

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *JSFNQ 1 Pty Ltd v Townsville City Council* [2021] QPEC 28

PARTIES: **JSFNQ1 PTY LTD (ACN 625 965 264)**
(appellant)
v
TOWNSVILLE CITY COUNCIL
(respondent)

FILE NO: 139 of 2019

DIVISION: Planning and Environment Court

PROCEEDING: Hearing of an appeal

ORIGINATING COURT: Planning and Environment Court of Queensland, at Brisbane

DELIVERED ON: 22 June 2021

DELIVERED AT: Brisbane

HEARING DATE: 27, 28, 29, 30 April and 25 May 2021

JUDGE: RS Jones DCJ

ORDER:

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

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL AGAINST REFUSAL OF DEVELOPMENT APPLICATION – where development application concerned material change of use permit – where proposed development involved construction of service station and food and drink outlets – where proposed in High Density Residential Zone

CONFLICT WITH PLANNING SCHEME – whether proposed development contrary to existing and intended standard of amenity and character – whether proposed development an appropriate use – where proposed development not contemplated by planning scheme

GROUND – whether proposed development assists in activation and enhancement of premises – whether proposed development contrary to reasonable community expectations – where proposed development did not meet an existing latent unsatisfied economic and planning need

LEGISLATION: *Planning Act 2016* (Qld) s 45

Planning and Environment Court Act 2016 (Qld) s 43,45

- CASES: *Abeleda & Anor v Brisbane City Council* (2020) QPELR 697; [2020] QCA 257
- Bell v Brisbane City Council* [2018] 230 LGERA 374; [2018] QCA 84
- Broad v Brisbane City Council & Baptist Union of Queensland* [1986] QSCFC 27; [1986] 2 Qd R 317
- Gold Coast City Council v K & K (GC) Pty Ltd* [2019] 239 LGERA 409; (2019) QCA 132
- Isgro v Gold Coast City Council* [2003] QPELR 414; [2003] QPEC 2
- K&K Pty Ltd v Gold Coast City Council* [2018] QPELR 540; [2018] QPEC 9
- Navara Back Right Wheel Pty Ltd v Logan City Council & Ors; Wilhelm v Logan City Council & Ors* (2020) QPELR 899; [2019] QPEC 67
- Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 335; [1998] HCA 28
- Redland City Council v King of Gifts (Qld) Pty Ltd and HTC Consulting Pty Ltd & Anor* (2020) 3 QR 494; [2020] QCA 41
- Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexu Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95
- United Petroleum Pty Ltd v Gold Coast City Council* [2018] QPEC 8
- Wilhelm v Logan City Council* [2020] QCA 273
- Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82; [2014] QCA 147
- COUNSEL: Mr E Morzone QC and Mr K Wylie for the appellant
Mr J Ware for the respondent
- SOLICITORS: Emanate Legal for the appellant
Townsville City Council Legal Services for the respondent

Introduction

- [1] This proceeding is concerned with an appeal by the appellant against the refusal by the respondent of its development application for a development permit for a material change of use for a service station and fast food and drink outlets. For the reasons set out below, the orders of the court are:

1. The appeal is dismissed;

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

The site

- [2] The subject site is located at 1 Mcilwraith Street, Townsville and is more particularly described as Lot 2 on RP731223. It is located in the Palmer Street precinct of the High Density Residential Zone under the respondent's planning scheme (CP2018). The site has an area of 1,869m² and while its address is Mcilwraith Street, its dominant frontage (approximately 68m) is to Dean Street. Dean Street is a State controlled road and at the location of the subject site, it carries approximately 7,000vpd southbound and approximately 7,880vpd northbound.
- [3] The site is located approximately 180m from the southern outskirts of the Townsville CBD, but is separated from the city centre by Ross Creek. Access to the site can be gained by two vehicular bridges and one pedestrian bridge. To the north, development comprises of a low-rise food and drink outlets and associated parking, known as Jam Corner and a restaurant known as Grill'd. Jam Corner fronts Palmer Street along which there a number of multi-storey, high density dwellings and short-term accommodation for residential uses. To the immediate east is vacant land which is being used for car parking. Further to the east is a dwelling house, land used for parking and low-rise business uses. To the west on the other side of Dean Street is Central Park and Ross Creek. To the south is Mcilwraith Street and single-storey commercial and business uses and food and drink outlets. Approximately 600m further is the Townsville Football Stadium.¹
- [4] There exists on the site a vacant, low-rise commercial building which, as I understand it, has been vacant for some considerable period of time. While more will be said about this below, Mr Curtis, the visual amenity expert relied on by the respondent, accepted that the site and the surrounding areas was a "*hotchpotch*" of uses. He even went so far as to say that of itself, the proposed development would constitute a visual improvement to, not only the site, but also the surrounding area.

The proposed development

- [5] The Development Application seeks a Development Permit for a Material Change of Use for Service Station and Food and Drink Outlets. The existing single-storey

¹ See generally Exhibit 1 at pp 3, 4 and 13.

building is to be demolished, and two separate, low-rise buildings are to be constructed. The proposal seeks to provide a Service Station comprising four double-sided fuel dispensers (eight fuel dispensers in total) as well as a control building with a shop component (Tenancy 1, comprising 360m² GFA), and two Food and Drink Outlet tenancies (together shown as Tenancy 2 and comprising 135m² GFA). Outdoor seating is proposed fronting Dean Street to the south of Tenancy 2.

