PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Self Storage Helensvale Holdings Pty Ltd v City of Gold Coast Council* [2021] QPEC 29
PARTIES:	**SELF STORAGE HELENSVALE HOLDINGS PTY LTD ACN 164 525 580** (appellant) v **CITY OF GOLD COAST COUNCIL** (respondent)
FILE NO/S:	157 of 2020
DIVISION:	Planning and Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	31 May 2021
DELIVERED AT:	Brisbane
HEARING DATE:	30 November, 1 – 4 December and 11 December 2020 and further hearing on 7 April 2021
JUDGE:	Kefford DCJ
ORDER:	**I order:** **1. The appeal is allowed.** **2. The decision of Gold Coast City Council notified by the decision notice dated 2 January 2020 is set aside.** **3. The development application is remitted to Gold Coast City Council.** **4. Subject to further order of the Court, by 28 June 2021, Gold Coast City Council is to give a decision notice approving the proposed development subject to lawful development conditions.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – DEVELOPMENT APPLICATION – where the Council refused an application to develop land for a self-storage facility – where the land was in the Medium density residential zone – whether the type of use is appropriate in the zone – whether the scale of use is appropriate in the zone – whether the built form and character and visual amenity impacts of the proposed development are acceptable –

whether the planning scheme has been overtaken by events – whether there is a planning, community and economic need for the proposed development – whether the proposed development provides other relevant public benefits – whether the proposed development should be approved in the exercise of the planning discretion

LEGISLATION: *Local Government Act 2009* (Qld) s 251

Planning Act 2016 (Qld) ss 45, 59, 60, 78, 81, 264

Planning and Environment Court Act 2016 (Qld) ss 43, 45, 47, 55

Planning Regulation 2017 (Qld) ss 31, 70, sch 22, sch 24

Sustainable Planning Act 2009 (Qld) ss 335, 367, s 374

CASES: *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2013] 1 Qd R 1, applied

Abeleda & Anor v Brisbane City Council & Anor [2020] QCA 257, applied

Aborigines and Islanders Alcohol Relief Service Ltd v Mareeba Shire Council [1985] QPLR 292, approved

Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16; [2019] QPELR 793, approved

Beck v Council of the Shire of Atherton & Anor [1991] QPLR 56, approved

Bennett v Livingstone Shire Council (1985) 19 APA 268, approved

Brisbane City Council v YQ Property Pty Ltd [2020] QCA 253, applied

Castro v Douglas Shire Council [1992] QPLR 146, approved

Charles & Howard Pty Ltd v Redland Shire Council [2007] QCA 200; (2007) 159 LGERA 349, cited

Ecovale Pty Ltd v Gold Coast City Council [1999] 2 Qd R 35, followed

Gaven Developments Pty Ltd v Scenic Rim Regional Council & Ors [2010] QPEC 51; [2010] QPELR 750, approved

Gibb v Federal Commissioner of Taxation [1966] HCA 74; (1966) 118 CLR 628, applied

Gillion Pty Ltd v Scenic Rim Regional Council [2014] QPELR 168; [2014] QCA 21, cited

Gold Coast City Council v K & K (GC) Pty Ltd [2019] QCA 132; [2020] QPELR 631, applied

Grosser (trading as Australian Ikebana Centre) v Council of the City of Gold Coast [2001] QCA 423; (2001) 117 LGERA 153, applied

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

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

K & K (GC) Pty Ltd v Gold Coast City Council [2020] QPEC 40, approved

Ko v Brisbane City Council & Anor [2018] QPEC 35; [2018] QPELR 1130, approved

Kotku Education & Welfare Society Inc. v Brisbane City Council & Ors [2004] QPEC 68; [2005] QPELR 267, approved

Lennium Group Pty Ltd v Brisbane City Council & Ors [2019] QPEC 17; [2019] QPELR 835, approved

Lockyer Valley Regional Council v Westlink Pty Ltd & Ors [2011] QCA 358; (2011) 185 LGERA 63, cited

Luke & Ors v Maroochy Shire Council & Anor [2003] QPEC 5; [2003] QPELR 447, approved

Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor [2019] QPEC 46; [2020] QPELR 328, approved

Navara Back Right Wheel Pty Ltd v Logan City Council & Ors; Wilhelm v Logan City Council & Ors [2019] QPEC 67; [2020] QPELR 899, approved

Pimpama Commercial Pty Ltd v Council of the City of Gold Coast [2020] QPEC 33, considered

Plafaire Projects Australia Pty Ltd v Council of the Shire of Maroochy & Anor [1991] QPLR 87, approved

Queensland Adult Deaf and Dumb Society (Inc) v Brisbane City Council (1972) 26 LGRA 380, approved

SEAQ v Warwick City Council (1971) 24 LGRA 391, approved

Shun Pty Ltd v Logan City Council & Anor [2020] QPEC 31, approved

United Petroleum Pty Ltd v Gold Coast City Council & Anor [2018] QPEC 8; [2018] QPELR 510, cited

Wilhelm v Logan City Council & Ors [2020] QCA 273, cited

Woolworths Ltd v Maryborough City Council (No. 2) [2005]

QCA 262; [2006] 1 Qd R 273, applied

COUNSEL:	T Sullivan QC and R Yuen for the appellant E Morzone QC for the respondent
SOLICITORS:	MacDonnells Law for the appellant McCullough Robertson for the respondent

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Introduction

[1] In the Gold Coast suburb of Pimpama, a new residential community is emerging. The planning scheme for the area, Gold Coast City Plan ("*City Plan*"), indicates that the area is to be predominantly developed for medium density residential development. The land at the southwest corner of the intersection at Yawalpah Road and Dixon Drive, Pimpama is in the Neighbourhood centre zone, while the land on the other corners and in the surrounding area is in the Medium density residential zone. Contrary to the planned intention for the area, the land at all four corners of the intersection has been developed for retail and commercial uses.

[2] The Appellant, Self Storage Helensvale Holdings Pty Ltd, wants to develop Lot 4 on SP 305751 ("*the subject land*") for a self-storage facility. The Appellant made a development application seeking a development permit for a material change of use for a warehouse (self-storage facility) to facilitate that outcome. If approved, the facility would sit amongst a variety of centre type uses that are already approved on the south-east corner of the intersection of Yawalpah Road and Dixon Drive.

[3] Gold Coast City Council ("*the Council*") refused the application. The Appellant appealed that decision.

[4] The question for me to determine is whether, in the exercise of the planning discretion, the development application for the proposed development should be approved.

What is the relevant framework for the decision?

[5] The Appellant seeks a development permit to authorise it to carry out a material change of use of the subject land from its present vacant state to use for a warehouse (self-storage facility).

[6] 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.[1]

[7] The appeal proceeds by way of hearing anew.[2] The Appellant bears the onus of establishing that the development application should be approved.[3]

[8] There is a broad discretion in determining this appeal.[4] The exercise of the discretion must be based on an assessment that:

(a) must be carried out:

(i) against the assessment benchmarks in City Plan version 6 to the extent relevant;[5]

(ii) having regard to any matters prescribed by the *Planning Regulation 2017* (Qld), which include the development approval for and the lawful use of the premises and adjacent premises and any properly made submissions about the development application (of which there were none);[6] 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).[7]

[9] The Court of Appeal in *Brisbane City Council v YQ Property Pty Ltd*[8] and *Abeleda & Anor v Brisbane City Council & Anor*[9] endorsed the approach of the Planning and Environment Court in *Ashvan Investments Unit Trust v Brisbane City Council & Ors*[10] with respect to assessing and deciding development applications. That same approach was considered by me in *Murphy v Moreton Bay Regional Council &*

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1 *Planning and Environment Court Act 2016* s 47.
2 *Planning and Environment Court Act 2016* s 43.
3 *Planning and Environment Court Act 2016* s 45.
4 *Planning and Environment Court Act 2016* s 47; *Planning Act 2016* s 60(3). *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253, [59].
5 It is common ground that version 6 of City Plan was the categorising instrument for the development in effect when the Appellant's application was properly made on or about 8 February 2019.
6 *Planning Regulation 2017* s 31.
7 *Planning Act 2016* ss 45(5), 59
8 [2020] QCA 253.
9 [2020] QCA 257.
10 [2019] QPEC 16; [2019] QPELR 793, 803-813 [35]-[86].

Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor ("*Murphy*").[11]

[10] As is apparent from those decisions, the *Planning Act 2016* affords greater flexibility for an assessment manager, or the Court on appeal, in deciding an impact assessable development application.[12] The flexibility promulgated by the *Planning Act 2016* is to enable:

> "a '*balanced decision in the public interest*' to be reached, based on an assessment of the merits of an application having regard to established policy and other relevant considerations."[13]

[11] To that end, the starting point generally remains that the planning scheme is taken to be an embodiment of the public interest.[14] Further, as I observed in *Murphy*:

> "[22] I agree with Judge Williamson QC's observation that a planning decision, and the inherent balancing exercise it entails, is invariably complicated and multifaceted. It must strike the balance between the maintenance of confidence in a planning scheme on the one hand and dynamic land use needs and recognition that town planning is not an exact science on the other. The Sustainable Planning Act 2009 gave primacy to the planning scheme in the striking of the balance. That is not what s 60 of the Planning Act 2016 requires. Under the Planning Act 2016, the discretion is to be exercised based on the assessment carried out under s 45. 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. It will be necessary to examine the verbiage of the planning scheme to ascertain the planning policy or purpose of relevant provisions and the degree of importance the planning scheme attaches to them. 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."[15]

What are the relevant assessment benchmarks?

[12] Under City Plan, the subject land is mapped as part of the Urban neighbourhoods element of the Strategic framework and is included in the Medium density residential zone. It is also affected by several overlays, including the Building height overlay.

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11 [2019] QPEC 46; [2020] QPELR 328, 333-7 [12]-[22].

12 *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16; [2019] QPELR 793, 804-6 [40]-[51]; *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46; [2020] QPELR 328, 334 [13]-[14].

13 *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16; [2019] QPELR 793, 806 [51].

14 *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257, [42], [54].

15 *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46; [2020] QPELR 328, 337 [22] (citations omitted).

[13] The development application seeks approval to use the subject land for a "*warehouse*", which is defined in City Plan as:

> "Premises used for the storage and distribution of goods, whether or not in a building, including self-storage facilities or storage yards. The use may include the sale of goods by wholesale where ancillary to storage. The use does not include retail sales from the premises or industrial uses."

[14] Pursuant to the Table of Assessment for the Medium density residential zone,[16] the making of a material change of use for a warehouse is impact assessable against the assessment benchmarks in City Plan including the Strategic framework, the Medium density residential zone code, any overlay code triggered by an overlay map and any other relevant code.

[15] The assessment benchmarks with which the Council alleges non-compliance are:

(a) in the Strategic framework:

  (i) the specific outcomes in ss 3.3.2.1(1), (4), (6), (8) and (9);

  (ii) the strategic outcomes in ss 3.4.1(3)(c), (4), (7), (8) and (9);

  (iii) the specific outcomes in s 3.4.2.1(12); and

  (iv) the specific outcomes in ss 3.4.5.1(1), (2), (5), (7) and (8)(a), (b), (e) and (g);

(b) in the Medium density residential zone code:

  (i) the purpose in s 6.2.2.2(1) and the overall outcomes in ss 6.2.2.2(2)(a)(iv) and (vii), (c)(i) and (iii), and (d)(i), (ii) and (v); and

  (ii) performance outcomes PO2, PO3 and PO9 of Table 6.2.2-2; and

(c) in the Commercial design code:

  (i) the overall outcomes in ss 9.3.4.2(2)(a)(i), (ii) and (v); and

  (ii) performance outcomes PO3, PO10 and PO11 of Table 9.3.4-2.[17]

[16] The Council asserts that the non-compliance arises because:

(a) the type of land use proposed is not appropriate;

(b) the scale of the proposed land use is not appropriate; and

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16 City Plan Table 5.5.2.

17 Exhibit 1.11. Although these provisions are identified as relevant to questions 1-3, when the document is read as a whole, it is apparent that there is a formatting issue such that the paragraph that should have been numbered "1" is that stating "*Whether the proposed development is an appropriate use of the subject land.*" That is supported by reference to Exhibit 1.9. That the Council relies on these provisions as founding non-compliance as part of an assessment against the assessment benchmarks. During the opening Mr Morzone QC confirmed that it was the Council's position that they are assessment benchmarks: Transcript of Proceedings, *Self Storage Helensvale Holdings Pty Ltd v City of Gold Coast* (Planning and Environment Court of Queensland, 157/20, Kefford DCJ, 30 November 2020) 34-7.

(c) the character and visual amenity impact and the built form of the proposed development are unacceptable.

[17] With a few exceptions, this is a reasonable summary of the issues that arise for consideration under those provisions relied on by the Council.

[18] Two of the Council's allegations of non-compliance can be readily dismissed at the outset. They relate to ss 3.4.1(4) and 3.4.2.1(12) of the Strategic framework.

[19] Section 3.4.1(4) states that:

> "The viability of the centres network is maximised by preventing out-of-centre development and avoiding incompatible uses within centres."

[20] Section 3.4.2.1(12) states that:

> "District centres support a mix of employment activities as well as other population needs related to goods and services. They are limited in size and intensity to serve the 'employment precinct' role provided by the higher order mixed use centres – central business district, principal centres and major centres. More intensive development activity is focused in these higher order mixed use centres."

[21] The Council's submissions do not explain the basis on which it alleges the proposed development fails to comply with these provisions. The Council's written submissions only address these provisions as part of its response to the Appellant's assertion that the allocation of the land to the Medium density residential zone has been overtaken by events. Although the provisions may be relevant to that issue, that does not demonstrate that the provisions are relevant assessment benchmarks nor that the proposed development fails to comply with them.

[22] There is a lack of consistency between the Council's allegation of non-compliance with ss 3.4.1(4) and 3.4.2.1(12) of the Strategic framework, and its submissions about these provisions. This inconsistency indicates to me that the Council has failed to appropriately recognise that some provisions of a planning scheme will be relevant to the assessment to be undertaken in accordance with s 45(5)(a) of the *Planning Act 2016*, while other provisions may only be relevant to that part of the assessment of the proposed development undertaken under s 45(5)(b) of the *Planning Act 2016*.

[23] Here, the Council does not allege that the proposed use involves inappropriate out-of-centre development. On the Council's case, the proposed use is a use that is not appropriate in centres. Further, these provisions are not properly engaged as the subject land is not in the Neighbourhood centre zone or the Centre zone, nor is it mapped conceptually as a centre on the Strategic framework maps. As such, approval of the proposed development would not result in non-compliance with ss 3.4.1(4) and 3.4.2.1(12) of the Strategic framework.

Is the type of land use proposed appropriate in this location?

[24] The proposed development is a self-storage facility with a total gross floor area of 8,224 square metres comprising storage units of varying sizes for domestic (i.e. residential household) and business users.

[25] The Council alleges that there is significant non-compliance with City Plan because the proposed development involves a nature of land use that is not contemplated on the subject land, namely an industrial activity.

What is the nature of the use?

[26] Under City Plan, a "*warehouse*" use (being the defined use for self-storage facilities for which the Appellant has applied) is clustered in the defined activity group of "*industrial activities*".[18] The defined activity groups appear in sch 1, s SC1.1.1 of City Plan. Section SC1.1.1(3) explains that "*An activity group is able to be referenced in Part 5*". Part 5 contains the Tables of assessment, which assign the category of assessment for defined uses. It does not contain the assessment benchmarks themselves. Considered in that context, it is apparent that the listing of a use in a defined activity group facilitates the defined uses being conveniently referenced, as a group, in pt 5 of City Plan. The inclusion of "*warehouse*" in the "*industrial activities*" defined activity group is not intended to preclude consideration of the particulars of the proposed development to ascertain whether it is industrial in nature for the purposes of assessing compliance with the assessment benchmarks.[19]

[27] The Appellant accepts that self-storage facilities have historically been characterised as an industrial type use. However, it says that is no longer always the case in the self-storage industry. Customers of storage facilities are changing all the time. This is explained in the uncontested evidence of Mr Perrins, a director of the Appellant.

[28] Mr Perrins has approximately 30 years of experience in the self-storage industry. He has been involved in all aspects of self-storage in regions throughout Australia, Europe, and Asia, which include building, owning, designing and running self-storage facilities. He has spent considerable time designing the way self-storage facilities integrate into their surrounding communities, including residential and mixed-use communities.[20]

[29] Mr Perrins says about 30 years ago customers of storage facilities were industrial type users. Now they are more often households. In the storage industry, there is now a clear distinction between domestic and business users, and industrial users.

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18 City Plan Table SC1.1.1.2.

19 In *Gibb v Federal Commissioner of Taxation* [1966] HCA 74; (1966) 118 CLR 628, Barwick CJ, McTiernan and Taylor JJ observed at 635:

> "The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense — or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way … Consequently the effect of the Act and its operation in relation to dividends as defined by the Act must, we think, be found in the substantive provisions of the Act which deal with 'dividends'."

20 He did so in the business called Steel Storage Group, of which he was the founder.

[30] In Queensland, self-storage facilities are typically used by a range of domestic and business users. They include:

(a) customers who do not have room to hold items at their places of residence, due to the small size of their lots and homes. These customers store their personal belongings at a self-storage facility instead and access self-storage on a semi regular or weekly basis;

(b) customers who are moving to a new house or selling and buying property. They use a self-storage facility as a holding place. These customers access their belongings on a daily basis, while living in temporary accommodation, and then on an as needs basis if they have not moved all of their belongings to the permanent accommodation;

(c) customers who are downsizing. These customers access self-storage on a semi regular or weekly basis;

(d) customers who have a death of a family member. In those circumstances, items are held in self-storage until the estate is administered;

(e) customers who are suffering from domestic violence and need assistance with removing items while seeking refuge;

(f) customers running small businesses, who use self-storage to store their work tools and equipment. These customers access the facility on a daily basis;

(g) customers who use self-storage for courier services (including those running businesses from home). In this respect, Storage King offers parcels services known as Parcel King. This is similar to the parcel delivery and collection services offered by a post office, where customers can have their items posted to or collected from the storage facility; and

(h) customers who use self-storage to collect online shopping parcels and to pick up and drop off goods.

[31] The proposed development is designed to cater for these types of domestic and business users.

