Retirement and Aged Care – Independent Recommendation Report refers to a shortage of housing for older people in Brisbane. The report identified that by 2026, an extra 41 000 persons aged over 65 years will live in Brisbane. It found that most of these people would want to stay in their homes and their own neighbourhoods as long as possible, embracing the concept of "*ageing in place*". The report found that existing aged care facilities are deteriorating, and their redevelopment is hampered by increasing construction costs. The report noted that in 25 years' time, Australia would need four times the amount of aged care accommodation that is presently available. This trend was expected to be mirrored in Brisbane.
- [218] The 2012 Council Report titled "*Senior Strategy 2012-2017*" was described by Mr Duane and Mr Brown as a strategy that complements the Lord Mayor's Taskforce report. It takes a broader view of what the Council can do to support older citizens to "*age in place*" and participate more fully in their local communities. It identified that it was a strategy priority for the Council to encourage niche, well-integrated and well-designed residential retirement and aged care facilities that operate at a local level in communities across Brisbane.
- [219] Mr Duane and Mr Brown explain that the Retirement Village Association is the representative of 800 members who play a role in the ongoing growth and

sustainability of the retirement village industry. The Association prepared a submission, dated September 2012. Mr Duane and Mr Brown note that the submission says that Queensland faces an enormous challenge in how to care for and house an ever-increasing ageing population. The submission again references the cost of developing or redeveloping retirement villages in locations suitable to the cohort. It identifies it as a factor that is contributing to the lack of affordable seniors' accommodation in Queensland.

- [220] Mr Duane and Mr Brown also reference the 2014 Property Council of Australia "*National Overview of the Retirement Village Sector*". That report projected that, by 2025, Australians living in retirement villages would increase (as a percentage of the population) to 7.5 per cent. It indicated that retirement facilities improve residents' lifestyles. The report also says retirement facilities provide significant savings for local and federal governments by delaying entry into government funded aged care facilities, as most services for retirement villages are self-funded.
- [221] The most recent report reviewed by Mr Duane and Mr Brown was a 2018 Price Waterhouse Coopers Retirement Census. It found that villages have an average occupancy of 89 per cent across Australia, with the average size of a village being 110 to 120 units.
- [222] Historically, people have had to move outside their local community to access appropriate housing that meets their aging needs. Ms Wells opines that modern retirement facilities within residential communities from which the residents will be drawn will play an important role in facilitating ageing in place and catering for residents for a longer period. Mr Brown accepts that one of the key dimensions to ageing in place is providing housing to suit the needs of the elderly in the community in which they have lived during the course of their life. He acknowledged that it assists them to maintain contact with their friends, family and familiar service providers such as medical practitioners.
- [223] The Council accepts that ageing in place and the modern provision of services is an admirable goal. It submits its most recent planning documents support ageing in place at the highest level. I agree. The Council's amendments to City Plan, particularly the incorporation of the Retirement and residential care facility code in version 16 of City Plan, are consistent with the Council implementing a planning strategy to support older citizens to "*age in place*" and participate more fully in their local communities.
- [224] I am satisfied that the provision of adequate facilities for the purpose of aging in place is a matter of significant importance to the community. It is critical to the wellbeing of an important group in the community.
- [225] At present, there are limited options for the elderly residents of the catchment area who wish to move into an independent living unit in their community. As I have already noted in paragraph [197] above, there are only three existing retirement villages offering a total of 698 independent living units and 104 serviced apartments.
- [226] The largest of the three retirement facilities is Aveo Durack. It is a large, broad acre retirement and aged care site developed in 1985. It offers 629 retirement homes and a Commonwealth funded residential aged care site with 123 beds. Ms Wells says that of the 525 independent living units provided by that facility, three quarters are

“*older stock*”. Settlers Forest Lake offers 86 units in a village setting. It comprises predominantly small, one-bedroom stock. The Terraces at Forest Lake, run by Lendlease, is a broad acre retirement village offering 87 places, providing a more traditional village with predominantly larger, three-bedroom homes.