- [6] The fuel forecourt will be positioned along the eastern boundary (adjacent to land included in the Palmer Street Precinct of the HDR Zone), setback from the frontages and behind the Food and Drink outlet and Service Station tenancies. Car parking is to be provided associated with the proposed use. Thirteen car parks, eight car refuelling positions, one SRV bay, and a delivery/refuse collection set down are proposed. Of the thirteen car parks proposed, two car parking spaces are nominated for staff parking and one for persons with a disability. Vehicular ingress and egress are proposed via Mcilwraith Street and Dean Street.

- [7] Solid timber fencing is nominated to the common northern and eastern boundaries to land, included in the Palmer Street Precinct of the HDR Zone. A narrow width of landscaping is also nominated to northern and eastern boundaries. Tenancies 1 and 2 are proposed to be built to the front boundaries. Openings to the streets have been included, together with awnings, with footpaths achieving a full verge construction. Underground fuel storage tanks are proposed to the south of the fuel dispensing forecourt.

- [8] The development application was lodged with the council on or about 14 September 2018 and required impact assessment under the CP2018. The application was publicly notified in March 2019 and there were three properly made submissions, all objecting to the proposed development. Of some significance was that the application also required referral to the Department of State Development, Manufacturing, Infrastructure and Planning (DSDMIP). No issue or objection was taken to the proposed development by that department. Nonetheless, as already identified, the development application was refused by the respondent.

The issues in dispute

[9] The agreed issues in dispute were reduced to writing² and were summarised in the written submissions on behalf of the appellant in the following terms:³

- (a) Whether the proposed use was:
 - (i) Appropriate for the site
 - (ii) Consistent with the strategic aims of creating a compact and efficient city form in or around the capital CBD in the intended character for the locality
- (b) Whether there is a need for development;
- (c) Whether the proposed development will result in any unacceptable amenity impacts which cannot be appropriately managed or mitigated by conditions;
- (d) Whether the proposed used will cause adverse traffic impacts because of the increase in right turn movements out of Mcilwraith Street and inadequate on-site car parking.

The statutory regime

[10] Pursuant to s 43 of the *Planning and Environment Court Act* 2016 (PECA), an appeal such as this is by way of a hearing anew and, pursuant to s 45(2), it is for the appellant to satisfy the court that the appeal ought be allowed. In respect of the proposed development which requires impact assessment, pursuant to s 45(5) of the *Planning Act* 2016, an impact assessment is an assessment that:

- “(a) Must be carried out –
 - (i) against the assessment benchmarks in a categorised instrument for a development;
 - (ii) having regard to any matters prescribed by regulation for the subparagraphs; and
- (b) May be carried out against, or having regard to, any other relevant matter, other than a person’s personal circumstances financial or otherwise.”

² See Exhibit 3.

³ Written Submissions of Appellant at p 4, [14].

Impacts on amenity

- [11] During the course of this proceeding, it became apparent that insofar as the respondent's concerns about noise and air quality (including odour) were concerned, those issues could be addressed by the imposition of appropriate conditions and accordingly, could not justify refusal. Also, during final submissions Mr Ware, counsel for the respondent, did not press the concerns about the right turn movement out of Mcilwraith Street. Indeed during final submissions, insofar as traffic related issues were concerned, the only matter being pressed was that concerned with the number of on-site car parks. During final submissions Mr Ware expressed his client's case insofar as amenity was concerned, leaving aside the issue of parking, in the following way:⁴

“Frankly, your Honour. So the remaining issue is visual amenity. And the written submissions of the council deal with amenity and character together in terms of compliance with the Planning Scheme Provisions in terms of the sorts of matters – place making, the primary destination for accommodation, etc. So visual amenity and character, in the evidence of Mr Curtis is very much relied on in that regard.”

- [12] Before turning to the issue of visual amenity, it is appropriate to deal with the council's concerns regarding on-site parking. It is uncontroversial that the proposed development will provide for only 13 on-site car parks. That is six less than the number required to demonstrate compliance with the planning scheme's acceptable outcome which directed the appellant's attention to the respondent's development manual planning scheme policy number SC6.4. The driver behind the application of that policy is the gross floor area (GFA) of any proposed development. It was uncontroversial between the traffic engineers relied on by both parties, Mr Flanagan for the appellant and Mr Pekol for the respondent that, by reference to the 360m² GFA for the shop associated with the service station and the 135m² GFA for the food and drink outlet, that would result in a requirement of nine and ten spaces respectively. The application of a GFA approach simpliciter is clearly a blunt instrument in determining what the real on-site parking requirements for any proposed development were. It is also accepted that if the 135m² of the mezzanine

⁴ T4-14 at lines 35 – 40.

of the total shop area was a passive use rather than one which might attract customers, it could reduce the number of car parks by between three and four.⁵

- [13] On the evidence before me, I can see no reason not to proceed on the basis that the mezzanine area would involve a passive use. It might, from time to time, be used for storage and even administration but, in either event, it is an area only likely to be utilized by employees of the service station and the associated shop. In this regard Mr Pekol, leaving his concern about what the function of the mezzanine area might perform, agreed that if those three to four car parks were not actually required, then the proposed 13 on-site car parks would be getting “*dangerously close*” to what the respondent’s parking policy required.⁶
- [14] On balance, I am satisfied that Mr Pekol’s concerns about the number of on-site car parks are not warranted for two reasons. First, for the reasons already given, I am satisfied that the real demand, insofar as the GFA methodology might be an appropriate indicator, is closer to 15 or 16 on-site car parks and not 19. The second reason is that I consider that Mr Pekol has materially underestimated the degree and extent to which there would be cross-utilization of car parking at the fuel dispensing sites. On this topic, I found the evidence of Mr Flanagan to be convincing. His evidence was to this effect; the vast majority of customers of the shop associated with the service station would be those who made their purchase while their vehicle was parked at the fuel dispenser. That is, it would be highly unlikely that there would ever be a demand for the nine on-site car parks required by the respondent’s parking policy.⁷
- [15] The evidence of Mr Flanagan on this topic is supported by the evidence of Mr Pekol to the effect that it is likely that less than 20% of the customers who pull in to purchase fuel would also make a purchase from the shop. That is, more than 80% of the motor vehicles will not park anywhere other than at the fuel dispensers.⁸ Also, as Mr Flanagan pointed out, a not insignificant number of customers for the fast food and drink outlet would walk from the surrounding accommodation buildings.