[32] The proposed development does not involve the storage of toxic or combustible materials, nor will it permit storage of large commercial quantities of goods. It will not generate odour or noise emissions. It does not intend to attract, and is not suitable for, industrial users.

[33] As was accepted by Ms Morrissy, the town planner retained by the Council, during cross-examination, the proposed development is a modern iteration of self-storage. It is quite different to the old-style self-storage facilities. It presents like a building that one would see in a centre. It has a retail user flavour, with bright internal access ways, electronic door monitoring systems, co-working office spaces and meeting rooms.

[34] The evidence of Mr Perrins persuades me that, while a warehouse is within the "*industrial activities*" defined activity group in City Plan, the self-storage facility proposed in this case is not industrial in nature or character. Its nature or character is more closely aligned with retail and commercial uses.

Is non-compliance occasioned by the type of land use proposed?

[35] In its written submissions, the Council says that the proposed development must be assessed against the strategic outcomes in ss 3.3.1(2), (7) and (9) and the specific outcomes in s 3.3.2.1(1), (4), (5), (6) and (11) within the Strategic framework of City Plan. It submits that the proposed development is in substantial non-compliance with each of these provisions of the Strategic framework.

[36] It is difficult to give these submissions credence given all but three of the provisions are not identified in Exhibit 1.11, which is the final version of the "*Agreed List of Issues in Dispute*".

[37] The three provisions that the Council identifies in Exhibit 1.11 are ss 3.3.2.1(1), (4) and (6). These specific outcomes relate to the "*Urban neighbourhoods*" element and state that:

> "(1) Urban neighbourhoods are compact, pedestrian-friendly, offer housing choice and high amenity and provide access to facilities, services, public transport, employment and essential infrastructure.
>
> …
>
> (4) Urban neighbourhoods vary from pockets of detached housing on smaller lots to medium or higher-intensity places containing medium or high-rise buildings.
>
> …
>
> (6) Urban neighbourhoods have a public transport hub, community facility, park or mixed use centre, specialist centre or neighbourhood centre as their focal point."

[38] These provisions are expressed in positive terms. They encourage identified outcomes in urban neighbourhoods, and do not expressly discourage uses. In those circumstances, a non-compliance would only arise where it can be said to follow as a matter of implication or inference having regard to the relevant context of the planning scheme.[21]

[39] In support of its allegations of significant non-compliance with these provisions, the Council submits that the use of land for a warehouse and other industrial activities is not contemplated in Urban neighbourhoods.[22] A Note to s 3.3.2.1 records:

> "Urban neighbourhoods are locations included in the Medium density residential and High density residential zone. Unless stated otherwise, Urban neighbourhoods may also include locations in other zones, such as the Neighbourhood centre and Community facilities zone depending on context."[23]

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21 *Navara Back Right Wheel Pty Ltd v Logan City Council & Ors; Wilhelm v Logan City Council & Ors* [2019] QPEC 67; [2020] QPELR 899, 928 [169]. This approach to the interpretation of a planning scheme was endorsed by the Court of Appeal in *Wilhelm v Logan City Council & Ors* [2020] QCA 273, [38], [39], [62]-[75].

22 The subject land is mapped as part of the Urban neighbourhoods element of the Strategic framework.

23 Notes are part of City Plan: City Plan s 1.2.2(3).

[40] The Council notes that uses for a warehouse and other industrial activities are impact assessable in the Medium density residential zone and the High density residential zone. They fall within the catchall phrase "*Any other use not listed*" in the Tables of Development for each of those zones. The Council also says there are no strategic outcomes applicable to "*creating liveable places*" in s 3.3 of the Strategic framework that envisage the establishment of industrial activities in Urban neighbourhoods. The Council relies on the evidence of Ms Morrissy to that effect. It also relies on an acknowledgment by Mr Duane, the economist retained by the Appellant, that warehouses generally locate in industrial areas. The soundness of the Council's propositions about the level of assessment and the strategic outcomes in City Plan are not a matter for opinion evidence. They are a matter of the construction of City Plan.

[41] The Council also submits that the non-compliance with the Strategic framework provisions is significant as the proposed development seeks to establish an industrial activity within an area where activities of that kind are not contemplated by the Strategic framework. In that regard, the Council notes that use for a warehouse is categorised as accepted development subject to requirements in each of the Low impact industry zone, Medium impact industry zone and High impact industry zone (where not in a precinct), in the Waterfront and marine industry zone (if directly associated with the marine industry), and in the Fringe business precinct of the Mixed use zone. It is also categorised as code assessable in the Special purpose zone (where not in a precinct). These zones are generally intended to deliver the specific outcomes for "*Industry and business areas*" under the Strategic framework.[24] The Council also notes other provisions of City Plan that encourage storage facilities in general industry areas.[25]

[42] The Council's observations about the allocations of the levels of assessment and the encouragement of warehouse uses (including storage) in identified zones are correct. However, those matters do not persuade me that discouragement for the proposed development should be assumed as a matter of implication or inference. City Plan does not stipulate the planning consequence for a use that falls within the catchall phrase "*Any other use not listed*" in the Tables of Development. In this regard, the observations of His Honour Judge Williamson QC in *Navara Back Right Wheel Pty Ltd v Logan City Council & Ors; Wilhelm v Logan City Council & Ors*[26] are apposite. His Honour states that:

> "The planning scheme does not, like other contemporary planning schemes, prescribe a planning consequence where a use falls outside the range of uses anticipated in a particular zone. For example, the planning scheme does not, like other contemporary planning schemes, deem such a use '*inconsistent development*' in the zone, or as being '*inconsistent*' with the zone code.[27] This, in my view, suggests one ought not be too ready to conclude a non-compliance with the zone code is established because, as here, the proposed uses

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24 City Plan Note to s 3.5.2.

25 City Plan ss 3.5.1(5), 3.5.2.1(1), 3.5.2.1(8).

26 [2019] QPEC 67; [2020] QPELR 899.

27 As was considered in *Lockyer Valley Regional Council v Westlink Pty Ltd* [2012] QPELR 354; [2011] QCA 358 and *Gillion Pty Ltd v Scenic Rim Regional Council* [2014] QPELR 168; [2014] QCA 21.

> are not expressly anticipated in the Overall outcomes of the zone code."[28]

[43] His Honour's observations were considered by the Court of Appeal in *Wilhelm v Logan City Council & Ors*.[29] The Court of Appeal dismissed the application for leave to appeal, including on the basis that there was no error in the primary judge's interpretation of the planning scheme.[30] Mullins JA observed that:

> "… Table 5.5.13.1 is the table of assessment for the RRZ and sets out the level of assessment and assessment criteria for each use in the RRZ. Apart from two uses which are exempt, namely Transport depot (with restrictions) and Park, the specific uses that are incorporated in the Overall Outcomes for the RRZ are the specific uses listed in the table of assessment and all other uses fall under the generic description at the end of the of the (*sic*) table of assessment of "[a]ny other use not listed in this table" and are, in effect, impact assessable and the assessment criteria are specified in the table as (*sic*) the Scheme. The table of assessment for the RRZ does not therefore exclude or prohibit uses that are not specifically listed."[31]

[44] Here, the Table of Development for the Medium density residential zone does not exclude or prohibit uses that are not specifically listed.

[45] For the reasons that follow, I am not persuaded that discouragement for the proposed development is an inference that can be readily drawn when City Plan is read as a whole.

[46] The implications of mapping the subject land as part of the Urban neighbourhoods element of the Strategic framework, and the significance of the Strategic framework provisions that the Council relies on, are informed by an appreciation of the structure of the Strategic framework and the direction in City Plan about how it is to be read.

[47] The Strategic framework sets the policy direction for City Plan.[32] City Plan states that:

> "(3) For the purpose of describing the policy direction for the City Plan the strategic framework is structured in the following way:
>
> (a) The strategic intent;
>
> (b) The following six city shaping themes that play an important role in shaping future growth and managing change across the city, and collectively represent the policy intent of the City Plan:
>
> (i) Creating liveable places;

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28 [2019] QPEC 67; [2020] QPELR 899, 928 [167] (original citations).
29 [2020] QCA 273.
30 *Wilhelm v Logan City Council & Ors* [2020] QCA 273, [38], [39], [62]-[75] per Mullins JA.
31 At [68].
32 City Plan s 3.1(1).

(ii) Making modern centres;

(iii) Strengthening and diversifying the economy;

(iv) Improving transport outcomes;

(v) Living with nature;

(vi) A safe, well designed city.

(c) The strategic outcomes proposed for development in the City Plan area for each theme.

(d) The elements that refine and further describe the strategic outcomes.

(e) The specific outcomes sought for each of the elements.

(4) Although each theme has its own section, the strategic framework is read in its entirety as the policy direction for the City Plan.

Note: The whole of the planning scheme is identified as the assessment benchmark for impact assessable development. This specifically includes assessment of impact assessable development against this strategic framework. The strategic framework may contain intentions and requirements that are additional to and not necessarily repeated in zone, overlay or other codes. In particular, the performance outcomes in zone codes address only a limited number of aspects, predominantly related to built form. Development that is impact assessable must also be assessed against the overall outcomes of the code as well as the Strategic framework."[33]

[48] It is apparent from these provisions that the specific outcomes in ss 3.3.2.1(1), (4) and (6) form part only of the Strategic framework that sets the policy direction of City Plan. They relate to the "*Urban neighbourhoods*" element and the specific outcomes for the "*Creating liveable places*" theme. For the "*Creating liveable places*" theme, both the strategic outcomes and the specific outcomes are expressed in terms that encourage certain forms of development. The outcomes referred to in the Council's written submissions are those that focus on housing, but that is not the only form of development contemplated as part of the "*Creating liveable places*" theme or in the Urban neighbourhood element of that theme.[34]

[49] The strategic outcomes for the "*Creating liveable places*" theme include:

"(9) Urban neighbourhoods accommodate a diverse and well-connected network of urban places. **Development is focused on mixed use centres** and specialist centres and public transport hubs, and densities are higher in areas with high frequency public transport, community facilities and infrastructure capacity.

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33 City Plan s 3.1 (original emphasis).

34 Respondent's Closing Submissions [20].

…

> (12) New communities are located in the urban area to achieve an orderly and efficient use of land and deliver a mix of housing forms. **They are supported by** social and essential infrastructure, **an appropriate range of goods and services** and employment opportunities, and active and public transport."[35]

[50] It is apparent from these provisions that not all non-residential development is regarded as the antithesis of "*liveable places*". To the contrary, City Plan recognises that new communities should be supported by an appropriate range of goods and services. Specific outcomes (1) and (6) and the Note in s 3.3.2.1 contemplate that those goods and services may be located within urban neighbourhoods.[36]

[51] The Medium density residential zone code also admits of the prospect that non-residential uses may occur in the Medium density residential zone. That is evident from four provisions of the code.

[52] First, s 6.2.2.2(1) of City Plan, which records that the purpose of the code is:

> "… to provide for a range and mix of dwelling types including Dwelling houses and Multiple dwellings **supported by** Community uses and **small-scale services and facilities that cater for local residents**."[37]

[53] Second, the overall outcome in s 6.2.2.2(2)(a)(iv), which states that land uses:

> "include neighbourhood centres and stand-alone small scale non-residential development consistent with the Strategic framework".

[54] Third, the overall outcome in s 6.2.2.2(2)(a)(v), which states that land uses:

> "which carry higher potential for impacts on amenity such as Car washes, Childcare centres, Health care services, Food and drink outlets, Shops (other than a supermarket), Veterinary services, Community care centres, Community uses, Emergency services, Educational establishments, and Places of worship may be considered if appropriately designed and located and not detract from the residential amenity of the area."

[55] The types of non-residential services and facilities contemplated are not limited to those listed in this provision. That is apparent from the incorporation of the words "*such as*" in the provision.

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35 City Plan ss 3.3.1(9) and (12) (emphasis added).

36 The Note says, "… *Urban neighbourhoods may also include locations in other zones, such as the Neighbourhood centre and Community facilities zone depending on context.*"

37 Emphasis added.

[56] Fourth, performance outcome PO9, which states that:

> "Non-residential uses (other than community uses and neighbourhood centres) are small scale and stand alone."

[57] Pursuant to s 5.3.3(4)(c)(ii) of City Plan, development that complies with the performance or acceptable outcomes complies with the purpose and overall outcomes of the code.[38] As such, the absence of a limitation on the type of non-residential uses in performance outcome PO9 supports the ordinary construction of s 6.2.2.2(2)(a)(v). It tells against an inference that the list of non-residential land uses in s 6.2.2.2(2)(a)(v) is intended to "*cover the field*" of non-residential land uses anticipated in the Medium density residential zone (and Urban neighbourhoods). It also tells against an inference that non-residential uses are discouraged in Urban neighbourhoods and the Medium density residential zone.

[58] The Council's submissions fail to confront that the provisions on which it relies do not, in terms, expressly discourage uses of the type proposed. The Council did not address the Court of Appeal authority with respect to the effect of such provisions.[39]

[59] For the reasons provided above, I do not accept the Council's submissions that the type of land use proposed, namely a warehouse (self-storage facility), demonstrates that the proposed development is non-compliant with the Strategic framework.

[60] Where the type of use proposed is not expressly encouraged or discouraged, it will be necessary to carefully examine the details of the proposed development against those provisions of City Plan that:

(a) guide the scale of non-residential uses that might be anticipated in the zone; and

(b) contain specific controls, particularly those that relate to built form, character, and amenity, to ensure the controls are respected.[40]

Is the scale of the proposed land use consistent with that planned for the area?

[61] The scale of non-residential land uses anticipated in the Medium density residential zone are those that are small scale. Their purpose is to cater for local residents. That is evident from ss 6.2.2.2(1), (2)(a)(iv) and (v) and performance outcome PO9 of the Medium density residential zone code.[41]

[62] The overall outcome in s 6.2.22(2)(a)(iv) directs the reader to the Strategic framework for further guidance about land uses that fall within the category of "*neighbourhood centres and stand-alone small scale non-residential development*".

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38 Although this section relates to code assessable development, it remains applicable in the context of impact assessable development: see *Lennium Group Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 17; [2019] QPELR 835, 865 [201], citing *United Petroleum Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 8; [2018] QPELR 510.

39 *Wilhelm v Logan City Council & Ors* [2020] QCA 273, [38], [39], [62]-[75], particularly at [73] per Mullins JA.

40 This was the approach adopted in *Navara Back Right Wheel Pty Ltd v Logan City Council & Ors; Wilhelm v Logan City Council & Ors* [2019] QPEC 67; [2020] QPELR 899, which was endorsed by the Court of Appeal in *Wilhelm v Logan City Council & Ors* [2020] QCA 273.

41 See paragraphs [52] to [57] above.

[63] By reference to this provision, the Council urges me to consider ss 3.2.2, 3.4.1(3)(c), (7), (8) and (9), and 3.4.5.1(1), (2), (5), (7) and (8) of the Strategic framework. Those provisions relate to the planning outcomes intended for neighbourhood centres. The Council's submissions do not explain the relevance of those provisions to the proposed development. The tenor of the Council's submissions is to assume the provisions are relevant on the basis that the proposed development either seeks approval of a neighbourhood centre or forms part of a broader neighbourhood centre located on the south-east corner of the intersection of Yawalpah Road and Dixon Drive.

Is the proposed development a neighbourhood centre?

[64] City Plan defines a "*neighbourhood centre*" in the following terms:

> "Neighbourhood centres provide day-to-day goods and services and diverse business opportunities. Neighbourhood centres differ from mixed use centres and specialist centres as they are smaller and comprise a mix of smaller scale uses. Neighbourhood centres must comprise a minimum of five separate commercial or retail tenancies, located within a single centre or comprising a consolidation of separate but interconnected uses."[42]

[65] Whether the proposed use for a warehouse (self-storage facility) is appropriately regarded as part of a broader neighbourhood centre conducted on the south-east corner of the intersection of Yawalpah Road and Dixon Drive depends on an identification of the correct planning unit. The identification and delineation of a planning unit, and whether a use fits within a particular definition in a planning scheme, can involve considerations of fact and degree.[43]

[66] Historically, the subject land formed part of a larger three-hectare parcel of land on the south-east corner of the intersection of Yawalpah Road and Dixon Drive ("*the broader development site*"). The broader development site has been the subject of numerous development approvals for non-residential activities since 2016. The development approvals permit the parcel to be developed for several vehicle-oriented precincts. A further approval authorised the creation of five separately titled lots – one for each precinct. The lots are connected by a series of easements.

[67] At the northern end of the broader development site, Lot 1 on SP 305751 has frontage to Dixon Drive and Yalwalpah Road. To date, it has been developed for a 24-hour United Petroleum service station; three fast food premises, each with their own drive-through facilities; and three takeaway food premises.

[68] Lot 3 on SP 305751 is located adjacent to the south-east corner of Lot 1 on SP 305751. It has been developed for a free-standing car wash known as Hoppy's Car Wash.

[69] Lot 2 on SP 305751 adjoins the southern boundary of Lot 1 on SP 305751. It fronts Dixon Drive and is approved to be developed for a tavern and a bottle shop.

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42 City Plan sch 1.

43 *Woolworths Ltd v Maryborough City Council (No. 2)* [2005] QCA 262; [2006] 1 Qd R 273, 291 [40] per Fryberg J citing *Lizzio v Ryde Municipal Council* (1983) 155 CLR 211 at 217 per Gibbs CJ.

[70] Lot 5 on SP 305751 adjoins the southern boundary of Lot 2 on SP 305751. It also fronts Dixon Drive and is approved to be developed for a medical centre.

[71] The final parcel in the broader development site, Lot 4 on SP 305751, is the subject land. It is located behind Lot 2 on SP 305751, separated from Dixon Drive but with vehicular access to Dixon Drive by way of easements that also provide access to the service station, fast food premises, takeaway food premises and the car wash. The proposed development is for use of the subject land for a warehouse (self-storage facility). It is the only use proposed on the subject land.

[72] In this case, the proposed development is neither a neighbourhood centre of itself, nor is it appropriately regarded as part of a neighbourhood centre conducted on the broader development site at the south-east corner of the intersection of Yawalpah Road and Dixon Drive.[44] Although an access easement connects the subject land to the adjoining parcels that form the broader development site, the uses of each lot are not interconnected. The five lots comprise physically separate and distinct areas. Each area makes its own provision for car parking. The five lots do not involve a composite use. They do not function as an integrated unit. Rather, they are occupied, or to be occupied, for different and unrelated purposes. They are separate planning units.