- [227] Ms Wells explains that no structured ageing services are available at the two smaller facilities. Ms Wells says that of the 698 independent living units in those existing retirement facilities, four-fifths of the stock are older and built more than 14 years ago, only 12 per cent are offered as apartments and only two percent are offered as two-bedroom apartments.
- [228] Ms Wells opines that the older stock at Aveo Durack does not enable ageing in place for all the individuals. As people age, they have some mobility issues. A very large, spread out and hilly site like Aveo Durack can be socially isolating for the residents because they cannot get to the communal facilities. Also, all of the independent living units are not designed for ageing. They do not all have level access. Some still have hobs on showers and kitchens that are not designed for easy use by the elderly. Only 25 per cent of the independent living units in Aveo Durack are modern stock. It is not apartment stock. Given the constraints of the site and the apartment design, in order to age in place at Aveo Durack, the residents move through to residential aged care. Ms Wells says this is not necessarily desirable for most of the population.
- [229] In the opinion of Ms Wells, as a result of the matters referred to in paragraphs [227] and [228] above, while there are three existing villages in the catchment, there is only a small number of modern independent living units meeting the need of the community for modern retirement accommodation. I accept her opinion.
- [230] Ms Wells opines that the proposed development offers a very different choice to the existing facilities. The proposed development does not present the impediments to ageing in place that plague the existing facilities. As I have already noted in paragraphs [178] and [179] above, Ms Wells opines that the proposed development is designed as a modern retirement facility that will enable ageing in place. It would be a contemporary retirement village that would offer a high standard of service to the public.
- [231] The proposed development also offers a different choice because of its size. Two-bedroom apartments constitute a very small proportion of available independent living units in the catchment. Further, at a size of 30 independent living units, the development is an exception. Of the 7 600 independent living units available across 79 retirement villages in the wider Brisbane area, the majority form part of large retirement or retirement and aged care campuses, offering at least 60 or more dwellings. Only four villages offer around 20 to 30 dwellings. All of the smaller facilities are older style villages with traditional retirement accommodation. This fact is not expected to change in the future. Ms Wells is of the opinion that the majority of providers will seek to develop at least 100 units moving forward. Ms Wells described the differences between large and boutique retirement villages as “*two very different choices*”. In her opinion, small scale villages provide an alternative to larger retirement and aged care campuses that house large populations and can often be separated from normal daily living of all ages.

[232] The Council submits that the benefits of choice associated with a modern facility at a location in the heart of Forest Lake could be met on the subject land by a building of a lesser height than five storeys. The Council did not reference any evidence that it says supports its submission. Ms Wells opined that it would be very difficult, if not impossible, for a smaller retirement village to be delivered on the subject land. Ms Wells provided a cogent explanation for her opinion. She says that with 30 units there would be around 40 residents (based on the average of 1.3 people per unit). Using a metric of home care as an example, Ms Wells explained that typically a full-time home care case manager would look for around 30 people seeking such services to be viable. If the facility had only 12 people seeking home care services, whilst it still might be serviceable, it is probably not viable. A smaller facility increases the prospect that an insufficient number of the residents would want the service. Around 39 or 40 people in a retirement village also gives a greater ability to have enjoyable social group activities, such as a craft group or a music group. In a facility of less than 40 people, you would need a large percentage of the residents to agree to participate in order to viably provide those activities. Ms Wells also opines that with a smaller facility you would have to halve, or probably more than halve, the communal facilities because otherwise it would make the cost of the individual apartments too expensive and the ongoing charges more expensive and perhaps not realistic. I accept this evidence of Ms Wells.

[233] Having regard to the matters identified in paragraphs [175], [176], [178], [179], [182], [183], and [222] to [232], I am satisfied that the proposed development will improve the services and facilities available in the catchment area. It will improve the ease, comfort, convenience and efficient lifestyle of the community.

#### Relevance of need

[234] In this case, the need for the proposed development is relevant in two ways. First, it forms part of the test prescribed in overall outcome (3)(d) of the Forest Lake neighbourhood plan area. Second, JRD relies on it as a matter that favours approval of the development application.

[235] For the reasons provided in paragraphs [137] to [142] above, it is unnecessary for JRD to demonstrate that there is both a community need and an economic need for the proposed development in order to demonstrate compliance with overall outcome (3)(d) of the Forest Lake neighbourhood plan code in version 9 of City Plan.

[236] For the reasons provided in paragraphs [188] to [233] above, I am satisfied that there is a pressing need for modern retirement facilities. Further, the provision of adequate facilities for the purpose of aging in place is a matter of significant importance to the community. It is critical to the wellbeing of an important group in the community. JRD's proposed development is appropriately located and designed to meet the need.

[237] I do not accept the Council's submission that the size of the development is of insufficient moment to support approval. The proposed development provides an important service to the community and is a use that is permissible in the area in which it is to be located. As such, it is not incumbent upon JRD to establish that the contribution will be significant in terms of the number of independent living units. It is sufficient for it to demonstrate that there is still a reasonably apparent, discernible need for extra retirement facilities. It has done so.

- [238] The proposed development will offer an additional choice. It will improve the services and facilities available in the catchment area. It will improve the ease, comfort, convenience and efficient lifestyle of the community.
- [239] The demonstrated need for modern retirement facilities to enable ageing in place is a matter in favour of the approval.