⁵ T2-60 at lines 13 – 29.

⁶ T2-60 at lines 32 – 38.

⁷ T2-26 at lines 42 – 47 and T2-29 at lines 1 – 47.

⁸ Exhibit 13 at para 27.

- [16] On the evidence before me, I am satisfied that the provision of 13 on-site car parks would meet the demand likely to be generated by the proposed development. While one could not rule out entirely the odd occasion when all the on-site car parks are full and another customer arrives, I am satisfied that those events would be so rare as to not warrant refusal on the basis of parking. On this topic I would finally note that Mr Flanagan has had many years of involvement in the design of service stations of the type proposed here.
- [17] Before going on to deal with the issue of visual amenity in more detail, I should deal with two matters raised on behalf of the respondent on that topic. First, it is asserted that the site is not a “*highly suitable location*” for the proposed development. The second matter is that it is said the site is suitable for multiple dwelling or short term accommodation. As to the second matter, it can be accepted that having regard to its land use designation and location, it is suitable for multiple dwelling or short-term accommodation. That said, the amenity of the site is somewhat blighted by the heavy traffic on Dean Street. That of course does not mean the site is not suitable for multiple dwelling or short-term accommodation uses, but that it might be seen as a site less desirable for those uses than others. In any event, that the land might be suitable for other uses does not, of itself, mean that alternate uses ought not be permitted. Turning then to the first matter, the evidence of Mr Flanagan together with that of the economists leaves me satisfied that the site of itself would be a suitable location for a development of the type proposed. This matter is dealt with in more detail below.
- [18] While the respondent accepts that the proposed development would result in an improved visual amenity outcome, having regard to the current hotchpotch of vacant buildings, car parks and other non-residential uses, it is nonetheless said that that ought be given little weight having regard to the aspirations for the Palmer Street precinct to continue to grow as the premier entertainment and accommodation destination.⁹ Leaving aside for the moment the issue of public expectations which will be dealt with below, I am satisfied that should the proposed development go ahead, it would have no material impact on the entertainment and accommodation aspirations for the Palmer Street precinct. It is tolerably clear that insofar as entertainment is concerned, that is focused on Palmer Street itself. The

⁹ Written Submission of Respondent at p 30, [114].

evidence also clearly establishes that should this site be utilised as proposed, it would have no material impact on the availability of land to accommodate high density development or other forms of accommodation within the CBD area and/or the Palmer Street precinct.

- [19] Mr Curtis’ concerns really fall under the following general headings. First, the proposed development is inconsistent with the strategic outcome intended to ensure that infill development would have a focus on “*place making*”. Next, it would unreasonably detract from the residential amenity of the area. Next, the proposed development does not comply with PO30 of the planning scheme which relevantly provides:¹⁰

“On frontages shown ... Palmer Street precinct concept plan as having a built form edge, buildings contribute to the creation of a strong and pedestrian orientated edge to the street by:

- (a) being built to the street frontage at the ground story
- (b) creating a general continuous building alignment
- (c) providing awnings over the footpath and
- (d) having facades which contain windows, door materials and features which generate visual interest at the street level.”

- [20] In respect to the issue of place making, the respondent placed considerable emphasis on the following evidence of Mr Curtis:¹¹

“The proposed development is for a service station where almost 50 per cent of the subject site area will be utilised by vehicles for circulation, refuelling or parking. Minimal area is provided for landscaping. In my opinion, this dominant vehicle use, the provision of an awning along part of the site’s fragmented frontage and a bus stop do not constitute ‘place making’ and do not make a significant contribution to the public realm.

...

The fuelling area to the rear of the subject site will, as noted above, be partially visible from the two adjoining street frontages. As a dedicated vehicle environment, the fuelling area and car parking will also dominate the rear of the site. The dominant fuelling area and car parking are not consistent with creating well designed built form and public spaces on the site that are pedestrian friendly and provide opportunities for community interaction.

¹⁰ Exhibit 4 at p 128.

¹¹ Written Submissions of Respondent at p 12 – 13, [43] – [44] and at p 14 – 15, [47] – [49].

The relative low scale of the proposed development's retail component may provide limited enhancement to the adjoining frontage being a public realm area. This may be of limited attraction to persons in the area in the absence of alternative facilities and public realm enhancements. However, as I note ..., the intent is for a high quality streetscape consistent with it being an active focus. The public realm enhancement provided by the proposed development will be somewhat underwhelming for a gateway site to the Palmer precinct and the CBD.

A significantly greater scale of development consistent with the planning intent would be expected to provide significant public realm enhancement that would reinforce the amenity and identity of the locality.

While adequately articulated, the length of the facades along the frontages are limited by the driveway crossovers, car parking and service bays that adjoin both street frontages and separate the built form from the adjoining properties. These crossovers etc. comprise 35 per cent and 37 per cent of the site's two frontage length, will be visually prominent and will provide views into the rear of the subject site and the fuelling area. The driveway crossovers and fuelling area will be dominated by the concrete height stand and vehicles, which will detract from the appearance of the frontages."