[73] In those circumstances, although ss 3.2.2, 3.4.1(3)(c), (7), (8) and (9), and 3.4.5.1(1), (2), (5), (7) and (8) of the Strategic framework provide relevant context when construing s 6.2.22(2)(a)(iv), they are of limited assistance in this case. The Council's allegation of non-compliance with ss 3.4.1(3)(c), (7), (8) and (9) and 3.4.5.1(1), (2), (5), (7) and (8) of the Strategic framework is ill-conceived.

Is the proposed development a stand-alone, small-scale non-residential land use?

[74] For the reasons explained in paragraphs [65] to [72] above, the proposed development is appropriately regarded as a stand-alone non-residential land use.

[75] There is no definition of "*small scale*" in City Plan. The Council submits that it should be understood and interpreted consistently with the language and purpose of those provisions, and having regard to the context, in which the words appear. The Council says the term is used in the context of catering for, serving or supporting the "*local residents*", "*local community*", "*immediate community", "neighbourhood"* and *"immediate neighbourhood*". I accept that those are relevant considerations that guide an assessment of whether the proposed development is small-scale.

[76] The proposed development is to be conducted in two buildings. It has a total gross floor area of 8,224 square metres comprising 3,773 square metres (including 202 square metres for ground floor office and customer workplace) in Building A and 4,451 square metres for Building B.

[77] In the Town Planning Joint Expert Report, Mr Schneider, the town planner retained by the Appellant, opines that, considered in isolation, the sizes of the buildings are

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[44] The proper construction of the definition of "*neighbourhood centre*" in City Plan was considered by the Court of Appeal in *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132; [2020] QPELR 631, 647-8 [76]-[80].

such that the proposed development is not a small scale non-residential land use. I agree.

[78] In those circumstances, the proposed development is a non-residential land use of a scale that is greater than that anticipated in the Medium density residential zone, particularly having regard to ss 6.2.2.2(1) and (2)(a)(iv) and performance outcome PO9 of the Medium density residential zone code. The Appellant accepts this. It accepts that it does not comply with performance outcome PO9.

What is the town planning significance of the scale of the proposed development?

[79] In assessing the significance of the departure from the anticipated scale of use, it is relevant to consider the verbiage of City Plan to ascertain whether there is any apparent underlying planning rationale for limiting uses to those that are small in scale, and to consider how the proposed development performs in relation to any such underlying planning policy or goals.

[80] Section 3.4.5.1(14) in the Strategic framework is informative in that regard. It states that:

> "Stand-alone, small-scale commercial uses (e.g. neighbourhood store, medical centres) may be appropriate in suburban and urban neighbourhoods (including light rail urban renewal area), new communities, Merrimac/Carrara flood plain special management area, townships and marine and general industry areas, where these uses:
>
> (a) are of a type and size that will not undermine the viability of existing, or new neighbourhood centres;
>
> (b) provide a direct service to the immediate neighbourhood/industry area or a high frequency public transport stop;
>
> (c) maintain a compatible form and scale to nearby development;
>
> (d) do not unduly detract from local character and amenity; and
>
> (e) are not service station, bar, hotel, nightclub or supermarket uses."

Will the proposed development undermine the viability of existing or new neighbourhood centres?

[81] The economic experts retained by the Appellant and the Council, namely Mr Duane and Mr Stephens respectively, gave evidence about the catchment area that would be served by the proposed development, the need for it, and the economic consequences of its approval.

[82] Mr Duane opines that the proposed development would not impact on existing facilities in the adjoining centre. He also says it will not impact on the viability or orderly development of other land in the catchment.

[83] Mr Schneider opines that, from a town planning perspective, the proposed development will not threaten the city's established centre hierarchy or the role and function of other centres.

[84] These opinions of Mr Duane and Mr Schneider were unchallenged, and I accept them.

Will the proposed development provide a direct service to the immediate neighbourhood?

[85] The economic experts disagreed about the catchment area that would be served by the proposed development. Mr Duane's catchment area comprises part of the Statistical Area 2 of Pimpama, Coomera and Jacobs Well to the east of the Pacific Motorway. Mr Stephens agrees that these areas form part of the catchment but says the proposed development will also draw from areas around Ormeau to the north and from Upper Coomera and Coomera West to the west of the Pacific Motorway.

[86] The catchment defined by Mr Stephens is one that generally extends to areas that are within 15 minutes' drive time from the subject land. The basis of Mr Stephens opinion that such a catchment is appropriate is that self-storage facilities are generally recognised to have a very wide or dispersed geographic draw or catchment area. Mr Stephens' opinion was informed by two matters. First, the Australasian Storage Demand Study 2013. Second, his understanding that need experts (of undisclosed identity) identified a 20-minute drive time as a relevant consideration in an unidentified past hearing of the Planning and Environment Court where the proposed use was a self-storage facility. Mr Stephens also says the scale of the proposed development supports an inference that it is seeking to serve a large catchment area.

[87] In forming his opinion, Mr Duane was cognisant of the Australasian Storage Demand Study 2013. However, he also had regard to the attributes of the local area. He says that, unlike other typical self-storage facilities in high profile locations, the location of the proposed development in a localised residential area would limit the extent of the catchment area. He also opines that the Pacific Motorway will form a barrier that will influence the extent of the catchment.

[88] Mr Duane opines that around 70 per cent of the customers of the proposed development will come from his defined catchment area and 30 per cent will come from areas outside the catchment area. He says it is typical for any facility to have overlapping catchments with other facilities. That said, Mr Duane considers it material in this case that the population growth is on the eastern side of the Pacific Motorway, and most of the growth is in and around his catchment area.

[89] When challenged during cross-examination about the inconsistencies between his catchment area and the insights provided by the Australasian Storage Demand Study 2013 and the customer origin data for the Coomera and Helensvale Storage King facilities, Mr Duane explained that the data from the Australasian study is an average. He says that within those averages, you will have facilities that draw from a larger area and those that draw from a closer area. Further, it was clear during cross-examination that, in forming his opinion, Mr Duane had carefully considered the customer origin data for the Coomera and Helensvale Storage King facilities. This included consideration of the accessibility and convenience of customers to

those facilities, and the changes to the customer origin data for the Helensvale Storage King after the opening of the Coomera Storage King. The data for the Helensvale Storage King shows that, prior to the opening of Coomera Storage King, a significant customer base was drawn from north of the Coomera River. After the Coomera Storage King opened, that customer base for the Helensvale Storage King was severely eroded. This supports Mr Duane's thesis that major barriers in the landscape, and the relative accessibility of other nearby facilities, can influence the catchment of a facility.

[90] I prefer the opinions of Mr Duane to that of Mr Stephens on this issue. I do not find Mr Stephens' explanations for his opinion to be compelling. They are suggestive of a purely theoretical approach that ignores the realities of the location. His catchment pays little regard to the constraint posed by the Pacific Motorway. I accept the evidence of Mr Duane that the Pacific Motorway will likely form a significant barrier for potential customers in circumstances where those customers already have a self-storage facility adjacent the western side of the Pacific Motorway (namely Storage King Coomera). Mr Duane's opinions about the catchment area of the proposed development are premised on reasonable assumptions that the catchment will be influenced by the location of the site in the residential vernacular, away from the Pacific Highway and away from adjacent competitors.

[91] The evidence of Mr Duane accords with the evidence of Mr Perrins about the typical range of domestic and business users for this type of self-storage facility, the nature of their use of such facilities, and the regularity with which such customers visit the facilities. Having regard to those matters, Mr Perrins opines that, to get the proper benefits of the facility, the customers need to live in proximity to the self-storage facility. Mr Perrins supported his opinion by reference to examples drawn from his experience. He says that the proposed development will provide storage choice and convenient services to the local residents. Mr Perrins' evidence was unchallenged.

[92] During cross-examination, Ms Morrissy accepted that the proposed development would provide a service to the residential community and to small businesses. She accepted that it would be convenient to the residential community and small businesses in the local area, as well as those in a much broader area.

[93] I accept this evidence of Mr Perrins and Ms Morrissy.

[94] Having regard to the evidence of Mr Duane, Mr Perrins, and Ms Morrissy, I am satisfied that the proposed development will provide a direct service to the immediate neighbourhood. The service will not be limited to the immediate neighbourhood. It extends to serve that broader area within the catchment defined by Mr Duane.

Will the proposed development maintain a compatible form and scale to nearby development?

[95] In considering whether the proposed development maintains a compatible form and scale to nearby development, it is necessary to acknowledge the disparate nature of the development that surrounds the subject land.

[96] To the east of the subject land is residential development comprising single storey detached dwellings on small lots. The proposed development will have a distinctly different form and scale to that development. It proposes to address that difference through architectural treatments and by providing a ten-metre setback to that development, within which there is a proposed three-metre-wide strip of landscaping containing eight metre high trees, and potentially 15 metre high feature trees.

[97] To the north, south and west of the subject land, extensive retail and commercial developments exist or have been approved. In his individual report, Mr Curtis, the visual amenity expert retained by the Appellant, provides photographs of the existing developments located on each corner of the Yalwalpah Road and Dixon Drive intersection. Those developments each present a lengthy facade to the street with minimal, if any, activation.

[98] The proposed development comprises two buildings. Each of the proposed buildings is less than half of the length of the Pimpama Junction shopping centre, which is fully visible along Dixon Drive. Each of the proposed buildings is similar in length to the tavern and medical centre. Their height is less than that of the approved medical centre and only marginally higher than the approved tavern.

[99] In those circumstances, and for reasons developed further in paragraphs [108] to [135] and [152] to [163] below, I am satisfied that the proposed development will maintain a compatible form and scale to nearby development.

Will the proposed development unduly detract from local character and amenity?

[100] For the reasons provided in paragraphs [103] to [185] below, I am satisfied that the proposed development will not unduly detract from local character and amenity.

Is the proposed use a service station, bar, hotel, nightclub or supermarket?

[101] The proposed use, being a warehouse (self-storage facility), does not offend s 3.4.5.1(14)(e).

Conclusion regarding significance of the scale

[102] In this case, the inconsistency with the intended scale is of diminished significance given the proposed development performs well when assessed against those planning goals that inform the policy position with respect to stand-alone, small-scale non-residential land uses. The scale of the proposed development is not a weighty consideration telling against its approval.

Are the built form, character and visual amenity controls respected?

[103] The Council says that the proposed development does not satisfy the assessment benchmarks for non-residential uses in the Medium density residential zone as it is a large and bulky built form and of a character that will detract from the residential amenity of the area.

[104] The Council's submissions with respect to built form, character and amenity issues meld considerations relevant to an assessment against the assessment benchmarks under s 45(5)(a) of the *Planning Act 2016* with those that may be considered under

s 45(5)(b) of the *Planning Act 2016*. Generally, and in the absence of a court document that articulates the basis on which the Council alleges non-compliance, I find that approach to be unhelpful. It does not readily lend itself to an appreciation of the extent to which development is alleged to be discordant with the planning outcomes sought under a planning scheme. As such, despite the Council's approach, I consider it helpful to first consider the Council's allegations of non-compliance.

[105] The built form, character, and amenity controls with which the Council alleges non-compliance are in three distinct parts of City Plan, namely the Strategic framework, the Medium density residential zone code and the Commercial design code.

Does the proposed development comply with the controls in the Strategic framework?

[106] The Council alleges non-compliance with the specific outcomes in ss 3.3.2.1(8) and (9) of the Strategic framework. These provisions relate to land in the Urban neighbourhoods element and form part of the policy directed at creating liveable places. The provisions state that:

> "(8) The **Building height overlay map** shows the building height pattern and desired future appearance for local areas within urban neighbourhoods. This map also shows areas where building heights change abruptly to achieve a deliberate and distinct contrast in built form within and between low, medium or high rise areas.
>
> (9) Increases in building height up to a maximum of 50% above the **Building height overlay map** may occur in limited circumstances in urban neighbourhoods where all the following outcomes are satisfied:
>
> (a) a reinforced local identity and sense of place;
>
> (b) a well managed interface with, relationship to and impact on nearby development, including the reasonable amenity expectations of nearby residents;
>
> (c) a varied, ordered and interesting local skyline;
>
> (d) an excellent standard of appearance of the built form and street edge;
>
> (e) housing choice and affordability;
>
> (f) protection for important elements of local character or scenic amenity, including views from popular public outlooks to the city's significant natural features;
>
> (g) deliberate and distinct built form contrast in locations where building heights change abruptly on the **Building height overlay map**; and
>
> (h) the safe, secure and efficient functioning of the Gold Coast Airport or other aeronautical facilities."

[107] On Building height overlay map – map 3, the subject land is mapped "*2 Storey (9 metres)* may include a partial third storey subject to code assessment*".

[108] The proposed development is three storeys in height and has a maximum vertical dimension of 9.9 metres above ground level. That dimension is at the northern end of Building A. This height exceeds that shown on the Building height overlay map. The Appellant does not suggest that there is an entitlement to any greater height under s 3.3.2.1(9), nor could it given the proposed development does not provide housing choice and affordability.

[109] Despite the exceedance of the height nominated on the Building height overlay map, I am satisfied that the height of the proposed development does not unacceptably cut across the intended pattern and desired future appearance of this local area for the following four reasons.

[110] First, as was appropriately accepted by Dr McGowan (the visual amenity expert retained by the Council) and Ms Morrissy during cross-examination, the exceedance results in only a minor non-compliance. The proposed development exceeds the maximum height of 9 metres by 0.9 metres for part of Building A and 0.3 metres for part of Building B.

[111] Second, I am satisfied that those parts of the proposed buildings that exceed the height nominated on the Building height overlay map will not be visually prominent given the other existing and approved development in the area. In this respect, I accept the evidence of Mr Curtis, the visual amenity expert retained by the Appellant.

[112] Mr Curtis opines that the proposed development is located within an area where the existing Pimpama Junction shopping centre, and the approved tavern and medical centre, will be visually dominant elements and focal points due to their bulk and their location along road frontages. The proposed buildings are each less than half of the length of the Pimpama Junction shopping centre, which is fully visible along Dixon Drive. The bulk and scale of each of the two proposed buildings is consistent with the approved tavern and medical centre. They are similar in length to the tavern and medical centre and their height is less than that of the medical centre and only marginally higher than the tavern. In addition, they are less visible from Dixon Drive than the tavern and medical centre. As is explained by Mr Curtis, the views of the proposed development from Dixon Drive will largely be obstructed by the approved tavern and medical centre. This is a feature of the location of the proposed development opposite the rear of the approved tavern and medical centre. Building A is directly behind the approved tavern. Part of Building B will be visible across a car park that is to be located between the tavern and medical centre, but its setback from Dixon Drive will reduce its visual prominence. For these reasons, the proposed development will not be visually dominant from Dixon Drive.

[113] Third, although the proposed development will not reinforce the local identity and sense of place planned for the area, it will reinforce the local identity and sense of place that exists, and is approved, in the area.

[114] The visual amenity experts agree that the local surrounding area is generally characterised by:

(a) a cluster of commercial development centred on the intersection of Yawalpah Road and Dixon Drive;

(b) residential development that extends to the south, east and west of Yawalpah Road beyond the commercial development, which is comprised of detached dwellings within a grid of connected suburban streets; and

(c) the Gainsborough Green Golf Course to the north of Yawalpah Road and the open space corridors that fragment the residential area to the south of Yawalpah Road.

[115] The cluster of commercial development centred on the intersection of Yawalpah Road and Dixon Drive is, in part, inconsistent with the local identity and sense of place planned for the area. Relevantly, only the land on the south-west corner of the intersection at Yawalpah Road and Dixon Drive is in the Neighbourhood centre zone. That land is improved by the Pimpama Junction shopping centre, which is anchored by a full line Woolworths supermarket and contains 18 specialty shops. That site also contains a medical centre. South of the shopping centre, also within the Neighbourhood centre zone, is a childcare centre, swim school and retail and commercial development that has frontage to Dixon Drive. Its vehicular access is integrated with the Pimpama Junction shopping centre.

[116] The balance of the commercial development that is centred on the intersection of Yawalpah Road and Dixon Drive is in the Medium density residential zone. It includes the McDonalds fast food premises with a 24-hour drive-through facility that is located north of the Pimpama Junction shopping centre, on the north-west corner of the intersection. The north-east corner of the intersection contains a 24-hour 7-11 service station, a small medical centre, a range of shops and a Bridgestone tyre and auto workshop.

[117] Further, as I have noted in paragraphs [66] to [71] above, on the south-east corner of the intersection is a three-hectare parcel of land that has been the subject of several approvals for non-residential activities. That broader development site has been developed for a 24-hour United Petroleum service station; three fast food premises, each with their own drive-through facilities; three takeaway food premises; and a free-standing car wash. A tavern and associated bottle shop, and a medical centre, each fronting Dixon Drive, are also approved in the Medium density residential zone.

[118] Although the subject land is separately titled to the other four lots that form the broader development site on the south-east corner of Yawalpah Road and Dixon Drive, the public will perceive it as consistent with the retail and commercial hub that exists and is approved on that corner.

[119] The public perception of the proposed development as part of the cluster of commercial development on the broader development site will be informed by the proposed development's absence of frontage to Dixon Drive, the location of the storage facility behind the tavern and medical centre, and the proposed access arrangements. There will be no access from the adjoining residential streets to the east. Rather, access to the proposed development will be obtained from Dixon

Drive via an internal road. The internal road runs between the service station and the tavern, then between the rear of the tavern and the car wash. It continues past the front of the proposed storage facilities and terminates in the approved car park to the rear of the medical centre.

[120] Mr Schneider aptly describes the character of the existing, and approved, commercial development centred on the intersection of Yawalpah Road and Dixon Drive. He says the mix of non-residential land uses in the immediate locality form part of a relatively large centre that serves the surrounding residential catchments by improving access to top-up and convenience good and services. He also says the non-residential land uses, including those approved on the south-east corner of the intersection of Yawalpah Road and Dixon Drive, cater for health, entertainment and service needs of the rapidly expanding Pimpama community. The proposed development will be perceived to be part of that cluster.