**Do the other relevant matters support approval?**

- [240] As I have noted in paragraph [186] above, JRD also relies on four other matters in support of approval.
- [241] First, the subject land is ideally located for retirement residential purposes having regard to its general amenity and aspect, and its proximity to facilities. This was not contested by the Council. The Council says it is relevant to the issue of need but it should not be double counted. I accept that the subject land provides excellent access to centres, retail, entertainment, health care, public transport and recreational facilities. Those features make the subject land ideal for a retirement facility. I accept that this is a matter that supports approval of the proposed development, particularly as it demonstrates compliance with the Retirement and residential care facility code in version 16 of City Plan.<sup>55</sup>
- [242] Second, the proposed development is aligned with the purpose to be served by the recent amendments to City Plan with respect to retirement and aged care facilities. This has already been addressed in paragraphs [143] to [185] above. It is a matter that supports approval of the proposed development.
- [243] Third, the proposed development would not result in any unacceptable amenity impacts. In amending the issues shortly before the commencement of the trial, the Council and the Co-Respondents by Election conceded that the proposed development would not have any unacceptable traffic, noise, or amenity impacts (including due to wind and lighting impacts).<sup>56</sup> Although the Council accepts this, it says this matter should not be determinative. I agree. However, it is an additional matter that supports approval of the proposed development.
- [244] Fourth, version 9 of City Plan failed to anticipate the need for a retirement facility of the type and form proposed on the subject land. Neither the Council nor the Co-respondents by Election<sup>57</sup> suggest that the retirement facility use is not contemplated in the Low density residential zone and the District Business Centre NPP-002 Precinct in the Forest Lake neighbourhood plan. The Council accepts that the location is an appropriate one. The Council also accepts that there may be a need in the sense of additional choice but says the choice could be provided by a development of a fewer number of storeys than what is proposed here. I do not accept the Council's submissions for the reasons provided in paragraph [232] above.

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

- [245] As I have noted in paragraph [12] above, there is a broad discretion in determining this appeal. The discretion is to be exercised based on the assessment carried out

---

<sup>55</sup> See paragraphs [181] to [185] above.

<sup>56</sup> See T1-7/L28 - T1-8/L39.

<sup>57</sup> When I refer to the Co-respondents by Election, I am referring to those four who elected to appear.

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 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.

- [246] In this case, JRD's proposed development does not comply with all aspects of version 9 of City Plan. It does not comply with overall outcome (4)(d) of the Low density residential zone code. Despite that, it achieves the other aspirations of City Plan and the planning outcomes sought in version 16 of City Plan. As such, the nature and extent of the non-compliance is not, of itself, a compelling reason to refuse JRD's application.
- [247] In the balancing exercise that is required through the development assessment process under the *Planning Act 2016*, I am persuaded that it is not an appropriate planning outcome to permit the low density residential zoning of the subject land and the contents of overall outcome (4)(d) of the Low density residential zone code in version 9 of City Plan to overwhelm the other aspirations of City Plan or the planning outcomes sought in version 16 of City Plan. During oral submissions, Mr Traves QC accepted that if JRD demonstrated compliance with version 16 of City Plan but had not demonstrated compliance with version 9 of City Plan, it would be difficult for the Council to resist an approval. That is the circumstance that pertains here.
- [248] I am satisfied that, in the exercise of the planning discretion, JRD's application should be approved because of the combined effect of the following matters:
- (a) while JRD's proposed development does not comply with overall outcome (4)(d) of the Low density residential zone code in version 9 of City Plan, that provision no longer exists in City Plan version 16;
  - (b) JRD's proposed development complies with the requirements in the applicable assessment benchmarks in the Forest lake neighbourhood plan code, which provide more detailed planning for the area than the zone code;
  - (c) JRD's proposed development complies with the requirements in the applicable assessment benchmarks in the Multiple dwelling code in version 9 of City Plan;
  - (d) JRD's proposed development complies with version 16 of City Plan;
  - (e) there is a pressing need for modern retirement facilities;
  - (f) the provision of adequate facilities for the purpose of aging in place is a matter of significant importance to the community: it is critical to the wellbeing of an important group in the community;
  - (g) the proposed development is a use that is permissible in the area in which it is to be located;
  - (h) the proposed development will offer an additional choice and will improve the services and facilities available in the catchment area;

- (i) JRD's proposed development is appropriately located and designed to meet the economic, community and town planning need; and
- (j) the proposed development would not result in any unacceptable amenity impacts.

[249] Accordingly, the application should be approved, subject to conditions.

### **Conclusion**

[250] For the reasons provided above, JRD has discharged the onus and the appeal will be allowed in due course.

[251] I will give the parties an opportunity to formulate an agreed suite of conditions of approval. The orders of the Court will be:

- (a) By 4pm on 11 March 2020, the Respondent is to deliver a draft suite of conditions to the other parties.
- (b) The appeal be listed for review at 9.15 am on 18 March 2020 either for the purpose of making final orders in the appeal or, failing agreement between the parties, for the purpose of making directions to facilitate the resolution of any dispute with respect to the suite of conditions of approval.