- [21] It has already been accepted that there are no unacceptable impacts on amenity associated with noise and/or air quality. Also, as Mr Curtis accepted, any issues associated with lighting have to be seen in the context of the subject site being located in an entertainment precinct where businesses could be expected to operate on a 24 hour/seven day a week basis. It would also be likely that any issues associated with light, if not capable of being adequately addressed by conditions, could otherwise be dealt with by appropriate design of any adjoining buildings which might be constructed in the future. Insofar as the issue of landscaping is concerned, I share Mr Curtis' concerns about the adequacy of what appears to be currently intended. However, it seems to me that this issue could be addressed by the imposition of appropriate conditions.

- [22] Mr Curtis accepted that there were a number of attractive architectural features associated with what is proposed. And, as already observed, Mr Curtis also accepted that not only would the proposed development be compatible with the existing local character and amenity, it would in fact result in a material improvement thereto.

- [23] Insofar as PO30 is concerned, Mr Curtis, consistent with the evidence of Mr Butcher, the visual amenity expert relied on by the appellant, also agreed that that part of the building on the corner of Dean Street and Mcilwraith Street would incorporate facades, windows, doors, materials and features which would generate visual interest at street level. Awnings over at least part of the footpath would also be incorporated. Mr Curtis also agreed with Mr Butcher that the proposed development would activate the street frontage by attracting pedestrian traffic.
- [24] Leaving aside Mr Curtis' opinion that the preferred use of the site should be for some form of high-rise residential use, it is also tolerably clear that his major concerns were those associated with the service station and not the other components of what is proposed. And, insofar as the service station is concerned, of particular concern to Mr Curtis was first, its visibility and second, having regard to the driveway entrances to both Mcilwraith and Dean Streets and the extent of the hardstand, that the proposed development would not provide for a "*generally continuous building alignment*".
- [25] As to the second of those matters, that is an unavoidable consequence. Where the visibility of the service station is concerned, the primary focus was on how visible the service station would be for both pedestrian and vehicular traffic along Dean Street. Insofar as the traffic heading towards the CBD district from the south is concerned, any driver and/or passenger would only have the most fleeting, if any, opportunity view of the service station as they drove past. Insofar as the return traffic is concerned, there can be no doubt that the service station would be more visible but that would only be again for a relatively brief period of time. It is unavoidable that any pedestrian movements, be it towards the CBD or away from the CBD, would have a clear view of the service station component. That however is hardly determinative in my view.
- [26] Turning then to the three submissions made opposing the proposed development, they were all made by persons associated with the operations known as Jam Corner and the Grill'd restaurant. In considering the submissions, the observations made by de Jersey J (as he then was) in *Broad v Brisbane City Council & Baptist Union of Queensland* are apposite:¹²

¹² [1986] 2 Qd R 317 at [326].

“There is no doubt that the concept of amenity is wide and flexible. In my view it may in a particular case embrace not only the effect of a place on the senses, but also the resident’s subjective perception of his locality. Knowing the use to which a particular site is or may be put, may affect one’s perception of amenity.”

- [27] The submissions are set out in the respondent’s written outline¹³ and their concerns could be summarised as follows in my view. First, the proposed development is not in keeping with what would be expected in the area, particularly having regard to the master plan for Central Park. Second, the service station would be a visually unattractive form of development for the area. Third, the proposed development would detract from encouraging other residential development within the area. Fourth, the proposed development is not complimentary to the overall aesthetics of the street and the precinct’s future development aspirations. Fifth, the service station would impact on the operation of the businesses being conducted on their properties as a consequence of odour emissions. Finally, that it would be likely to reduce the value of their properties.
- [28] Many of the concerns raised are not consistent with the evidence on amenity, or otherwise have no evidentiary basis. This would include those concerns about petrol fumes and pedestrian connectivity to the new stadium for people walking from Palmer Street. There is also no probative evidence that the proposed development would be likely to discourage other residential development within the precinct. That said, it is clear that in respect of each of the submitters, they considered that the proposed development is inconsistent with what a member of the general public might expect to occur on the subject site, having read the relevant provisions of CP2018.
- [29] On balance, for the reasons given I am sufficiently satisfied that the proposed development ought not be refused on the grounds of unacceptable impacts on amenity, including visual amenity. However, as is discussed below, this does not mean that it is a use that would be expected by the public in this location.

The key provisions of CP2018

¹³ At [60], [61] and [62].

- [30] In my view, the outcome of this case turns on the construction of a relatively few key provisions of CP2018. Section 2.3.2.2 identifies a key land use strategy for this area to be:

“The residential and centre zones reflect intentions for development at a range of densities. The Medium Density residential and High Density residential zones accommodate the city’s key areas for infill development. Within these areas development is desired to capitalize on the proximity to activity centres, public transport and amenity attractors.”¹⁴

- [31] This theme is also picked up in the HDR Zone Code where, pursuant to s 6.2.3.2(2)(a), it is said that one of the particular purposes of the Code was to:

“Optimize opportunities for higher density living close to the city’s principal centre, in order to maximise accessibility to services, employment and public transport, promote affordable living and maximise day and night-time vibrancy of the centres.”¹⁵

- [32] The evidence of Mr Perkins, the town planner relied on by the respondent, was that the proposed development was at odds with the higher order provisions of CP2018. I agree with that assessment. Also, in this regard, in cross-examination, Mr Schomburgk, the town planner relied on by the appellant, accepted that the proposed development was not consistent with the overall planning intent for this site to optimize opportunities for higher density living. However, he considered that having regard to the area of the site and the volume of land available for high density development, this was not a major concern.¹⁶ The evidence of the economists makes it abundantly clear that sacrificing this site for the proposed development would have no meaningful impact on the available supply of land for high-rise development within Townsville generally and, more relevantly, for the Palmer Street precinct.