[121] I accept the evidence of Mr Curtis that the proposed development will contribute to the approved commercial streetscape by providing a partially visible backdrop that will complement and integrate with the focal points provided by the approved tavern and medical centre in the foreground along the Dixon Drive frontage. Mr Curtis opines that the proposed development will add to the cluster of similar scale forms that exist and are approved in this area. He says that, in so doing, it will integrate with the principal focal point provided by the existing shopping centre on the opposite side of Dixon Drive and will reinforce the overall legibility and coherence of the approved retail and commercial development. That part of Building B that will be visible when looking across the tavern car park, between the tavern and medical centre, will have an articulated appearance by reason of the double height entrance focus, the varied painted wall surfaces and the ground level landscaping.

[122] Fourth, I am satisfied that the built form of the proposed development achieves a well-managed interface with, relationship to, and impact on, nearby development, and the reasonable amenity expectations of nearby residents.

[123] The top of the wall facing the residential area to the east is limited to 9 metres in height. The roof slopes up from this eastern side up to a height of 9.3 metres on the western façade, and then there is a parapet extension in some parts of the feature façade on the western side of the building, which takes the building up to a maximum vertical dimension of 9.9 metres.

[124] The 9-metre height of the eastern wall is consistent with the maximum height contemplated on the Building height overlay map and under performance outcome PO3 of the Medium density residential zone code. Further, I accept the evidence of Mr Curtis that the modest height increase of 0.9 metres will be balanced by the provision of a setback of ten metres from the common boundary with the adjoining residential development, which is greater than the 2.5 metres allowable for a multiple dwelling building 9 metres in height. Mr Curtis opines that the significantly greater separation of the proposed development will provide a superior interface than would a multiple dwelling building with a 9-metre building height setback 2.5 metres from the boundary. In addition, the greater than minimum setback will offset the potential for greater impact of overshadowing on the

adjoining residential properties and the potential for any greater sense of overbearing scale resulting from the height exceedance.

[125] A 2.2-metre-high fence along the eastern boundary and a three-metre-wide strip of landscaping containing eight metre high trees, and potentially 15 metre high feature trees, along the common boundary will minimise any impacts upon the existing visual privacy. In addition, the proposed development's east facing elevations are articulated by a series of vertical strip windows and variations in the cladding and its colouration. Mr Curtis opines that these variations fragment the visual bulk of the façade's appearance to create residential scale proportions. The photomontages prepared by Mr Eliott and Dr McGowan assist me to understand this evidence from Mr Curtis. I accept the photomontages prepared by Mr Elliott as appropriately demonstrating how the proposed development will relate to its surroundings, including the foreground and the background. Having regard to those photomontages, I prefer the opinion of Dr McGowan about the impact of these design elements. He acknowledges that some effort has been made to break up the buildings with varied material treatments and fenestration and articulation. However, he says the design treatments do not disguise the imposing form of the buildings. I agree. The design treatments do not successfully fragment the visual bulk of the façade's appearance to the extent that they create residential scale proportions. I also accept Dr McGowan's opinion that the design treatments do not disguise the building typology, being that of a large non-residential use.

[126] Although the design treatments do not successfully minimise the apparent scale of the proposed development nor disguise the non-residential building typology, this is not the only factor that is relevant to the potential visual impact of the proposed development on the nearby residential development. The visual impact must be considered by reference to the context in which it is viewed.

[127] The residential development to the south of Yawalpah Road, and which adjoins the broader development site on the south-eastern corner of the Yawalpah Road and Dixon Drive intersection, is primarily comprised of single storey detached dwellings. The lots on which they are located are in the order of 400 to 500 square metres.

[128] The four houses immediately adjacent to the subject land, being those at 7 Hipwood Street, 8 Richmond Street, 5 Richmond Street and 16 Hollyoak Crescent, are all single storey. They are orientated to have their sidewalls parallel to the common boundary with the subject land. They only have a small side setback to the subject land. Their principal front facades address the perpendicular streets that terminate at the eastern boundary of the subject land. Their landscaped front yards merge with the roadside verges and include grass areas, shrubs, and small trees. As was accepted by Dr McGowan and Ms Morrissy, the proposed buildings are unlikely to be seen from inside the houses. The view from inside the houses would largely be a view of the boundary fence.

[129] During cross-examination, Dr McGowan also acknowledged that the other houses in the residential area to the east are located on small lots. They generally have small backyards and small front yards. The houses are also built very close to one another such that the boundary fence and, perhaps, the adjoining house would dominate the views the residents would experience from side windows.

[130] Given the attributes of the residential development to the east of the subject land, Mr Curtis opines that the proposed development will not impact upon any significant views from the residential development to existing character elements or natural features. Dr McGowan did not dispute this. Further, during cross-examination Dr McGowan accepted that the visual impact on residents would be limited to their experience of the proposed development as they travel to and from their residences. He accepted that such travel by the residents would primarily be by car, given the lack of pedestrian paths in the vicinity. This mode of travel will, of itself, limit the visual impact. Dr McGowan also accepted that the visual impact would be limited to a peripheral appreciation of the building as part of the overall background given the vehicle occupants visions would be restricted by the car itself. In addition, Dr McGowan accepted that the driver would need to focus on driving safely, as the attributes of the neighbourhood are such that one might reasonably expect to see children playing on the street.

[131] Despite acknowledging that the attributes of the surrounding residential area limit the visual exposure of the proposed development to that experienced by residents during their travel to and from their homes and limit the impact to a peripheral appreciation of the building as part of a broader backdrop, Dr McGowan maintained that the proposed development would have an unacceptable visual impact on the residential area. He opines that the proposed development will, nevertheless, present as an unengaging and imposing, bulky built form that is out of character with the residential area.

[132] Although I accept that the built form of the proposed development is out of character with the residential character, or small scale non-residential development, planned for the subject land, I do not consider that the visual impact on the residential area is unacceptable. My view is informed by the limited visual exposure and the limited impact referred to above. It is also informed by reference to the reasonable amenity expectations of nearby residents.

[133] As was acknowledged by Dr McGowan during cross-examination, given the location of the subject land in the Medium density residential zone, a multiple dwelling building with a height of 9 metres setback 2.5 metres from the eastern boundaries would be within the reasonable expectations of the neighbouring residents to the east of the subject land. As such, the extent of the built form is not discordant with the reasonable expectations of the neighbouring residents.

[134] Reasonable expectations of the neighbouring residents would also be informed by the approvals over the subject land. Since 2016, there have been large and bulky buildings, and non-residential uses that are not small-scale, approved on the broader development site on the south-eastern corner of the Yawalpah Road and Dixon Drive intersection. The approved uses included a trampoline centre, gymnasium, and medical centre close to the eastern and southern boundaries. Regardless of whether the owners of the adjoining residential development purchased their lots prior to any such approvals or have purchased in the area since the approvals, the residents' expectations would reasonably be affected by the Council's decisions to grant those approvals. Further, I infer from the absence of any properly made submission objecting to the proposed development that the residents of the area do not consider the proposed development to be outside of their reasonable amenity expectations.

[135] When the proposed building height is considered in the context of the other design attributes of the proposed development and the local context referred to above, I am satisfied that the building height is acceptable. It accords with the planning goals to ensure that development of greater height than that nominated in the Building height overlay map achieves a reinforced local identity and sense of place; and a well-managed interface with, relationship to, and impact on nearby development, including the reasonable amenity expectations of nearby residents. The proposed development performs favourably against the provisions of the Strategic framework that govern the interrelationship between the potential for development of greater height and the countervailing goals relating to protection of the amenity and character of the area. In those circumstances, the non-compliances occasioned by the height of the proposed development should not be afforded significant weight.

Does the proposed development comply with the controls in the Medium density residential zone code?

[136] The Council alleges non-compliance with the overall outcomes in ss 6.2.2.2(2)(a)(vii), (c)(i) and (iii), and (d)(i), (ii) and (v) of the Medium density residential zone code. The overall outcomes state that:

> "(a) Land uses –
>
> …
>
> (vii) do not detract from the residential amenity of the area.
>
> …
>
> (c) Character consists of –
>
> (i) urban neighbourhoods that vary from pockets of detached housing on smaller lots to medium or higher intensity places containing medium rise buildings;
>
> …
>
> (iii) walking and cycling paths, street trees and local streets for shared car and bike use.
>
> (d) Built form (excluding Dwelling houses on small lots) –
>
> (i) has a building height that does not exceed that indicated on the **Building height overlay map**;
>
> (ii) contributes to a transitioning density from lower intensity areas to higher intensity areas near centres, the high rise coastal spine and areas well serviced by public transport;
>
> …
>
> (v) has varying site cover to reduce building dominance and provide areas for landscaping."

[137] It also alleges non-compliance with performance outcomes PO2 and PO3 of Table 6.2.2-2 of the Medium density residential zone code. The performance outcomes state that:

> "**PO2**
>
> Site cover:
>
> (a) is balanced between built form and green areas for landscaped private open space;
>
> (b) contributes to neighbourhood character and amenity;
>
> (c) promotes slender bulk form;
>
> (d) promotes an open, attractive and distinct skyline; and
>
> (e) facilitates small, fast moving shadows.
>
> …
>
> **PO3**
>
> Building height and structure height does not exceed that shown on the **Building height overlap map**.
>
> **OR**
>
> Where not identified on the overlay map building height and structure height does not exceed:
>
> (a) 2 storeys with a maximum of 9m; or
>
> (b) a partial third storey if within 9m."

[138] These provisions raise four questions for consideration:

1. Will the proposed development detract from the residential amenity of the area?
2. Is the proposed development discordant with the intended character of the area?
3. Is the built form of the proposed development appropriate?
4. Is the site cover of the proposed development appropriate?

Will the proposed development detract from the residential amenity of the area?

[139] The only amenity impact alleged by the Council is that of visual amenity. For the reasons provided in paragraphs [106] to [135] above, I am satisfied that the proposed development will not unacceptably detract from the residential amenity of the area. There is no material non-compliance with s 6.2.2.2(2)(a)(vii) of the Medium density residential zone code.

Is the proposed development discordant with the intended character of the area?

[140] The Council alleges conflict with the overall outcomes in ss 6.2.2.2(2)(c)(i) and (iii) of the Medium density residential zone code on the basis that the proposed development is out of character with the detached housing in the area and effectively turns its back on the surrounding residential neighbourhood. The

Council says the proposed development effectively closes off the opportunity for any connectivity between that neighbourhood and the expanded centre whether by walking paths or local streets. I do not accept the Council's case for three reasons.

[141] First, the Council case ignores that the character of the area is not exclusively defined by reference to ss 6.2.2.2(2)(c)(i) and (iii). Pursuant to s 6.2.2.2(2)(c)(ii), the Medium density residential zone code also contemplates uses that provide a character that consists of:

> "well serviced and compact urban neighbourhoods that offer a level of amenity appropriate to the intensity of the area."

[142] Sections 6.2.2.2(2)(c)(i) and (iii) of the Medium density residential zone code must also be read in context with the other provisions of City Plan, which reveal that the intended character of the area is not limited to a residential character.[45]

[143] As I have explained in paragraphs [61] to [78] above, the proposed development is a non-residential land use of a scale that is greater than that anticipated in the Medium density residential zone. However, the significance of that non-compliance is tempered by the fact that the nature of the use is one that will ensure that the area is well serviced and which will not compromise the character of the area as a compact urban neighbourhood that offers a level of amenity that is appropriate to the intensity of the area.[46]

[144] Second, the Council's case that the proposed development is out of character with the detached housing in the area and effectively turns its back on the surrounding residential neighbourhood ignores the existing character of the area. That character is not only informed by the existing detached housing to the east of the subject land. It is also informed by the existing, and approved, commercial development on the south-west corner of the Yawalpah Road and Dixon Drive intersection. Those commercial developments, such as the approved medical centre, the approved tavern and the approved trampoline centre, are not small scale developments. As much was acknowledged by Dr McGowan and Ms Morrissy during cross-examination. They accepted that those approved developments involve large commercial buildings. The trampoline centre, which was approved on the broader development site, was large and bulky and was to be located up against the eastern and southern boundaries adjacent to residential areas.

[145] The proposed development is not out of character or scale with its surrounds when one has regard to those existing and approved uses on the broader development site. It fits comfortably into the surrounding area given its location at the mid rear of the broader development site on the south-east corner of the Yawalpah Road and Dixon Drive intersection, behind the approved tavern and its car park.

[146] Further, Ms Morrissy and Mr Stephens accept that while the existing and approved commercial uses in the immediate area are of a scale that would serve the needs of the immediate neighbourhood and cater to local residents, for some of those uses

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45 See paragraphs [24] to [60] above.

46 For the reasons provided in paragraphs [24] to [60] above, the use is not to be regarded as one that is to be excluded from the zone. For the reasons provided in paragraphs [79] to [102] above, the excessive scale of the proposed development is not a weighty consideration that tells against its approval. See also paragraphs [106] to [135] above.

their role and function is more extensive. Like the proposed development, some of the commercial uses will also serve a much broader catchment. During cross-examination Ms Morrissy and Mr Stephens accepted that was the case for the approved tavern and medical centre. They also accepted the same was true of the full-line Woolworths supermarket located in the Neighbourhood centre zone and the various fast-food premises with their drive-through facilities, including those located on the broader development site.

[147] Third, the Council's case that the proposed development effectively closes off the opportunity for any connectivity between that neighbourhood and the expanded centre whether by walking paths or local streets ignores the situation created by development approvals issued by the Council.

[148] Since 2016, the Council has granted several approvals for non-residential uses on the broader development site on the south-east corner of the Yawalpah Road and Dixon Drive intersection. Those development approvals have authorised a vehicle-oriented environment that is not pedestrian friendly, pedestrian oriented or pedestrian focused. Ms Morrissy acknowledged this during cross-examination. She accepted that the approved design does not provide for walkability internal to the broader development site. The approvals include a car wash facility; a service station and three fast food premises each with their own drive-through facilities; a drive through bottle-shop attached to the tavern; and separate hardstand areas for car parking that wrap around each of the commercial buildings on the broader development site.

[149] Further, the opportunity for connectivity between the neighbourhood and the expanded centre by either walking paths or local streets has been precluded in each development approval issued by the Council, as each of the approvals require construction of acoustic barriers for the entire length of the eastern boundary.

[150] When viewed in the context of the existing and approved uses of the broader development site, I am satisfied that the proposed development makes adequate provision for walking and cycling paths. As Mr Schneider aptly observed during cross-examination, there is only so much that the proposed development can realistically contribute by retro-fitting some form of pedestrian environment in what has otherwise been approved by the Council as a vehicle-oriented site.

[151] For the reasons provided above, to the extent that there is discord between the proposed development and that part of the intended character of the area referenced in the overall outcomes in s 6.2.2.2(2)(c) of the Medium density residential zone code, it is not a weighty consideration that tells against approval.

Is the built form of the proposed development appropriate?

[152] As I have noted in paragraph [108] above, the height of the proposed development exceeds that shown on the Building height overlay map. As such, the proposed development does not comply with the overall outcome in s 6.2.2.2(2)(d)(i) and performance outcome PO3 of the Medium density residential zone code. The Appellant accepts these non-compliances. Nevertheless, for the reasons provided in paragraphs [108] to [135] above, I am satisfied that these non-compliances should not be afforded significant weight.

[153] The Council's submissions do not clearly articulate its allegation of non-compliance with the overall outcome in s 6.2.2.2(2)(d)(ii) of the Medium density residential zone code. To the extent that the Council addresses this provision, it says:

> "To the extent that the proposed development might be considered part of the centre activities extending across former Lot 5, it is reasonable to expect a more sensitive transition to nearby residential areas and a building height that complements and does not dominate the surrounding area."

[154] The Council's submissions do not properly engage with the requirement in s 6.2.2.2(2)(d)(ii). The Council's complaint appears to relate to the height of the building, even though s 6.2.2.2(2)(d)(ii) relates to density and intensity. There is often a correlation between height and density where the use is residential, but this is not necessarily the case for other types of uses. The Council has not adequately identified a case with respect to this provision that the Appellant must meet.

[155] In any event, I have already addressed the acceptability of the building height. Further, the proposed development will provide an appropriate transition from the tavern on its western boundary to the residential development on its eastern boundary. The proposed development is a less intensive use than the approved tavern, which is permitted to operate between 8 am and 2 am. During cross-examination, Ms Morrissy accepted that it is also a less intensive use than a shopping centre. In those circumstances, I am satisfied that the proposed development is not discordant with the outcome sought in s 6.2.2.2(2)(d)(ii) of the Medium density residential zone code.

Is the site cover of the proposed development appropriate?

[156] Although the Council alleges non-compliance with s 6.2.2.2(2)(d)(v) and performance outcome PO2 of the Medium density residential zone code, its submissions only addressed the nature of the non-compliance by reference to performance outcome PO2. In relation to that outcome, the Council says:

> "the proposed site cover exceeds the maximum applicable, as per AO2. Again, such exceedances alone may not be significant, but combined with other factors, contributes to the industrial scale and bulk of the warehouse contrary to the zone."

[157] Acceptable outcome AO2 stipulates that, for uses other than dwelling houses, site cover is not to exceed a cumulative total of 50 per cent of net site area. The proposed development exceeds that maximum by a small margin as it has a site cover of 53.7 per cent.

[158] I do not accept that the exceedance of the maximum site cover stipulated in acceptable outcome AO2, of itself, demonstrates non-compliance with performance outcome PO2. The Council's position in that regard is not supported by s 5.3.3(4)(c) of City Plan, which provides an indication of the significance of compliance with the purpose and overall outcomes of a code, as well as the performance outcomes and acceptable outcomes. It states that:

> "(4) Code assessable development:
>
> …
>
> (c) that complies with:
>
> (i) the purpose and overall outcomes of the code complies with the code;
>
> (ii) the performance or acceptable outcome complies with the purpose and overall outcomes of the code."

[159] Although the proposed development is impact assessable, it is difficult to see why the Medium density residential zone code should be interpreted differently in the context of impact assessment. Impact assessable development is required to be assessed against the whole of City Plan, not just certain nominated codes, but the requirement to consider the whole of City Plan calls s 5.3.3(4)(c) into play. It is the section that provides the reader of City Plan with an understanding of the relationship, within a code, between the stated purpose and overall outcomes on the one hand, and performance outcomes and acceptable outcomes on the other hand.

[160] At least two other provisions of City Plan support that it is appropriate to have regard to s 5.3.3 when construing the code and assessing compliance with it. The first is the application part of each code, which states that when using the code, reference should be made to s 5.3.2 and, where applicable, s 5.3.3. The second is s 6.1 of City Plan. It deals with the structure of zone codes and, in s 6.1(8), states that:

> "(8) Each zone code identifies the following:
>
> (a) the purpose of the code;
>
> (b) the overall outcomes that achieve the purpose of the code;
>
> (c) the performance outcomes that achieve the overall outcomes and the purpose of the code;
>
> (d) the acceptable outcomes that achieve the performance and overall outcomes and the purpose of the code;
>
> (e) the performance and acceptable outcomes for the precinct."

[161] It is apparent from these provisions that the performance outcomes and acceptable outcomes are alternative means of achieving the overall outcomes and the purpose

of the code.[47] As such, it is not appropriate to rely on the acceptable outcome to restrict the ordinary meaning of the performance outcome.

[162] Given the Council's case with respect to site cover is premised only on failure to comply with acceptable outcome AO2 of the Medium density residential zone code, the Council has not adequately identified a case with respect to this provision that the Appellant must meet.

[163] In any event, I am satisfied that the site cover is appropriate in its context. It allows a greater than minimum setback to the eastern boundary, thereby reducing the building dominance. It also has facilitated landscaping on 10.7 per cent of the subject land, including areas of deep planting along the eastern boundary. Further, there are no adverse amenity impacts occasioned by the extent of site cover. The Appellant has discharged its onus with respect to the allegation of non-compliance with s 6.2.2.2(2)(d)(v) and performance outcome PO2(a) of the Medium density residential zone code. There is no material allegation made by the Council with respect to the balance of performance outcome PO2 of the Medium density residential zone code. In any event, any non-compliance with the balance of the provision is not a weighty consideration of itself given s 5.3.3 of City Plan and the absence of unacceptable amenity impacts occasioned by the proposed development.

Does the proposed development comply with the controls in the Commercial design code?

[164] The Commercial design code applies when assessing development seeking a material change of use for non-residential uses.[48] Its purpose is to ensure that non-residential development is designed to make a positive contribution to the character of the area in which it is located.[49]

[165] The Council alleges that the proposed development fails to comply with the overall outcomes in ss 9.3.4.2(2)(a)(i), (ii) and (v) of the Commercial design code. They state that:

> "(a) Built form –
>
> (i) allows for the flexible reuse of street level tenancies for future changing businesses and community needs;
>
> (ii) visually integrates with the street and maintains the reasonable amenity expectation of the surrounding area through well designed building facades;
>
> …
>
> (v) of stand-alone small scale uses maintain a compatible form and scale to nearby development."

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47 See also *K & K (GC) Pty Ltd v Gold Coast City Council* [2020] QPEC 40, [205]–[210].
48 City Plan s 9.3.4.1.
49 City Plan s 9.3.4.2(1).

[166] The Council also alleges non-compliance with performance outcomes PO3, PO10 and PO11 of Table 9.3.4-2 of the Commercial design code, which state that:

> "**PO3**
>
> Large scale uses are sensitively placed within buildings and are sleeved by smaller tenancies or provide a shopfront presentation to the street.
>
> …
>
> **PO10**
>
> Ground floor spaces are designed to enable flexible reuse of the tenancies to support changing community and business needs.
>
> **PO11**
>
> Active uses are located on the ground floor to encourage pedestrian activity and interaction.
>
> **Note: An example of 'active uses' could include uses such as shops and food and drink outlets.**"

[167] The Appellant concedes non-compliance with s 9.3.4.2(2)(a)(i) and PO10 of the Commercial design code.[50]

[168] With respect to s 9.3.4.2(2)(a)(ii) of the Commercial design code, the Council submits that the built form of the proposed development will not complement or effectively integrate with the existing and emerging built form (and activity) on the broader development site in any meaningful way.[51] It relies on the evidence of Dr McGowan in support of its submission.

[169] Dr McGowan opines that the lack of ground level activation will contribute little to the structure, identity, or sense of place emerging from the existing and approved uses on adjoining land. He agrees with Mr Curtis that the forms and material treatments of the western façade of the proposed buildings will continue a "*visual rhythm*" and assist to create a "*cohesive streetscape*". However, Dr McGowan says that these outcomes do not amount to a positive contribution to the pedestrian-oriented environment, nor to the neighbourhood sense of place or activation of the neighbourhood centre. Dr McGowan opines that the cohesive and legible commercial streetscape to which Mr Curtis refers is effectively a section of service road between the back of the tavern development and the proposed development. Dr McGowan says that the only activity along the street will be traffic to the proposed development, the medical centre car park, or the tavern.

[170] Further, while Dr McGowan agrees with Mr Curtis that the approved tavern and medical centre will be visually dominant elements in the local context, he says there

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50 I infer this from its submission at paragraph [53] of its written submissions and the fact that it has not directed me to any evidence that addresses how the built form of the proposed development will allow for the flexible reuse of street level tenancies for future changing businesses and community needs or otherwise made submissions inconsistent with a finding of non-compliance with these provisions.

51 The Council's submissions refer to the "*Centre Design Code*". I have assumed that the reference is an error and should have been a reference to the Commercial design code.

are notable differences between these buildings and the proposed buildings. He says the tavern and medical centre are more separated from neighbouring buildings than the two proposed buildings and are surrounded by more open space, including more space for landscaping. He also says that the tavern and medical centre will contribute to the neighbourhood centre as a focal point and contribute to a sense of place. He says they do so by virtue of their frontage to Dixon Drive, which provides activity along that frontage and opportunities for ground level activation.

[171] According to Dr McGowan, rather than forming an activated and integrated part of these emerging centre type of activities, the proposed development will present as an imposing, cumbrous, and disengaged backdrop to those uses. He says the proposed development will present as an overtly bulky and large built form. In his opinion, the proposed development will make no contribution (by way of activation, engagement, or use) to the neighbourhood identity or sense of place, which he says is defined by emerging centre type uses and by the adjacent residential development.

[172] In Dr McGowan's opinion, the proposed development does little to contribute to a pedestrian environment. Dr McGowan says practical notions of walkability and accessibility for pedestrians determine the concepts of "*pedestrian-oriented areas*" or "*pedestrian-focused environments*", but he says those concepts are also affected by qualitative aspects. This includes the provision of an environment that is comfortable and visually engaging for pedestrians. Dr McGowan says there is no footpath adjacent the proposed buildings; the landscaping contributes little to amenity; the buildings lack street level engagement, other than the glazing at the north-west corner and at the entry point; and the buildings lack any articulation that would assist with making them of a more pedestrian-friendly scale.

[173] On these issues, I prefer the opinions of Mr Curtis to that of Dr McGowan. I have already outlined Mr Curtis' evidence in paragraphs [112] and [121] above. Unlike Dr McGowan, Mr Curtis has considered the reality presented by the context in which the subject land sits.

[174] The subject land is an individual parcel with no frontage to Dixon Drive. The Council approved its creation, on condition that access would be obtained from Dixon Drive via access easements over the broader development site. The previous Council approvals determined that there would be an internal road that runs between the service station and the tavern, then between the rear of the tavern and the car wash. Those approvals determined that the road would continue past the front of the subject land and terminate in the approved car park to the rear of the medical centre. As such, the development approvals granted by the Council created the section of "*service road*" between the back of the tavern development and the proposed development.

[175] As I have already observed in paragraphs [148] and [149] above, the development approvals granted by the Council over the broader development site authorise a vehicle-oriented environment that is not pedestrian friendly, pedestrian oriented or pedestrian focused. The Council has also precluded the opportunity for pedestrian or vehicular connectivity between the residential neighbourhood to the east and the broader development site by imposing conditions requiring construction of acoustic barriers along the entire length of the eastern boundary. Accordingly, it is the

previous Council approvals, rather than the design of the proposed development, that will limit the activity along the service road to traffic attending any development approved on Lot 4 and traffic attending the medical centre car park, or the tavern car park or bottle shop drive through.

[176] The previous approvals granted by the Council also provide an environment that permit the tavern and medical centre to contribute to the neighbourhood centre as a focal point and contribute to a sense of place. The approvals permit their frontage to Dixon Drive. As I have already mentioned, those approvals also created the subject land in a location that denied it any frontage to Dixon Drive. Further, although the tavern and medical centre have a smaller site cover than the proposed development, I do not accept Dr McGowan's opinion that they have more space for landscaping. Dr McGowan does not disclose the basis for his opinion. On my review of the plans, there is no annotation prescribing the extent of landscaping, and much of the open space surrounding the buildings is dedicated to car parks.

[177] Having regard to the matters referred to above, I am satisfied that the proposed development makes adequate provision for street activation and visual integration. It complies with s 9.3.4.2(2)(a)(ii) of the Commercial design code.

[178] The Council has not identified the basis of its allegation of non-compliance with s 9.3.4.2(2)(a)(v) of the Commercial design code. Its submissions do not address the provision at all. The allegation is ill-conceived. The provision contains a requirement about the "*built form of stand-alone small scale uses*". Both parties accept that the proposed development is not a stand-alone small scale use. As such, the provision is not engaged.

[179] The Council has also not identified the basis of its allegations of non-compliance with performance outcomes PO3 and PO11 of the Commercial design code. The Council did not identify the evidence that it says supports its allegations, nor address why the alleged non-compliances were weighty considerations that tell against approval. It did not make any submissions about the provisions at all.

[180] The proposed development is a large-scale use that has been sensitively placed within buildings such that it occasions no adverse amenity impacts. It is not sleeved by smaller tenancies, nor does it provide a shopfront presentation to the street. As such, it does not achieve compliance with performance outcome PO3 of the Commercial design code. However, I do not consider the non-compliance to be a weighty consideration telling against approval of the proposed development for two reasons.

[181] First, the attributes of the land coupled with conditions of approval that attach to it are not conducive to the presentation of a shopfront to the street. This is because the Council approved the creation of the subject land with no frontage to Dixon Drive and no practical frontage to Hollyoak Crescent. Further, while the subject land has frontage to Richmond Street, conditions of approvals attaching to the land require an acoustic barrier to be erected along that frontage, thereby precluding the presentation of a shopfront to Richmond Street.

[182] Second, the proposed development provides a shopfront presentation to the internal road from which it obtains access.

[183] I am satisfied that the proposed development complies with performance outcome PO11 of the Commercial design code. The ground floor of the proposed development includes a customer workspace that will operate like a shop. I consider this a reasonable attempt at encouraging pedestrian activity and interaction given the development approvals granted by the Council over the broader development site have authorised a vehicle-oriented environment that is not pedestrian friendly, pedestrian oriented or pedestrian focused.

[184] For the reasons provided above, to the extent that the proposed development fails to comply with the identified provisions of the Commercial design code, the non-compliance is largely informed by the Council's decisions to grant the other development approvals over the broader development site. As such, the non-compliances are not deserving of significant weight. The non-compliances with s 9.3.4.2(2)(a)(i) and performance outcome PO10 are not weighty considerations telling against approval as it is the absence of frontage to Dixon Drive, rather than the design of the street level, that makes the subject land unattractive for other uses in the future.

Conclusion regarding the acceptability of the design of the proposed development

[185] For the reasons provided above, when the proposed development is assessed against the specific controls in City Plan that relate to built form, character and amenity, its performance, while not ideal, is generally acceptable. The non-compliances do not sound in unacceptable amenity impacts. In addition, the character and amenity impacts occasioned by the proposed development are within the reasonable expectations of the residents, having regard to the existing uses on the broader development site and the approvals issued by the Council to date. In those circumstances, I am satisfied that the non-compliances with City Plan should not be afforded significant weight.

Are there relevant matters that support approval?

[186] In *Abeleda & Anor v Brisbane City Council & Anor*,[52] Mullins JA (with whom Brown and Wilson JJ agreed) observed:

> "[54] Subject to recognition that the Act has not changed the characterisation of a planning scheme as the embodiment of the community interest, I also agree with the observations of Williamson QC DCJ at [53]-[54] of *Ashvan* on the role of non-compliance with a planning scheme in the exercise of the planning discretion under s 60(3) of the Act:
>
> > "[53] An application must be assessed against the applicable assessment benchmarks, which will invariably include a planning scheme for appeals before this Court. That assessment will inform whether an approval would be consistent, or otherwise, with adopted statutory planning controls. **The existence of a non-compliance with such a document will be a relevant '*fact and circumstance*' in the exercise of the planning discretion under s 60(3) of the [Act]. Whether that**

[52] [2020] QCA 257.

> **fact and circumstance warrants refusal of an application, or is determinative one way or another, is a separate and distinct question.** That question is no longer answered by a provision such as s 326(1)(b) of the SPA. It will be a matter for the assessment manager (or this Court on appeal) to determine how, and in what way, non-compliance with an adopted statutory planning control informs the exercise of the discretion conferred by s 60(3) of the [Act]. **It should not be assumed that non-compliance with an assessment benchmark automatically warrants refusal. This must be established, just as the non-compliance must itself be established.**
>
> [54] In practical terms, the change to the statutory assessment and decision making framework may call for an assessment manager (or this Court on appeal) to reach a balanced decision in the public interest where two competing considerations are at play: (1) the need for the rigid application of planning documents on the one hand; as against (2) the adoption of a flexible approach to the application of planning documents to, inter alia, exercise the discretion in a manner that advances the purpose of the [Act]."[53]

[187] The Appellant concedes that its proposed development does not accord with the desired outcomes for the Medium density residential zone. It advances an alternative case for approval. In effect, it raises four factors that it says, individually and cumulatively, support approval of the proposed development.[54] They require consideration of:

(a) whether the Council has departed from the planning intent in City Plan or whether the planning intent in City Plan has been overtaken by events;

(b) whether there is a need for the proposed development;

(c) whether the proposed development creates a buffer between the adjoining residential uses and other commercial uses in the surrounding area and benefits the amenity of those residents; and

(d) whether there is an absence of adverse amenity impacts on neighbouring residential development.

[188] Each of these factors are relevant matters for the purposes of assessing the application under s 45(5)(b) of the *Planning Act 2016*. The issue is whether they have been established on the evidence and, if so, how they inform the exercise of the discretion.

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53 *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257, [54] (emphasis added).

54 For the purpose of s 45(5)(b) of the *Planning Act 2016*.

Has the Council departed from the planning intent of City Plan or has City Plan been overtaken by events?

[189] It has long been recognised that a town planning appeal court may depart from the planning intent of the local government set out in its planning scheme if the local government has itself departed from that intent.[55] The Court may also depart from the planning intent if it has been overtaken by events;[56] or where it can be demonstrated plainly that the land has been given a designation on a basis that was and remains invalid.[57]

[190] These long recognised principles are encompassed in s 45(5)(b) of the *Planning Act 2016*, which cites "*the current relevance of the assessment benchmarks in the light of changed circumstances*" as an example of a relevant matter.

[191] Cases where a planning instrument has been overtaken by events or has an invalid designation are rare.[58] The Appellant says that this is one of those rare cases.

[192] The Appellant submits that the Council's departure from the planning intent in its own planning scheme is evidenced by the development approvals for the subject land and the broader development site.[59] It says the non-residential uses that have been approved by the Council since 2016 have departed from, and compromised, the planning outcomes in terms of built form, character, scale and type of uses sought by the relevant assessment benchmarks in material respects. The approvals have created a vehicle-oriented environment that is not pedestrian friendly, pedestrian oriented or pedestrian focused. In addition, the approved developments are not small scale. They involve large commercial buildings, particularly those fronting Dixon Drive such as the approved tavern and the approved medical centre. The trampoline centre, which was approved on the broader development site, was also large and bulky. It was to be located up against the eastern and southern boundaries adjacent to residential areas. The non-residential uses approved on the broader development site are also not of a scale that is limited to serving the needs of the immediate neighbourhood or catering for local residents. The Appellant submits that in those circumstances, the approved non-residential uses have affected the future of the subject land in a significant way.

What are the development approvals for the subject land and the broader development site?

[193] The first development approval over the broader development site was granted by the Council in January 2016. In a decision notice dated 2 February 2016, the Council records its decision made on 27 January 2016 to grant a development permit for a material change of use for a service station, take away premises, fast food premises and shop.

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55 *Grosser (trading as Australian Ikebana Centre) v Council of the City of Gold Coast* [2001] QCA 423; (2001) 117 LGERA 153, 165 [44]; *Ko v Brisbane City Council & Anor* [2018] QPEC 35; [2018] QPELR 1130, 1144 [83].

56 *Plafaire Projects Australia Pty Ltd v Council of the Shire of Maroochy & Anor* [1991] QPLR 87.

57 *Beck v Council of the Shire of Atherton & Anor* [1991] QPLR 56, 59.

58 *Beck v Council of the Shire of Atherton & Anor* [1991] QPLR 56, 59.

59 These development approvals are a relevant consideration under s 45 of the *Planning Act 2016* and s 31(1)(f) of the *Planning Regulation 2017*.

[194] After the first development approval, and before any material change of use was made of the broader development site,[60] the Council issued a decision notice dated 4 October 2016 ("*the October 2016 development approval*"). It records the Council's decision made 29 September 2016 to grant a development permit for a material change of use across the entirety of the broader development site and a development permit for reconfiguring the broader development site into three lots and an easement.

[195] The approval authorised the development of the three-hectare broader development site to be used for a service station, fast food premises, takeaway food premises, shop, showroom, café, restaurant, tavern, indoor recreation (gymnasium), indoor recreation (trampoline centre), medical centre and commercial services.

[196] The approved plans show three buildings at the northern end of the broader development site designated for use for a service station and fast food uses. Each building has a drive-through facility. A single building at the southern end of the broader development site contains an indoor recreation (trampoline centre) of 1,930 square metres and an indoor recreation (gymnasium) of 2,430 square metres. Along the Dixon Drive frontage, at the centre of the broader development site, is an 800 square metre tavern, a 200 square metre liquor store, three shops of varying sizes between 75 square metres and 200 square metres, and 1,000 square metres dedicated to health care services. The plans show the service station and fast food uses separated from the other uses on the broader development site by four traffic lanes that provide access from and egress to Dixon Drive. There is an at-grade car park of about 7,690 square metres that provides for 413 car parks. It is at the centre of the broader development site and along the eastern boundary. The plans also show several pedestrian paths and pedestrian crossings throughout the broader development site.