- [33] Of particular significance is that, as was emphasised on behalf of the appellant, CP2018 does not go so far as to say that all forms of non-high rise development would be an inappropriate or unacceptable use. Indeed, non-residential uses are clearly contemplated. Section 6.2.3(3)(f) of the HDR Zone Code provides that:

¹⁴ Exhibit 4 at p 27.

¹⁵ Ibid at p 115.

¹⁶ T3-32 at lines 13 – 22.

“Non-residential uses occur where they **directly support the day to day needs of the immediate residential community** and do not unreasonably detract from the residential amenity of the area and are not better located in nearby centres.”¹⁷ (emphasis added).

- [34] Performance Outcome 24(b) adopts similar but different terminology. It provides that non-residential uses are established only where:

“(b) **limited in scale and supporting the day to day needs of the local community** or as specifically intended for a particular precinct...” (emphasis added)

- [35] No acceptable outcome is nominated, but the editor’s note points the applicant to the relevant economic impact assessment planning scheme policy for guidance on how to demonstrate compliance with the performance outcome.¹⁸ Also, within the Palmer Street precinct it is stated that:

*“Large-scale offices and other commercial activities are not established within the precinct.”*¹⁹

- [36] Clearly the proposed development does not envisage large-scale offices. On the other hand, it clearly involves commercial activities. On behalf of the appellant, it was submitted that when considering the description of “*other commercial activities*,” it should also be interpreted by reference to the limitation on office development. That is, it is intended to discourage other larger scale commercial activities. I agree with that submission. On any view of the evidence, the proposed development could not be sensibly described as involving large-scale commercial activities. The shop and the fast food outlet are modest in size and, insofar as the service station is concerned, it is not atypical of most service stations located in suburban areas on busy roads. In this regard, CP2018 defines a service station to also include a shop.

- [37] In *Zappala Family Co Pty Ltd v Brisbane City Council*,²⁰ followed more recently in *Wilhelm v Logan City Council*,²¹ Morrison JA, with whom McMurdo P and Douglas J agreed, stated that the principles that apply to statutory construction generally applied to the construction of planning documents. In particular, His Honour

¹⁷ Exhibit 4 at p 115.

¹⁸ Exhibit 4 at p 126.

¹⁹ Ibid at p 116.

²⁰ (2014) 201 LGERA 82 at [52].

²¹ [2020] QCA 273 at [54].

referred to the principles set out by the majority of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*:²²

[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’.... “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 the particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of 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.

....

[78] However, the duty of a court is to give the words of a statutory provision the meaning that the legislature has taken to have intended them to have. Ordinarily, that means (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspondent with the literal or grammatical meaning...” (reference to authorities deleted).

[38] As was observed by Brown J in *Trinity Park Investments Pty Ltd*:²³

“Morrison JA in *Zappala Family Co Pty Ltd v Brisbane City Council* also referred to the decision of *AAD Design Pty Ltd v Brisbane City Council*, where Chesterman JA stated in relation to planning schemes, they can ‘often lack clarity, contain ambiguities and sometimes appear contradictory’, and noted that the court should adopt a common sense approach and endeavour to give words meaning. Justice Morrison stated that the approach should start and end with the text, seen in its context in the way suggested by *Project Blue Sky*. His Honour also referred to (the) High Court decision often cited as setting out the modern approach to statutory interpretation, *CIC Insurance Ltd v Bankstown Football Club Ltd*,

²² (1998) 194 CLR 335 at [69] – [71].

²³ [2021] QCA 95 at [78].

where the majority stated that the modern approach to statutory interpretation insist that the context be considered in the first instance, and context is to be used in its wider sense.” (footnotes deleted)

- [39] The central issue in dispute here is the acceptability of the service station use within this precinct. The resolution of that dispute is to be determined, in my view, by the level of support that use would provide to the day to day needs of the relevant community. It was submitted on behalf of the appellants that the service station, which includes the shop, would be a development that supported the day to day needs of the community. In that regard, reliance was placed on a recent decision of Williamson QC DCJ in *Navara Back Right Wheel Pty Ltd v Logan City Council* where His Honour observed that a service station was a use that “*relates to a daily essential of life, namely fuel, for a trade area population that is co-dependent*”.²⁴ It was then submitted on behalf of the appellant:²⁵

“... all components of the proposed development also support the needs ‘**of the immediate residential community**’ or ‘**of the local community**’. Mr Schomburgk accepted in cross-examination that the immediate residential community in the context of this case, would be the Primary South Trade Area shown in pink on map 3 of the economic JER, excluding the Port of Townsville. Mr Perkins accepted, however, there is a difference in the use of the different phrase ‘local community’ in the language in PO24(b) in that it connotes a broad area. The local community ought it is respectfully submitted, be construed as being consistent with the type of community ordinarily served by local centre [sic], noting that the purpose of the Local centre zone code is to provide for ‘local needs’. Having regard to this broader community identified in PA24(b) it is submitted that both the Primary North and Primary South areas identified by the need experts may be properly construed as forming part of the subject’s ‘local community’.” (original emphasis-footnotes deleted)

- [40] While I am readily able to accept Judge Williamson QC’s observations in a general sense, it is my respectful view however, that His Honour was not suggesting that his observations should apply in every situation where it is necessary to look at how any intended service station might meet the day to day needs of a community.
- [41] I accept that the trade area identified by Mr Shomburgk might reflect what might be described as the “*immediate residential community*.” In this regard, it is also

²⁴ [2020] QPELR 899 at [368].