[197] The conditions of the development permit for the material change of use include a requirement for an acoustic barrier to be erected along the entire eastern boundary of the broader development site. Condition 67 permits the service station, fast food premises and indoor recreation (gymnasium) to operate 24 hours a day and permits the tavern to operate between 10 am and midnight. The condition permits the balance of the uses to operate between 6 am and 10 pm.

[198] The Council says that the genesis of these pre-existing approvals was the previous Our Living City – Gold Coast Planning Scheme 2003 ("*the 2003 Planning Scheme*"), under which it says the broader development site had different planning designations. It says the first development approval was given at a time when a portion of the broader development site was mapped as being part of a local centre. The Council asserts that each of the fast food premises, medical centre, service station and showroom were code assessable uses in the Local Centre Precinct of the Coomera Local Area Plan.

[199] The Council has not proved its assertions about the contents of the 2003 Planning Scheme, or the designation of the broader development site under the 2003 Planning Scheme, or the timing of the applications made to the Council under s 367 of the *Sustainable Planning Act 2009* (Qld). It elected not to provide a certificate under

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60 See aerial photographs in Exhibit 4.13, which show the broader development site in a vegetated state in July 2017, but with development in May 2019.

either s 251 of the *Local Government Act 2009* (Qld) or s 55 of the *Planning and Environment Court Act 2016*. Nevertheless, for the purpose of considering the merits of the Council's arguments, I will assume that the extracts (ultimately)[61] provided by the Council are a true and correct copy of the only relevant parts of the 2003 Planning Scheme and that the broader development site is the single allotment shown on the south-east corner of the Yawalpah Road and Dixon Drive intersection on the Coomera Local Area Plan – LAP Map 9.2 – Precincts.

[200] Subject to the correctness of the assumptions referred to in paragraph [199], under the 2003 Planning Scheme, the broader development site was located within the area regulated by the Coomera Local Area Plan. Coomera Local Area Plan – LAP Map 9.2 – Precincts shows a blue circle that extends across Dixon Drive and both sides of Yawalpah Road. The legend indicates that it represents "*Local Centre*". It covers part only of the broader development site. The balance of the allotment on the south-east corner of the Yawalpah Road and Dixon Drive intersection, being an area that is significantly greater than 50 per cent of the lot, is coloured pink, which the legend describes as "*Coomera Residential*".

[201] The Coomera Local Area Plan Table of Development for Precinct 2 – Local Centres in the Coomera Local Area Plan in the 2003 Planning Scheme[62] indicates that a code assessable development application was required for any material change of use for Fast Food Premises (where operating within the hours 6 am to 10 pm), Medical Centre, Service Station (except where operating hours outside 7 am to 7 pm) and Showroom.[63] A note above the table records:

> "This table must be read in conjunction with the explanation provided in Part 6, Division 1, Chapter 2 – Using Local Area Plans."

[202] During the initial hearing, the Council did not provide a copy of pt 6, div 1, chp 2 of the 2003 Planning Scheme. It only provided a copy in April 2021 in response to my request for assistance about the appropriate construction of the Table of Development and the Coomera Local Area Plan Map.

[203] The following provisions in Part 6, Division 1, Chapter 2 – Using Local Area Plans are relevant in this case:

> "**Part 6 Local Area Plans**
> **Division 1 Introduction to Local Area Plans**
> **Chapter 2 Using Local Area Plans**
>
> **1.0 Purpose**
>
> To provide guidance on the operation of the Local Area Plans (LAPs) in the Planning Scheme. This section sets out the role of each part of the Local Area Planning measures.

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61 The extracts initially provided by the Council did not include any of the provisions that explain how the Local Area Plan is intended to be read.

62 Exhibit 4.11.

63 The Council did not prove that the extracts from the Coomera Local Area Plan tendered by it were the provisions that applied to the development application that the Council approved in October 2016. The Council did not prove when the development application was made, nor did it prove the version of the 2003 Planning Scheme that was in effect at the time the development application was made.

2.0 Intent Statements in Local Area Plans

Each LAP contains an intent statement which sets out the primary objectives of this Planning Scheme for the land that is included within the particular LAP. The intent statement is informed by the Land Use Themes and the City wide Desired Environmental Outcomes (DEOs) which are directly relevant to the areas included within the LAP.

…

6.0 Precincts

Most LAPs contain precincts which define separate areas of distinct land use and development within the plan boundary. The planning measures contained in the LAP will make direct reference to these precincts.

Note: In a very few cases, the LAP is small and homogeneous enough to have no need to define individual precincts.[64]

The land uses, proposed as part of the development, should generally be located to accord with the intent and land use provisions for the precinct in which the part of the development is located. An integration of car parking and common facilities will be allowed between precincts.

The provisions for development will be assessed on a pro rata basis, in accordance with the provisions applicable in each precinct.

7.0 The Table of Development in Local Area Plans

Each LAP includes a Table of Development which sets out the assessment status of development in the area covered by the LAP, using classifications of development generally consistent with the **Integrated Planning Act 1997 (IPA)**. The Table of Development indicates that development may be classified as: exempt, self, code or impact assessable.

Any Table of Development used in the LAPs must be read in conjunction with this section.

…

7.6 Default Assessment Categories for the Table of Development

7.6.1 Material Change of Use

All uses included in Section A of the Table of Development, may be considered as appropriate for the LAP or LAP precinct to which the Table of Development applies, subject to each use meeting the relevant assessment criteria.

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64 Original emphasis.

> **Any use, not listed in Section A of the Table of Development, should be considered undesirable or inappropriate in the LAP or LAP precinct to which the Table of Development applies.**
>
> Any Material Change of Use not individually listed in the relevant Table of Development will be treated as an impact assessable development except where this would conflict with the provisions of **Schedule 8** of the **IPA**.
>
> …
>
> **10.0 Land within Two or More Precincts**
>
> Where a lot is included in two or more Precincts, the level of development assessment shall be determined in accordance with the Precinct in which the part of the development is located. **Similarly the land uses, proposed as part of the development, should generally be located to accord with the intent and land use provisions for the Precinct in which the part of the development is located**."
>
> (emphasis added)

[204] Two material observations can be made about these provisions.

[205] First, where development is proposed on land in more than one precinct, the desired planning outcomes is that the land uses for each part of the relevant land be located to accord with the intent and land use provisions for the precinct in which the part of the development is located. These provisions indicate that the mapped precinct areas is to be approached with a degree of precision and rigidity, even where the boundaries does not correspond to cadastral boundaries. That such an approach is intended under the 2003 Planning Scheme is supported by pt 6, div 2, chp 9, cl 5.0 in the Coomera Local Area Plan. It states that:

> "Coomera is a large and complex local area. The outcomes desired for different parts of the area require its division into precincts. **Delineation of these precincts is based on the local area features identified in the LAP. The preferred pattern for future development has also determined the boundaries of the precincts, with common activities placed in the same precinct**. Coomera LAP Map 9.2 – Precincts depicts the distribution and location of each precinct."
>
> (emphasis added)

[206] Accordingly, most of the broader development site was intended to be developed in accordance with the intent and land use provisions for the Coomera Residential Precinct. Only that part of the broader development site in the Local Centre Precinct, being an area significantly less than half of the broader development site, was intended to be developed in accordance with the intent and land use provisions for the Local Centre Precinct.

[207] Second, under the 2003 Planning Scheme, any use not listed in Section A of the Table of Development was undesirable or inappropriate in the Local Area Plan precinct to which the Table of Development applied. Uses not listed in Section A of

the Table of Development for Precinct 1 – Coomera Residential in the Coomera Local Area Plan include shop, showroom, restaurant, tavern, indoor recreation centre and commercial services.

[208] The development approval granted by the Council in January 2016 respected the planning intent under the 2003 Planning Scheme in that the approved retail and commercial uses were limited to that part of the broader development site mapped as the Local Centre Precinct. The same is not true of the October 2016 development approval.

[209] The approved plans that form part of the October 2016 development approval show that the service station and associated shop and fast food uses were to be limited to that part of the broader development site located in the Local Centre Precinct. Those uses were permitted to operate 24 hours a day. However, the October 2016 development approval also authorised use of land in the Coomera Residential Precinct for the purposes of shop, tavern, indoor recreation centre and commercial services. Under the 2003 Planning Scheme, they are undesirable or inappropriate uses in the Coomera Residential Precinct. As the Council ultimately conceded at the further hearing on 7 April 2021, they are uses that occasioned serious conflict with the 2003 Planning Scheme and which, under s 326 of the *Sustainable Planning Act 2009*, were required to be refused unless there were sufficient grounds justifying their approval.[65]

[210] Both approvals also departed from the planning intent in pt 6, div 2, chp 9, cl 5.2.5 of the Coomera Local Area Plan for this Local Centre Precinct, which states that:

> "5.2.5 Yawalpah Centre
>
> The Yawalpah Centre is located within the public transport corridor that connects the Pimpama Centre to the Coomera Town Centre. This corridor supports residential densities up to 25 dwellings per hectare. **This local centre will be required to cater for the pedestrian-based retail and commercial needs of the residential population in the area.** Architectural form and building configuration will be required to reinforce a sense of place for the Yawalpah community.
>
> **Approximately 1.5 hectares will be required to facilitate the establishment of 3,000m^2 of retail and commercial floor space.**"
>
> (emphasis added)

[211] For reasons provided in paragraphs [146], [148], [149] and [175] above, the October 2016 development approval is not conducive to catering for the "*pedestrian-based retail and commercial needs of the residential population in the area.*" It authorises

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65 See Transcript of Proceedings, *Self Storage Helensvale Holdings Pty Ltd v City of Gold Coast* (Planning and Environment Court of Queensland, 157/20, Kefford DCJ, 7 April 2021) 5. See also *Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* [2011] QCA 358; (2011) 185 LGERA 63. Contrary to the Council's obligations under s 335 of the *Sustainable Planning Act 2009*, the decision notice issued by the Council on 4 October 2016 did not record whether the Council considered its conflicted with the 2003 Planning Scheme and, if so, the reasons for the decision, including a statement of the sufficient grounds relied on to justify an approval.

a vehicle-oriented environment that is not pedestrian friendly, pedestrian oriented or pedestrian focused.

[212] The October 2016 development approval also approves retail and commercial space on a site with an area of three hectares.[66] It authorises retail and commercial uses that will cater to more than the needs of the residential population in the area.

[213] For the reasons provided above, I am satisfied that the October 2016 development approval overtook the Council's planning intentions in its 2003 Planning Scheme.

[214] The 2003 Planning Scheme ceased to have effect on the commencement of City Plan on 2 February 2016.[67] After that date, the Council approved several applications to change the October 2016 development approval.[68]

[215] On 10 August 2017, the Council first approved a minor change to the development approval. Pursuant to s 374 of the *Sustainable Planning Act 2009*, the Council was obliged to assess the request having regard to the 2003 Planning Scheme but was permitted to give the weight it considered appropriate to City Plan.

[216] The decision authorised a change to the approved drawings and permitted the service station, takeaway food premises and fast food premises to proceed as Stage 1. It also permitted a change to the uses in each of the three buildings. It authorised a total of three fast food premises and three takeaway food premises in

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66 The three hectares of the broader development site appears to have been approved in addition to the retail and commercial development provided in the Yawalpah Centre as part of the Pimpama Junction shopping centre. The notations on the approved plans and the aerial photograph of the area in June 2015 suggest that, at the time the Council gave the October 2016 approval, the Pimpama Junction shopping centre had already been constructed on the south-western corner of the Yawalpah Road and Dixon Drive intersection, on a site with an area of 2.11 hectares (as evidenced in Exhibit 1.2). In those circumstances, it would be reasonable to expect that the balance of the Yawalpah Centre would be developed for dwelling units, in accordance with the stated intent in pt 6, div 2, chp 9, cl 5.2 of the Coomera Local Area Plan.

67 The Council did not provide any evidence about when the 2003 Planning Scheme ceased to have effect, even though it is information of the type that the Council is obliged to keep pursuant to s 264 of the *Planning Act 2016* and s 70 and sch 22 of the *Planning Regulation 2017*. However, Mr Morzone QC did not object to Mr Sullivan QC's suggestion, accepted by Ms Morrissy during cross-examination, that City Plan commenced on 2 February 2016.

68 In oral argument, the Council submitted that, depending on when the applications were made, some of the requests to change the approval may have been granted at a time when, pursuant to s 367(2) of the *Sustainable Planning Act 2009*, the 2003 Planning Scheme applied. This submission is unhelpful and unpersuasive. It invites the Court to assume that some of the applications to change the October 2016 development approval were made at a time when the 2003 Planning Scheme applied in circumstances where:

(a) the Council did not prove when the 2003 Planning Scheme ceased to have effect, even though it is information of the type that the Council is obliged to keep pursuant to s 264 of the *Planning Act 2016* and s 70 and sch 22 of the *Planning Regulation 2017*;

(b) Mr Morzone QC did not object to Mr Sullivan QC's suggestion, accepted by Ms Morrissy during cross-examination, that City Plan commenced on 2 February 2016; and

(c) the decision notice dated 10 August 2017 records that the first request to change the October 2016 development approval was made on 8 May 2017. The Council did not challenge the accuracy of the information contained in its decision notice. It had the requisite knowledge to do so. The date when the application was made is information in the Council's possession as it is information of the type that the Council is obliged to keep in an application register pursuant to s 264 of the *Planning Act 2016* and s 70 and sch 22, pt 2, s 6(1) of the *Planning Regulation 2017*. "*Application register*" is defined in sch 24 of the *Planning Regulation 2017* to mean a register that includes, amongst other things, the day each application was made.

addition to the service station. The other uses were approved to occur in a single further stage. The timing of the conditions with respect to erection of the acoustic barrier along the eastern boundary was changed from "*prior to the occupation of the development*" to "*prior to occupation of Stage 1 and respective stages*".

[217] On 18 September 2018, the Council approved a change application made under s 78 of the *Planning Act 2016* with respect to the October 2016 development approval. Pursuant to s 81 of the *Planning Act 2016*, the Council was obliged to assess the request having regard to the 2003 Planning Scheme but was permitted to give the weight it considered appropriate to City Plan.

[218] The decision notice amended the layout of Stage 2 to break it into two further stages, which were permitted to occur in any order. The decision also amended the size and configuration of the approved uses. The tavern use increased to 1,405 square metres and the liquor store reduced to 116 square metres. The trampoline centre was removed and there was a change to the single large building at the southern end of the broader development site to incorporate the medical centre, gym and three shops. Pedestrian links internal to the broader development site were required to be altered. The conditions about the acoustic barrier were changed to require the erection of the acoustic barriers along the eastern boundary of the broader development site "*Prior to Occupation of Stage 1*". The hours of operation of the liquor store were also extended by an hour, permitting operation between 10 am and 10 pm.

[219] By decision notice dated 7 February 2019, the Council notified its decision of 4 February 2019 to approve a further change application made under s 78 of the *Planning Act 2016*. This decision approved an increase in the number of lots from three to five. It authorised the creation of Lot 3 and Lot 4 with no frontage to Dixon Drive in circumstances where the conditions with respect to acoustic barriers prevented any access from those lots to the adjoining residential streets to the east. The approved plans for the reconfiguration did not show any pedestrian links internal to the broader development site. The condition requiring easements did not require the provision of pedestrian access. This reconfiguration has been perfected and the broader development site now comprises the approved five lots.

[220] On 8 May 2019, the Council granted a development permit for a material change of use to permit proposed Lot 3 to be used for a car wash. This car wash has now been established on the broader development site.

[221] On 29 October 2020, despite opposition by the Council, His Honour Judge Jones approved a further change to the October 2016 development approval. The changes maintained the requirement for acoustic barriers along the southern and eastern boundaries of the broader development site. The decision also extended the hours of operation for the tavern to permit it to be conducted between 8 am and 2 am.

[222] In the reasons for his decision, His Honour Judge Jones observed:

> "[38] Before I go on to address the evidence of the social and town planners in more detail, I should make it clear that **I consider the reference to and reliance on a number of the various provisions of the planning scheme to be unnecessary. That is so for at least three reasons being, in reverse order of**

> **importance; first, it would be wrong to consider this tavern in the context of it being situated in a typical neighbourhood centre. As Mr Ovenden pointed out, with Ms Morrissey largely in agreement, by reference to its sheer size and the number of commercial components making up the centre, it has many of the attributes of a district centre. Second, insofar as the land is included in the Medium density residential zone, having regard to what has and will occur on the ground, the relevance that zoning is of significantly less importance than would usually be the case.** This issue will be discussed in more detail below."[69]

[223] His Honour also found:

> "[82] Insofar as the discussion concerning centres is concerned, I do not consider it necessary to say anything further than **it is uncontroversial that this tavern is located in a centre that has many of the attributes of a district, as opposed to a neighbourhood, centre. That is relevant because a tavern of the type proposed would not be an acceptable use within a typical neighbourhood centre. Typically in a neighbourhood centre, hotels and nightclub entertainment ought not be permitted and operating hours should "generally" cease by 10pm. Not surprisingly, more intensive development is encouraged within a district centre including entertainment where operating hours would be expected to "generally" close by midnight.**
>
> "[83] **Turning then to the zoning of the subject land in the opinion of Mr Ovenden, the relevance of that has been overtaken by what is actually occurring on the ground**. In the JER of the town planners, he expressed the following opinions:
>
> > *"Mr Ovenden is of the opinion is that the Medium density zoning context of the site has been overtaken by events by virtue of the development approvals for the tavern and other non-residential uses over the broader 3 hectare site since 2016.* ***He notes that there is no medium density residential use approved across the site…***
> >
> > ***Mr Ovenden notes that no specific benchmarks from the Medium density residential zone code have been identified by the Respondent in the grounds of refusal and that is because the existing and proposed development in no way represents a land use and development outcome intended for the Medium density residential zone…***

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69 *Pimpama Commercial Pty Ltd v Council of the City of Gold Coast* [2020] QPEC 33 (emphasis added).

> ***Mr Ovenden says, against this backdrop, the provisions of the Medium density zone, as they apply to the site and as have been by the Respondent in the consolidated grounds of refusal, lack utility.*** *In his opinion the amenity considerations for neighbourhood centres has been overtaken by events with respect to the established development and approvals over the site. With one of the largest integrated service station and fast food/take-away food complexes conceivable in any centre located on the site, an existing car wash, together with approval for a large tavern and associated drive-through bottle shop, a 24-hour recreation facility and large medical centre, I struggle significantly to accept the relevance on guidance provided for amenity considerations for neighbourhood centres on this site, through provisions of the MDR zone."* (emphasis added)

[84] I would note in this regard that even more commercial development is proposed. **Mr Ovenden's evidence on this topic was not shaken during cross-examination and I accept it**. …"[70]

[224] By decision notice dated 10 November 2020, the Council notified its decision of 3 November 2020 to approve (in part) an application for a change other than a minor change. The Council refused the request to establish an office use but approved the request to amend the building design and site layout. These are the currently approved plans. They show the medical centre located in a large building at the southern end of the broader development site. It is greater in height than the approved tavern. The approved master plan does not depict any pedestrian connectivity or pedestrian crossings internal to the broader development site. It depicts a series of vehicle-oriented developments.

What is the effect of the earlier development approvals and the subsequent decisions to change the development approval?

[225] The Council characterises these earlier approvals and decisions as consistent with centre type activities. It submits that, to the extent the designation of the surrounding land has been overtaken by events, it is in the sense of an expansion of centre activities. The Council submits that the proposed development, on the other hand, is of an entirely different character. It says it is an industrial activity, not a centre activity.

[226] I do not find the Council's submission persuasive. The Council did not point to any definition of centre activities. There is no definition of that term in the definitions in sch 1 of City Plan, including in the defined activity groups. Insofar as the Council says the proposed development is an industrial activity, the submission appears to be premised on the Council's submissions with respect to the clustering of a "*warehouse*" use in the defined activity group of "*industrial activities*" in sch 1

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70 *Pimpama Commercial Pty Ltd v Council of the City of Gold Coast* [2020] QPEC 33 (emphasis added, footnotes omitted).

of City Plan.[71] For the reasons provided in paragraphs [26] to [34] above, I do not find the Council's submissions to be persuasive. I also do not accept that the proposed development is of an entirely different character to that expected in a centre. That submission does not sit comfortably with the fact that, while the Appellant applied for a development permit for a "*warehouse*" use, it could have instead applied for approval for a "*service industry*" use,[72] which is code assessable (or in some cases accepted development) in the Centre zone under City Plan.

[227] The Council's previous decisions are compelling evidence that the planning outcomes intended for the broader development site (including the subject land) under the 2003 Planning Scheme have been overtaken by events and the planned outcomes in City Plan are not soundly based.

[228] For all practical purposes, the outcomes for the broader development site are unlikely to be reversed. The Council's earlier decisions have affected the future of the broader development site, and the area generally, in a very significant way. The decisions have compromised the desired planning outcomes in terms of built form, character, scale, and type of uses sought by the relevant assessment benchmarks in material respects. They have created a vehicle-oriented environment that is not pedestrian friendly, pedestrian oriented or pedestrian focused. They authorise non-residential development that is not small-scale development. The decisions permit the construction of large commercial buildings fronting Dixon Drive, such as the approved tavern and the approved medical centre. The non-residential uses approved on the broader development site are of a scale that will serve a catchment greater than the immediate neighbourhood, and they will cater to more than just the local residents. When viewed in that context, the town planning propriety of the location of non-residential uses on the subject land is readily apparent. It is a compelling factor that favours approval of the proposed development.

[229] The Council's earlier decisions demonstrate that the assessment benchmarks that it relies on to oppose the development no longer have substantive relevance to the assessment of the proposed development and that the City Plan designations for the subject land and the broader development site no longer represent an embodiment of what is in the public interest for the subject land and its surrounds.

[230] The Council seeks to counter the effect of its decisions with an assertion that the subject land remains valuable for development that accords with its designation in the Medium density residential zone. The Council alleges that the establishment of the proposed development on the subject land will prevent the establishment of a more suitable use in the location and will compromise the ability to meet the

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71 City Plan Table SC1.1.1.2.

72 "*Service industry*" is defined in schedule 1 of City Plan as "*Premises used for industrial activities that have no external air, noise or odour emissions from the site and can be suitably located with other non-industrial uses*". Although the definition does not include "*self-storage sheds*" as an example of the types of activities that fall within the defined use, this does not preclude it from meeting the definition. That "*self-storage sheds*" is listed as an example of a type of activity that falls within a warehouse use is also not definitive: *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2013] 1 Qd R 1. To the extent that the use might be regarded as an industrial activity, it is one that would have no external air, noise or odour emissions from the site and which could be suitably located with other non-industrial uses. The suitability of its co-location with centre type activities is supported by its designation as a code assessable use (or in some cases accepted development) in the Centre zone under City Plan.

community's needs, both current and future. I consider that issue in paragraphs [281] to [291] below.

Is there a need for the proposed development?

[231] The general principles that inform and guide an assessment of need are well settled. The parties agree that they are conveniently summarised by His Honour Judge Wilson SC (as he then was) in *Isgro v Gold Coast City Council & Anor*.[73] As His Honour stated:[74]

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

[232] His Honour also observed that:[75]

> "This Court has been prepared to find that a need exists, despite the presence of similar businesses in the locality. Generally speaking, however, those decisions have been confined to circumstances where the proposals were likely to provide benefit by way of a greater level of convenience to patrons. At the other end of the spectrum are cases in which such facilities as a new service station, or cinema complex would add to a consumer's area of choice but not noticeably improve the wellbeing of the community, or improve the services and facilities available in a locality where existing businesses plainly met demand."

[233] Other relevant principles referred to in the analysis of the authorities in *Isgro v Gold Coast City Council & Anor*,[76] and summarised by me in *Shun Pty Ltd v Logan City Council & Anor*,[77] include:

(a) need in the town planning sense does not mean a pressing need or a critical need or even a widespread desire, but relates to the well-being of the community;

(b) a thing is needed if its provision, taking all things into account, improves the services and facilities available in a locality such that it will improve the ease, comfort, convenience and efficient lifestyle of the community;

(c) the question whether need is shown to exist is to be decided from the perspective of a community and not that of the applicant, a commercial competitor, or even particular objectors;

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73 [2003] QPEC 2; [2003] QPELR 414, 417-20 [20]-[30].
74 [2003] QPEC 2; [2003] QPELR 414, 418 [21].
75 [2003] QPEC 2; [2003] QPELR 414, 419 [26] (references omitted).
76 [2003] QPEC 2; [2003] QPELR 414, 417-20 [20]-[30].
77 [2020] QPEC 31 at [156].

(d) providing competition and choice can be a matter which also provides for a need, in the relevant sense, but of itself the addition of choice to the marketplace does not necessitate a finding of need;[78]

(e) need is a relative concept to be given a greater or lesser weight depending on all the circumstances which the planning authority is to take into account; and

(f) in some instances, public or community need for a service or facility may not be great, and other considerations may be of greater moment.

What was the evidence with respect to need?

[234] The economists disagree about the extent to which existing facilities are adequately addressing the community's demand for self-storage facilities. Mr Duane considers the existing supply to be inadequate. Mr Stephens accepts that there will be a need for further facilities over time. However, he opines that the existing facilities are presently sufficient and there is no urgent or immediate need for the proposed development. Despite their differing conclusions, there are considerable areas of agreement between the experts.

What is common ground between the experts?

[235] The economists agree that, despite their age, the Australasian Self Storage Almanac 2012 and the Australasian Storage Demand Study 2013 provide a useful guide in assessing the need for self-storage facilities in Australia. Those studies provide an understanding of relevant benchmarks, performance standards and supply considerations.

[236] The Australasian Self Storage Almanac 2012 indicates that average occupancy for a self-storage business is 75 per cent to 80 per cent. The average unit size has fallen around 20% over the past decade. It now sits at around nine square metres across Australian capital cities. In 2012, the Gold Coast had one of the highest provisions in Australia of self-storage facility space per capita at 0.23 square metres per person. In Brisbane, the provision was 0.16 square metres per person.

[237] The Australasian Storage Demand Study 2013 indicates that between 3.5 per cent and 4.0 per cent of households use self-storage. It also records that the population in the income bracket $52,000 to $70,999 per annum represents 23.6 per cent of self-storage users even though they only represent 13% of the general population. The report indicates that 71 per cent of self-storage customers are aged between 30 and 60 years of age. Higher levels of demand are also generated by those who reside in a flat, unit or apartment, those who are separated or divorced and those who rent. Those with higher income levels are also positively associated with higher levels of self-storage demand.

[238] The experts agree that the information available in these reports indicates that business customers visit their storage facility more frequently than household customers. The experts also agree that the data indicates that key drivers of demand for the use of self-storage by private users are lack of space at their residence and the need for temporary storage while moving between locations.

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

[239] This market information generally accords with the evidence of Mr Perrins.

[240] While the economic experts disagree about the likely catchment area to be served by the proposed self-storage facility, they agree about the key demographic information that informs a quantitative analysis of the likely demand for the proposed development. Relevantly, the experts agree there is rapid population growth in their respective defined catchment areas. They also agree that the socio-economic profile of the population in their respective defined catchment areas includes many affluent young families in rental households and is consistent with a market that would demand self-storage facilities. In addition, the experts agree that over time to 2041, in their respective defined catchment areas, there will be demand for around four additional self-storage facilities of about the size of the proposed development. They agree that this demand reflects the rapid population growth in the area.

[241] The economic experts acknowledge that City Plan generally encourages their location in industrial zones, and that they have historically been in those types of areas. Mr Duane accepted this was historically informed by the fact that they tend to be large, low intensity uses and those types of uses historically located in industrial areas.

Where do the economic experts differ with respect to economic need?

[242] Although the economic experts generally agree with respect to the base data that informs their opinions, they diverge about what can be gleaned from that data. One key difference relates to their respective catchment areas.

[243] As I noted in paragraph [85] above, the experts disagree about the catchment area that would be served by the proposed development. For the reasons provided in paragraphs [87] to [93] above, I prefer the opinions of Mr Duane to that of Mr Stephens on this issue. I accept that the location of the proposed development off the freeway and in a more localised area distinguishes the proposed development from the other existing facilities that currently address the needs of the local residents of the area.

[244] There is not a material difference in the quantitative analysis of the demand generated by the respective catchment areas. However, there is a material difference in the existing supply of facilities in the respective catchments. Table 4 in the Joint Economic Need Report records the details of the existing facilities within the respective catchment areas as follows:[79]

Storage facility	**Suburb**	**Units**	**Land Zoning**
Within GD and SS Trade Area			
Pimpama Self Storage	Pimpama	100*	Mixed use
Within SS Trade Area			
Upper Coomera Self Storage	Upper Coomera	150*	Medium density residential

[79] Not all columns of the table have been reproduced.

Storage King Coomera	Coomera	600	Low impact industry
Grahams Self Storage	Coomera	50*	Medium density residential
National Storage Ormeau	Ormeau	175[80]	Low impact industry

* *Estimated based on size of facility*

[245] Even with these differences, the quantitative analysis for both catchment areas indicates an undersupply of self-storage facilities at present – an undersupply of 574 units for Mr Duane's catchment and 436 units for Mr Stephens' catchment. All figures used in this analysis were agreed by the experts.

[246] During cross-examination, Mr Stephens agreed that a supply and demand analysis, by reference to catchment areas, is a key metric to determine need. When he was taken to the outcome of the agreed quantitative analysis, Mr Stephens did not take issue with the figures or calculations in the analysis. Nevertheless, during his oral evidence, Mr Stephens sought to undermine the reliability of the quantitative analysis on the basis that it is a mathematical construct that assumes all demand is met by facilities within the catchment area. The Council criticises Mr Duane's reliance on the analysis on the same basis. It submits that the analysis is flawed as the supply analysis does not account for vacancies at facilities outside of the defined catchment areas.

[247] Mr Stephens' attempt to distance himself from the quantitative analysis that follows from the agreed data with respect to his and Mr Duane's respective catchment areas was unconvincing. It struck me as artificially contrived, as does the Council's submission. Although the quantitative analysis is a mathematical construct, it was adopted by both experts as a reliable means of testing the adequacy of supply in the area having regard to their agreed assumptions with respect to growth in demand. In addition, while the quantitative analysis does not account for available vacancies at facilities outside of the defined catchment areas, that is appropriately countered by assuming the full capacity of each facility within the respective catchment areas is available to serve the demand that is only generated within the catchment area, notwithstanding that those facilities would actually serve other areas also.

[248] During cross-examination, Mr Duane explained that he did not regard the quantitative analysis as an accurate mathematical prediction of need. Rather, it indicated to him that there is a large demand for this type of facility, the demand is increasing at a large rate, and the growth in demand can be expected to continue over an extended of period within his defined catchment. I am satisfied that the quantitative analysis supports the conclusions that Mr Duane drew from it.

[249] Mr Duane's conclusion about the need for the proposed development is also supported by data provided by Storage King Helensvale and Coomera. That data shows extremely high occupancy rates at Helensvale and rapid growth in occupancy for the recently opened facility at Coomera. Mr Duane considers the data to be

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[80] The table recorded this as "*n.a.*" but during cross-examination Mr Stephens confirmed that the appropriate figure was 175 units, which was referenced in paragraph [71] of the Joint Economic Need Report as a point of agreement.

indicative of a latent unsatisfied demand. Mr Stephens disputes the reasonableness of that conclusion.

[250] Mr Stephens made no attempts to investigate whether there was any other matter that might explain the trends, even though he had access to Mr Duane's individual report, and his opinions about the data, for over a month before he gave his evidence. Mr Stephens' insistence that there was likely to be another explanation and his persistent proffering of speculative explanations in his oral evidence, in the absence of any attempt to investigate such matters, is disappointing given his obligations under r 426 of the *Uniform Civil Procedure Rules 1999* (Qld). I prefer the evidence of Mr Duane with respect to this issue.

[251] Mr Stephens opines that while an economic and community need for additional self-storage facilities will emerge over time in association with population and business growth, there is no need for the proposed development. Mr Stephens' opinion appears to be premised on four propositions. First, the need for self-storage facilities in this locality is currently being met by existing facilities including the Coomera Storage King facility. Second, Mr Stephens believes that it is not sufficient to demonstrate a general need for a development that conflicts with a planning scheme. Rather, he considers it necessary to demonstrate that there is a need for the development in a particular location, and that the public interest of satisfying the need outweighs the public interest in confining development to that which accords with the planning scheme. He does not consider this to have been established. Third, Mr Stephens asserts that alternative sites are available to accommodate the need for additional self-storage facilities and he opines that those other locations should be preferred. Fourth, Mr Stephens opines that the proposed development is not suitable for the subject land as it is a use that is inconsistent with an in-centre location.

[252] I do not accept Mr Stephens' first proposition. The Coomera Storage King facility is now close to 70 per cent occupied in just over 20 months of trading and was forecast to reach 90 per cent occupancy by late 2020. Storage King Helensvale is close to 90 per cent occupancy, despite the recent opening of the Storage King Coomera within its catchment area. This recent data is demonstrative of increasing demand for self-storage facilities. It is consistent with a rapidly growing demand environment, as agreed by the need experts. It is also consistent with an existing unsatisfied latent demand.

[253] Mr Stephens' second proposition is wrong at law. In *Abeleda & Anor v Brisbane City Council & Anor*,[81] Mullins JA (with whom Brown and Wilson JJ agreed) observed that:

> "The focus in *K & K* and *King of Gifts* in respect of s 326(1)(b) of the SPA was whether the planning need for the proposed development overrode the planning scheme in relation to the development of that particular site. **Under s 60(3) of the Act, the decision is made in respect of the development application for a particular site, but the parameters of the impact assessment undertaken by the decision-maker do not necessarily suggest that, where planning need is a relevant matter, the planning need**

[81] [2020] QCA 257.

> **must be limited to the need for the proposed development on that particular site only and no other site, rather than a planning need for that type of proposed development that would be appropriately satisfied by the development of that site**. The weight to be given to the planning need may be greater if the evidence showed that the need would be satisfied only by the proposed development on the particular site. The process of decision-making provided for by the Act under s 45(5), s 59(2), s 59(3) and s 60(3) does not restrict planning need to the proposed development of the specific site in the manner discussed in *Bell*, *K & K* and *King of Gifts* for the purpose of s 326(1)(b) of the SPA, but the existence of other sites for which the proposed development is permitted under the applicable code may be a relevant matter."[82]

[254] I consider the third proposition in more detail in paragraphs [267] to [280] below. However, I do not accept Mr Stephens' opinion that a significant amount of appropriately located and zoned land is available to meet the need. His opinion in that regard is unreliable. During cross-examination, Mr Stephens conceded that he has only considered the zoning of the sites at a very high level and has not undertaken any site-specific analysis. He also defers to the town planner in relation to any site-specific analysis.

[255] The evidence Mr Stephens gave in respect of the fourth proposition is unpersuasive. In expressing his opinion that the precinct comprising the land at the four corners of the intersection of Yawalpah Road and Dixon Drive serves a catchment or trade area that is generally localised in nature, Mr Stephens appears to have deliberately ignored the catchment that would be served by the existing full-line supermarket and the approved tavern and medical centre.

[256] In addition, Mr Stephens' opinion that the precinct operates like a neighbourhood centre under City Plan has no probative value as it extends outside his area of expertise. On numerous occasions during his oral evidence, Mr Stephens' claimed to hold the appropriate expertise to express the opinion, yet when challenged in cross-examination about pertinent matters in City Plan that he had apparently overlooked, Mr Stephens sought to avoid answering the questions on the basis that they were outside his expertise. Mr Stephens' impressed me as keen to advocate his client's position, rather than assist the court with independent expert evidence. Even if I am incorrect about Mr Stephens' expertise, I do not accept his evidence as it is unpersuasive. As was readily, and appropriately, accepted by Ms Morrissy, the larger precinct does not meet many assessment benchmarks of a neighbourhood centre. Its operation is more closely aligned with that of a district centre in City Plan.

[257] Overall, I prefer the evidence of Mr Duane to that of Mr Stephens with respect to the economic need for the proposed development. The opinions expressed by Mr Duane were well-considered and were supported by cogent explanations. They satisfy me that there is a current need for the proposed development.

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82 At [51] (emphasis added).

Will the proposed development provide choice and convenience?