²⁵ Written Submissions of Appellant at p 9, [32].

unsurprising that Mr Perkins accepted that the extent of the community within the description of “*local residential community*” was less restricted than what would be envisaged under the description of an immediate residential community.

- [42] As to the submission that the extent of the local residential community for the purposes of PO24(b) ought be constructed in a manner consistent with the type of community typically served by a Local Centre, I am unpersuaded that it is of any assistance in the circumstances of this case. The Local centre zone code clearly envisages a centre that would provide for a much wider range of uses than contemplated by the proposed development. Section 6.3.2.2 provides:²⁶

“(1) the purpose of the Local centre code is to provide for a limited range of land uses and activities to service local needs. It includes local shopping, local employment nodes, commercial, cafes and dining, entertainment, community services and residential development where it can integrate and enhance the fabric of the activity centre, but it is not the predominant use.

...

(3) the purpose will be achieved through the following overall outcomes:

- (a) local centres provide a range of retail, commercial and community activities that are focused on grocery shopping and local service needs of their surrounding catchments. They may include a single full-line supermarket and a small range of speciality shops, food and drink outlets, personal services and local offices ...;
- (b) local centres provide a significant focal point for the surrounding community. Wherever possible they are co-located with or include other local facilities such as child care centres, parks or community uses.

...”

- [43] A local centre, as I have already pointed out, contemplates a much wider range of uses and activities and, accordingly, contemplates servicing a much larger community or catchment area.

- [44] In the appellant’s supplementary written submissions it was accepted that, to construe a “*local community*” to, in effect have the same meaning as a “*community ordinarily served by a local centre*” was, at face value, a form of construction

²⁶ Exhibit 4A at p 6.

rejected by the Court of Appeal in *Trinity Park*. As I understand it however, the appellant seeks to distinguish the facts facing the Court in *Trinity Park* on the basis that, in respect of the scale of development contemplated by the relevant planning schemes, while *Trinity Park* was concerned with “*small scale*” commercial development, in this case CP2018 provides that “*limited scale*” development is contemplated.²⁷

[45] With all due respect, I do not consider that anything of significance arises out of those differences in terminology. In this case, the scale of development contemplated to support the needs of the immediate residential community is informed by reference to PO24(b) and OO(e). That is, non-residential development is to be limited to such a scale as to ensure large-scale offices and other commercial activities are not established within this precinct.

[46] In any event, it is not necessary to consider the relevance of what might constitute the local community. The evidence of Mr Schomburgk, which I accept, is that the extent to which the proposed development supported the needs of the immediate residential community was the critical issue.²⁸ In fact, insofar as the issue of need, in the sense of planning need, was concerned, Mr Schomburgk in the JER of the town planners stated:²⁹

“As was noted at the beginning of this report, ‘need’ for the proposed development of this particular site, is an important, if not critical, aspect of this appeal. **In the event that the court might find there is no or insufficient need for the service station, there are then, in my opinion, no matters that would override or outweigh that finding to then support the approval of the service station component.** In my opinion, the fast food outlet component is different in that regard and is a useful and appropriate addition to the provision of food and drink outlets for this local area.” (emphasis added)

[47] In respect of those opinions, I would make the following observations. First, unsurprisingly Mr Schomburgk did not shy away from them when being cross-examined.³⁰ Second, the reference to “*no matters that would override or outweigh that finding*” is clearly a reference to s 45(5)(b) of the *Planning Act*. The third

²⁷ Supplementary Submissions of Appellant at [5]-[7].

²⁸ T3-53 at lines 43 – 47 and T3-56 at lines 36 – 38.

²⁹ Exhibit 11 at p 29, para 125(e).

³⁰ T3-57 at lines 1 – 5.

observation I would make is that whilst I am inclined to agree that the fast food component would be a useful and appropriate addition to the existing food and drink outlets in the Palmer Street Precinct, that is not necessarily to the point. By that I mean, if it were found that there was no or insufficient need for the service station with its associated shop, the application could not succeed on the basis that it has, in addition, the fast food and drink outlet. I certainly did not understand Mr Schomburgk to say otherwise.

Public expectations

[48] Relevant to the outcome of this case is that since the introduction of the *Planning Act 2016*, there have been a number of decisions of the Court of Appeal that have established two fundamental principles for planning law in this state. The first is that, *prima facie*, the planning scheme must be accepted as a comprehensive expression of what will constitute in the public interest the appropriate development of any particular parcel of land. The second is that the decision making process involves weighing up the extent of the non-compliance and other relevant matters that might favour approval notwithstanding the non-compliance with the planning scheme.³¹

[49] In *Abeleda*, Mullins JA speaking on behalf of the Court said:³²

“... The decision-maker under s 60(3) of the Act is still required to carry out the impact assessment against the assessment benchmarks in the relevant planning scheme and can take into account any other relevant matter under s 45(5)(b). The starting point must generally be that compliance with the planning scheme is accorded the weight that is appropriate in the particular circumstances by virtue of it being the reflection of the public interest (and the extent of any non-compliance is also weighted according to the circumstances), in order to be considered and balanced by the decision-maker with any other relevant factors.”

³¹ *Abeleda v Brisbane City Council* (2020) QPELR 697; *Bell v Brisbane City Council* [2018] 230 LGERA 374 at [66] per McMurdo JA; *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] 239 LGERA 409 at [48] Per Sofronoff P; *Redland City Council v King of Gifts (Qld) Pty Ltd and HTC Consulting Pty Ltd & Anor* (2020) 3 QR 494 at [122] per Philippides JA and *Wilhelm v Logan City Council* [2020] QCA 273 per Henry J.

³² At [42].

- [50] In *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors*,³³ Brown J (with Philippides and Mullins JJA agreeing) said:³⁴

“...The process adopted by a decision-maker may now be one which involves balancing a number of factors to which consideration was permitted under s 45(5) of the *Planning Act* in making a decision under s 60(3) of the *Planning Act* where the factors in favour of approval have to be balanced with the factors in favour of refusal of the application. The weight that is given to each factor is a matter for the decision-maker.”

- [51] Insofar as public expectations are concerned, the evidence of Mr Perkins, the town planner relied on by the respondent, was clearly to the effect that the level of non-compliance with CP2018 in the circumstances of this case was such that it would offend public expectations. The evidence of Mr Schomburgk was less strident but,³⁵ when looked at objectively, came to a similar conclusion to that reached by Mr Perkins. He agreed that the proposed development was not consistent with the overall planning intent for this site. He also agreed that in the absence of sufficient planning need, he would be unable to support the approval of what is proposed. While both of these matters are dealt with in more detail below, it is appropriate to point out at this stage that I do not consider the size of the site to have any material bearing on what the public might or might not expect to be approved in this precinct under CP2018. On balance, it appears tolerably clear to me that the location of a service station on this site would be contrary to the expectations of the public.

Need

- [52] Having regard to the conditional expression of interest on the part of BP,³⁶ I am prepared to proceed on the basis that the service station would be economically viable. That said, the evidence on this topic is not entirely convincing. As is discussed below, I consider that Mr Duane, the economist relied on by the appellant, has overestimated the likely custom from his primary northern catchment area. And, while he is correct in saying that there is in the order of 15,000 plus vpd which

³³ [2021] QCA 95.

³⁴ At [180].

³⁵ It was Mr Schomburgk's opinion that on a "cursory reading" of CP2018, the public might not expect a service station on this site. See Exhibit 11 at p 22, para 96.

³⁶ Exhibit 19.

will pass the site on Dean Street, just over 50% of that traffic is southbound traffic and access in and out of the site is limited to left in, left out terms only.

- [53] The concept of planning need has been considered in a number of cases. In *Isgro v Gold Coast City Council & Anor* Wilson SC, DCJ (as he then was) said:³⁷

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

- [54] More recently, Rackemann DCJ in *United Petroleum Pty Ltd v Gold Coast City Council* observed:³⁸

“... the fact that it would be possible for them to buy fuel beyond their local area however does not mean that there is no need, in a planning sense, for a conveniently located facility within their area as well. Need in planning terms is a relative concept. It does not connote pressing urgency but rather relates to the general wellbeing of the community. A use would be needed if it would, on balance, improve the services and facilities available in a locality.”

- [55] In developments that combine a number of uses, Kefford DCJ in *K & K Pty Ltd v Gold Coast City Council* unsurprisingly said:³⁹

“It is axiomatic that different elements of a development will offer different benefits to the community. The question for the court is whether there is a need for the proposed development that warrants its approval when one considers all of the benefits of all the components of the proposed development as a whole.”⁴⁰

- [56] While it would be a nonsense to expect that the custom base for any service station would be limited only to a specified catchment area, in the circumstances of this case, it is clear that most of its custom would be sourced beyond the immediate residential community. In fact, that extended custom base is necessary for its viability. In this context it is significant that as at 2020, Mr Duane’s trade area is the combination of his primary north and primary south catchment areas which, in

³⁷ [2003] QPELR 414 at [21].

³⁸ [2018] QPEC 8 at [96].

³⁹ [2018] QPELR 540 at [272].

⁴⁰ *K&K* was overturned on appeal, however no adverse observation was made in respect of the quote set out above.

total, was estimated at 10,120 persons. Of the total trade catchment, 7,590 potential customers were located in the northern catchment and only 2,530 in the southern catchment. From 2021 to 2041, while the northern catchment increased to 10,240, the southern catchment prediction is an increase in population to only 2,540.⁴¹

- [57] It is also tolerably clear that Mr Duane's assessment, insofar as the primary northern catchment is concerned, involves an overestimate. It seems to me more likely than not that residents at the northern end of that catchment would be likely to utilise the service station at Belgian Gardens. That said, I am unable to accept Mr Brown's assertion that Ross Creek in some way acts as a natural barrier which would deter custom from the north of that Creek. Before proceeding any further, I agree with the submission made on behalf of the appellant that no real assistance can be gained by comparing the applicable catchment areas in this case to those identified in *Trinity Park*.
- [58] While Mr Duane's estimate insofar as the northern catchment is concerned might be an overestimate, overall I am satisfied that a not insignificant population of that catchment would use the proposed service station on a regular basis. The difficulty for the appellant is that while that supports the viability of the proposed development, it is unclear how, in circumstances where it is more likely than not that a significant majority of the users of the site would come from outside the immediate residential community as identified by Mr Schomburgk, it could be said that the proposed development, insofar as the service station is concerned, is one where its expected or primary purpose is to directly support the day to day needs of the **immediate** residential community. In *Trinity Park*,⁴² it was accepted that it would be unrealistic to expect any given use would serve only those within the catchment. That said however, the situation is not an open-ended one and phrases such as "*immediate residential community*" must be construed to have some limiting meaning and effect.
- [59] Perhaps the most telling hurdle facing the appellant is whether in fact there is a genuine need for the service station and associated shop. The unchallenged evidence of Mr Flannigan, who I have said has considerable experience in the development of service stations of the type envisaged here, is that the shop will only

⁴¹ Exhibit 6 at p 29.

⁴² At [81] also at [116]

provide for a “*narrow range of small items that are convenience activities – of convenience shopping items – that you would pick up coincidentally with your fuel purchase*” and a shop where “*you’re more likely to do a convenience shop to pick up the milk and the bread on the way home...*”.⁴³ Having regard to the type and range of items the shop would be likely to offer, it is questionable as to whether the shop would be capable of meeting the day to day needs of the immediate residential community in any meaningful way. However, even accepting that it would, as was recognised in *Isgro* and, as I understood it, accepted by Mr Schomburgk, that a particular use might attract patronage does not necessarily equate to a planning need. It must be able to be shown that “*there is a latent unsatisfied need which is either not being met at all or is not being adequately met.*”

[60] Only some two minute drive to the south, between 1.4 and 1.5 kilometres, is the existing Caltex service station at the Railway Estate residential area. That service station is very similar to the one proposed, both in respect of the number of fuel dispensers and the area of the shop once the mezzanine area of the proposed shop are taken into account. It is also located on the same side of the road and operates 24 hours, seven days a week. It can be accepted that the additional 1.4 to 1.5 kilometres would be a significant deterrent to those more proximate to Palmer Street to walk to the service station and shop. However, given the limited range of items that the shop is likely to provide, it seems relatively unlikely that this would cause any material disadvantage to those residents within the Palmer Street precinct area.

[61] In this context, after Mr Schomburgk had repeated his opinion that the need for the proposed development to directly support the day to day needs of the immediate residential community was critical to his support of the proposed development,⁴⁴ the following exchange took place between him and Mr Ware.⁴⁵

Q: You’re aware of the service station on Railway Avenue 1.4 kilometres south of the site?

A: Yes I am.

Q: 24/7 operation?

A: Yes it is.

⁴³ T2-26 at lines 42 – 47, T2-27 at lines 8 – 14 and T2-29 at lines 13 – 17.

⁴⁴ T3-53 at lines 43 – 47.

⁴⁵ T3-54 at lines 21 – 47 and T3-55 at lines 10 – 17.

Q: Same side of road?

A: Yes.

Q: Two minute drive further down the road from the proposed site.

A: Yes.

Q: ...the extra two minute drive down the road, I'd suggest to you, (not) a major inconvenience to anyone in a local community looking for petrol?

A: It could be or could not be.

Q: Could not be?

A: Two minutes is not an inconvenient travel distance. I accept that.

Q: So they've already got reasonable access to convenient – a convenient locality for a service station?

A: Reasonable access yes. What they don't have reasonable access to is the development as a whole that's being proposed which is what I am asked to assess.

Q: But the service station aspect of it they do have – they have convenient access to one in the locality; you agree?

A: They (sic) got a – convenient access to fuel a couple of minutes down the road. Yes.

Q: And do you mean fuel and a shop?

A: I can't recall, your Honour it's a long time since I went to that – that site. I can't recall what else there is other than fuel.

...

Q: It says it has a convenience store.

A: Yes.

Q: Yes. And similar to the proposal, it's got eight fuel spots, 24 hours, and has a convenience store of a quite reasonable size.

A: Yes it does. It doesn't have any food outlets, but – yes.

Q: Pretty much exactly the same offered just two minutes down the road.

A: Well without the food outlets, yes.

[62] Both Mr Schomburgk and Mr Duane accepted that the significant majority of customers of the shop would come from outside of the immediate residential community. According to Mr Schomburgk, that would likely be the short term

situation.⁴⁶ According to Mr Duane, whose evidence is more persuasive on this aspect of the case, that situation could extend for up to 20 years.⁴⁷ That is, for the next 20 years or so, the “*bulk*” of the custom for the service station and, by necessary implication the shop, will come from the north of Ross Creek.⁴⁸

[63] Given Mr Schomburgk’s concessions together with the evidence of Mr Perkins, and that of Mr Duane and Mr Flanagan referred to above, I am unable to accept that there is any meaningful planning need for the service station and associated shop. That the proposed development includes a fast food and drink outlet cannot overcome this problem for the appellant. As I have already noted, Mr Schomburgk’s evidence was that, if no significant need for the service station was established, he would be unable to support the development application.

[64] The purpose or outcome of non-residential development within the Palmer Street precinct is to directly support the day to day needs of the immediate residential community. In this case, the evidence is that while residents within this community would purchase food and limited shop items from the proposed development, the bulk of its custom would come from beyond. In truth, the purpose of this service station is to meet the demand of a much wider community base. Its contribution to the meeting of the day to day needs of the immediate residential community is but a by-product of that wider commercial aim.

[65] Further, insofar as the day to day needs of the community are concerned for fuel and convenience shopping, that can be conveniently met, as Mr Schomburgk accepted, by the Caltex service station some two minutes’ drive to the south. This is not a situation where the evidence has established that the provision of conveniently located service stations is inadequate. That stands in contrast to the situation found to exist in *Navara*.⁴⁹

[66] By way of conclusion, I would note that while the proposed development might introduce a new competitor into the market (BP), there is no probative evidence that this additional competition would have any material impact on the price of fuel.

⁴⁶ T3-39 at lines 3 – 17.

⁴⁷ T1-37 at lines 1 – 13.

⁴⁸ T2-35 at lines 24 – 33 and T-43 at lines 23 – 37.

⁴⁹ At p 56, [329].

[67] For the reasons given, the appeal must be dismissed. The proposed development insofar as its major component, the service station, is concerned, does not comply with important strategic objectives or outcomes of CP2018 and, the evidence leaves me less than satisfied that on the balance of probabilities, there are any relevant matters that would warrant approval notwithstanding that non-compliance. An unfortunate consequence is that the fast food and drink outlet, which might well have catered for a latent unsatisfied need, will not proceed. However, as I have already observed, the existence of such an outlet cannot justify the approval of the balance of the proposed development. Accordingly, the orders of the court are:

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