[258] Mr Duane opines that the proposed development provides storage choice and convenience for residents and businesses. During his oral evidence, he explained that it would allow residents who are reluctant to go to industrial areas the choice of an alternative location.

[259] Mr Stephens recognised the obvious benefits that a self-storage facility has in meeting the needs of households and business customers. During cross-examination, he accepted that the proposed development would offer convenience and choice to people in the adjacent residential area. He also accepted generally that the offerings described by Mr Perrins set out in paragraph [30] above constitute the obvious benefits that a self-storage facility has in meeting the needs of households and business customers. Ms Morrissy holds a similar view.

[260] The Appellant has demonstrated that the proposed development will provide choice and diversity of services (personal and business) delivered on the subject land for the benefit of the nearby community. It has also established that it will provide a safe, accessible, and convenient service for storing personal and business belongings.

[261] In the circumstances, the proposed development will improve the well-being of the community.

Will the proposed development create a buffer between the residential uses and other commercial uses?

[262] The Appellant asserts that the proposed development will create a buffer between the adjoining residential uses and other commercial uses in the surrounding area and will benefit the amenity of those residents. It did not direct my attention to evidence about this issue. I am not persuaded that it has been established.

Will there be an absence of adverse amenity impacts on neighbouring residential development?

[263] For the reasons provided in paragraphs [103] to [185] above, I am satisfied that the proposed development will not occasion any adverse amenity impacts on the neighbouring residential development. The absence of adverse planning consequences is a relevant matter to be considered in the exercise of the planning discretion.[83]

Are there relevant matters that support refusal?

[264] In addition to refuting the relevant matters raised by the Appellant, the Council raises two relevant matters that it says support refusal of the proposed development.[84]

[265] The Council's Statement of Position with Respect to Appeal states:

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83 *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257, [61].

84 Exhibit 1.6.

> "The Respondent's position in the appeal is that, in exercising the Court's discretion under section 60(3) of the *Planning Act 2016* (Qld) (**PA**), the development application the subject of this appeal ought be refused on the following grounds:
>
> …
>
> ***Relevant matters***
>
> 7 There is no planning, economic or community need for the proposed development in this location.
>
> 8 If there is a planning, economic or community need for the proposed development, other more suitable sites exist to establish the proposed development that are consistent with the City's settlement pattern and that support the provision of an integrated and coordinated system of planning.
>
> 9 The establishment of the proposed development in this location will prevent the establishment of a more suitable use in the location, and will compromise the ability to meet the community's needs, both current and future."[85]

[266] I have already addressed the first matter raised by the Council as the Appellant raised the converse proposition as part of its case. As such, only those matters referred to in paragraphs [8] and [9] of the Council's Statement of Position with Respect to Appeal remain to be addressed.

Are there other more suitable sites?

[267] The Council contends that there are other more suitable sites that exist to establish the proposed development. It relies on this allegation in two respects. First, the Council asserts that the Appellant is required to demonstrate the absence of other more suitable sites to demonstrate a need for the proposed development at the proposed location. Second, in support of its case resisting the relief sought by the Appellant, the Council alleges that a relevant matter to be considered is that there are other more suitable sites that exist and that are consistent with the City's settlement pattern.

[268] The Council did not provide any authority in support of its first assertion and I do not accept it. As has long been recognised by this Court, it is not the Court's function to determine whether a better site exists for a particular proposal. Rather, the issue to be determined is whether approval should be given for the particular use proposed on the particular site.[86]

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85 Exhibit 1.6.

86 *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200, (2008) 159 LGERA 349; *Bennett v Livingstone Shire Council* (1985) 19 APA 268; *Aborigines and Islanders Alcohol Relief Service Ltd v Mareeba Shire Council* [1985] QPLR 292; *Luke & Ors v Maroochy Shire Council & Anor* [2003] QPEC 5; [2003] QPELR 446, 458 [50] citing *Queensland Adult Deaf and Dumb Society (Inc) v Brisbane City Council* (1972) 26 LGRA 380, 386, *SEAQ v Warwick City Council* (1971) 24 LGRA 391, 394 and *Castro v Douglas Shire Council* [1992] QPLR 146, 158. See also *Gaven Developments Pty Ltd v Scenic Rim Regional Council & Ors* [2010] QPEC 51; [2010] QPELR 750, 764 [37].

[269] With respect to the second proposition, the Council submits that:

> "It is not for the Council to prove an alternative site. To the contrary, it was for the Appellant, if it wanted to raise the absence of alternative sites (which the Appellant has chosen not to do), to prove that to be the case."

[270] In support of this submission, the Council refers to s 45(1)(a) of the *Planning and Environment Court Act 2016*, which provides that it is for the Appellant to establish that the appeal should be upheld. It does not follow that the Appellant is obliged to prove every issue raised by it **and** disprove every allegation raised as a relevant matter warranting refusal. Most cases involve more than one issue. The legislation is silent about which party bears the onus with respect to each issue raised. The onus for each issue may be variously distributed between the parties.[87]

[271] The Appellant did not allege the absence of suitable alternative sites as a relevant matter. Its case is not founded on the proposition that the proposed development is only appropriate because of the absence of suitable alternative sites. The issue only arises as part of the Council's case. As such, the Appellant is obliged to demonstrate that, in the exercise of the planning discretion, approval of the proposed development is warranted despite any adverse relevant matters that are established on the evidence.

[272] In support of its contention that there are other more suitable sites, the Council relies on Appendix D of the Town Planning Joint Expert Report. Appendix D was prepared by an officer of the Council. It identifies 27 sites that are said to be at least partly in the Low impact industry zone or the Mixed use (fringe business precinct) zone. That the sites were within those zones attributed to them in Appendix D was not proved by the Council.[88]

[273] Ms Morrissy undertook a "*desktop*" review of the 27 sites. During cross-examination, Ms Morrissy confirmed that no site-specific analysis has been carried out to ascertain the extent to which each of the individual sites is developable or is available for a self-storage facility. She conceded that sites 9, 13 and 16 have already been developed for an existing storage facility. Sites 1, 7 and 8 are owned by public entities, including the Council, and are unlikely to be available for private development. With the possible exception of site 10, and sites 2 and 26 (which have been cleared contrary to the protection afforded by vegetation and species overlays in City Plan), Ms Morrissy was unable to confirm "*definitively*" that the rest of the sites identified in Appendix D are in fact available to accommodate the proposed development.

[274] The extent to which the contents of Appendix D could be regarded as reliable is highlighted by the following exchange I had with Ms Morrissy during the hearing:

> "HER HONOUR: When you said a moment ago that there is future available land, but it's constrained, how am I supposed to reconcile whether the constraint is an absolute – if it's an absolute constraint, that it's not available. You haven't done any analysis - - -?---And

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87 J D Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) 264 [7005].

88 The Council elected not to provide a certificate under either s 251 of the *Local Government Act 2009* (Qld) or s 55 of the *Planning and Environment Court Act 2016* (Qld).

> that's why I answered in the affirmative to the question that was just asked of me. Because I haven't done that analysis of every individual site, you can't trust that all of the lots shown in this appendix is available for the use.
>
> Well, you couldn't trust any of them, really, could you, other than the ones where there's already a storage facility or the Strawberry Fields, potentially?---Because the assessment hasn't been done - - -
>
> Yes?---To work out the extent to which it's constrained."[89]

[275] The next day, when dealing with sites 2 and 26, Ms Morrissy further explained as follows:

> "To the extent, I suggest to you, that, in effect, the overlays may mean that these sites can't be developed, in terms of clearing vegetation - - -?---Yes.
>
> - - - that was incorrect?---I appreciate that you're pointing out that some of the land – some of the examples are constrained and that those constraints might have an impact on whether the land could be developed. I appreciate that, in practice, when overlays are applicable to land, that they need to be ground truthed, and certainly vegetation mapping is one of those. But I – I accept also that I didn't undertake that task to ground-truth every example there, so I – I didn't know that there was clearing or there wasn't clearing, and I didn't know that there was koala habitat on – on the sites."[90]

[276] Site 10 is the subject of an impact assessable development application for a self-storage facility accommodating 165 units. At the time of the hearing, the Council had issued an action notice stating that the development application was not a properly made application under s 51 of the *Planning Act 2016*. As such, on the evidence before me, there is a prospect that the development application would not proceed.

[277] Appendix D provides little assistance as to the appropriateness or availability of the sites listed therein to accommodate or establish the proposed development. Having regard to Ms Morrissy's evidence during cross-examination, I am satisfied that Appendix D does not provide a sound basis for identifying that other more suitable sites exist to establish the proposed development, nor that the sites identified in Appendix D are consistent with the City's settlement pattern and support the provision of an integrated and coordinated system of planning.

[278] The evidentiary value of Appendix D is also undermined because several of the sites identified therein are outside Mr Duane's catchment area.

[279] At its highest, the evidence shows that there might be land that is vacant that may be within a zone of City Plan where self-storage facilities are generally encouraged. Even if I were to assume that the sites are zoned in the manner identified in

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89 Transcript of Proceedings, *Self Storage Helensvale Holdings Pty Ltd v City of Gold Coast* (Planning and Environment Court of Queensland, 157/20, Kefford DCJ, 3 December 2020) 73-4.

90 Transcript of Proceedings, *Self Storage Helensvale Holdings Pty Ltd v City of Gold Coast* (Planning and Environment Court of Queensland, 157/20, Kefford DCJ, 4 December 2020) 3-4.

Appendix D, such land will be available generally for industrial type uses also. Further, before any of the sites could be used for self-storage facilities, there would need to be a successful development application to facilitate that use. This could take some time. As such, while the potential location of a use in a more appropriate zone might have some superficial appeal as a relevant matter that warrants refusal of the proposed development, closer scrutiny reveals that the prospect of the need being met in more appropriate locations is speculative. This Court has previously recognised the questionable value of undertaking this nature of collateral enquiry. In *Kotku Education & Welfare Society Inc. v Brisbane City Council & Ors*,[91] His Honour Judge Wilson SC (as he then was) observed:

> "An effort was made by Ms Rayment to establish the existence of other suitable and allegedly preferable sites but that is an exercise which has generally been disapproved in this Court: *Baptist Union* (supra at p.72); *Green v. Moreton Shire Council* (1985) Q.P.L.R. 328 at 330; *Aquatic Sub v. Sydney City Council* (1981) 43 L.G.R.A. 126 and *Ecovale* (supra)[92] at 47 where Fryberg J said, forcefully:
>
> > **The Court is not a super planning authority for the various local authorities of Queensland. It cannot in a particular appeal carry out the sort of inquiry which must be carried out to formulate a new Planning scheme. In a case involving the rezoning of small allotments, I do not think the Court derives much assistance from evidence relating to the market availability of a few other similar allotments in the neighbourhood. When such evidence is advanced by opponents of the development, its supporters may be tempted to advance evidence that the supposedly similar allotments are in fact unsuitable for the proposed development. Such an approach could turn the appeal into an inquiry into the suitability and planning terms of all those allotments. The resulting delay in cost may easily be imagined.**
>
> That is precisely what occurred here, with inordinate time and effort being expended by the Appellant in considering and addressing various sites identified by Ms Rayment. The alleged existence of alternative sites has to be considered, too, in light of Mr Yilmaz' evidence which shows this group has expended a good deal of time and effort over many years attempting to find a suitable site, and, even after initial encouragement, has been rebuffed or driven away. Of the sites Ms Rayment referred to only one is in the Local Government area of Brisbane; others are in the Koala Conservation Area; only one is in a Centre; three are in Residential Zones; and, almost all are not unlikely to attract exactly the same response from submitters as occurred here. The exercise neither extinguished nor, indeed, reduced the force of the Appellant's contentions about its strong need for a mosque, and a community centre."[93]

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91 [2004] QPEC 68; [2005] QPELR 267.

92 *Ecovale Pty Ltd v Gold Coast City Council* [1999] 2 Qd R 35.

93 [2004] QPEC 68; [2005] QPELR 267, 280 [61] (emphasis added, citations omitted).

[280] For the reasons provided above, I am satisfied that this issue is not a weighty consideration telling against approval. It does not reduce the force of the Appellant's case that there is a need for the proposed development.

Will the proposed development preclude a more suitable use of the subject land?

[281] The Council notes that the subject land is vacant. It says that there is no reason why it could not be used for a development that is consistent with the Medium density residential zone. It alleges that appropriate uses that could be developed on the subject land include a child-care centre, community use, caretaker accommodation, community residence, rooming accommodation, multiple dwelling, residential care facility and retirement facility. The Council also alleges that the subject land might be more appropriately developed for other centre activities.

[282] I have reservations about the utility of engaging in this type of exercise. When invited by the Council to have regard to similar matters, with respect to an application under the *Sustainable Planning Act 2009*, in *K & K (GC) Pty Ltd v Gold Coast City Council*,[94] I observed:

> "[150] At the other end of the spectrum is an approach that involves considering the public interest served by approval of the proposed development as compared to the public interest served by compliant development of the subject land. This begs the question: what is the compliant development that one must assume? How does one determine the parameters of such a development? What built form should be assumed? How are the defining characteristics of the compliant built form to be established? Are they determined by the Council advancing a hypothetical design that it says reflects a compliant design? Must the developer accept that the Council's hypothetical design is compliant, or can it challenge, as part of the appeal, any hypothetical advanced by the Council on the basis that it does not, in fact, comply and, as such, the Council's case is premised on a false basis? Is it for the developer to put forward a demonstrably "*compliant*" design as an alternative to its proposed development? What if the Council does not accept the developer's alternative is compliant? How does one choose the use that is to form the basis of the comparison? Is it one of the range of uses that is able to be implemented with the least amount of scrutiny, such as a use that is self-assessable, or one that is code assessable and meets all of the acceptable outcomes? If so, which of the range of self-assessable or code assessable uses is to be chosen as the basis for the comparison? If the comparison is to be made having regard to a self-assessable or code assessable use, what consideration is given to an impact assessable use that complies with the planning scheme? Does one disregard such a use even though it also is a form of development that accords with the planning scheme? What if there is a greater public need for a compliant impact assessable use than a code

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94 [2020] QPEC 40.

assessable use, but the impact assessable use affords less public benefit in terms of amenity considerations? In that circumstance, should the impact assessable "*compliant*" development form the basis for the comparison, or should the code assessable use form the basis? Does one undertake a full merits assessment of both alternatives in order to decide which compliant development represents the greater public interest before then deciding if there is an even greater public interest provided by the proposed development? How far down this rabbit hole must a developer go to discharge its onus? Does it need to present hypothetical designs for each type of use contemplated as appropriate in the applicable domain or zone and demonstrate the respective need for each hypothetical development? In developing hypothetical "*compliant*" developments, what, if any, regard should be had to whether it is commercially feasible to deliver the hypothetical developments? Should the "*compliant*" use be one that is demonstrated to be the highest and best use of the land?

[151] These questions highlight why it is impractical to approach the exercise in this manner. Such an approach ignores the reality that, in assessing the acceptability of a proposed development, a local government is not presented with a binary choice between a non-compliant development and an alternative compliant development. Planning schemes do not advance a particular design option or solution for a particular site. They articulate planning goals and stipulate controls that guide the parameters of development in performance-based terms.[95]

[152] It must also be remembered that the function of the Planning and Environment Court in an appeal is to resolve the issues in dispute between the parties in the individual case. If a party opposed to a development were to advance a case that the public interest of the proposed development is not greater than the public interest in a particular alternative design advanced by it on the basis that the alternative represented a "*compliant*" development, the developer (as the party with the onus) might feel obliged to present evidence that the supposedly compliant design is in fact not compliant and, as such, the public interest associated with that design is not relevant. Such an approach could turn the appeal into an inquiry into the acceptability of many alternative designs, rather than an assessment of the proposed development itself. One can readily imagine the resulting cost and delay.[96]

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95 See s 88 of the *Sustainable Planning Act 2009*.

96 Fryberg J expressed similar concerns, about a different issue, in an appeal to the Court of Appeal from this court in *Ecovale Pty Ltd v Gold Coast City Council* [1999] 2 Qd R 35, 47.

> [153] In any event, it seems to me that when Sofronoff P's reference to "*maintenance of the status quo*" is read in the context in which it appears, this approach does not find favour. As Sofronoff P goes on to say:[97]
>
> > "The public interest that is to be satisfied by the proposed development must be greater than the public interest in certainty that the terms of a Planning Scheme will be faithfully applied."
>
> [154] There is no certainty that a hypothetical development will be delivered. After all, a planning scheme does not, nor could it, require a landowner to deliver a particular form of development. That is not its role. Its role is to guide, and regulate, the nature of development that could proceed should landowners seek to develop their land."[98]

[283] Leaving aside my reservations about the utility of considering this issue, the Council has not demonstrated that the version of City Plan that it has provided is the current version. In addition, the Council has not demonstrated that the current version of City Plan encourages use of the subject land for the alternative uses for which it advocates. As such, it has not demonstrated that appropriate uses that could be developed on the land include a child-care centre, community use, caretaker accommodation, community residence, rooming accommodation, multiple dwelling, residential care facility and retirement facility. The Council's allegations are also not supported by any evidence that the requirements of City Plan that would apply to those uses would likely be satisfied were an alternative development proposed on the subject land.

[284] Further, and in any event, the subject land presents considerable difficulties for any residential development or other development of the type advanced by the Council.

[285] The subject land sits behind a tavern that is permitted to operate until 2 am. The potential impact of the tavern on nearby residents is a matter of concern to the Council. It has previously opposed the increase in trading hours of the proposed tavern, partly based on the potential affect it may have had on the residents to the east of the broader development site. The Council also expressed concern about the anti-social behaviour that might emanate from that use. Given the Council's previous attitude, which is recorded (and publicly available) in the decision of His Honour Judge Jones in *Pimpama Commercial Pty Ltd v Council of the City of Gold Coast*,[99] one might expect a developer to be reluctant to propose a child-care centre, community use, caretaker accommodation, community residence, rooming accommodation, multiple dwelling, residential care facility and retirement facility or other form of residential development on the subject land.

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97 *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132, [2020] QPELR 631, 647 [67].
98 Original citations.
99 [2020] QPEC 33 at [18]-[21].

[286] I accept the evidence of Mr Schneider that there are other practical complexities to realising any residential development on the subject land. He opines that the ability to achieve the planning intent is very likely to be undermined by the dimensions of the subject land, the difficulties occasioned by accessibility through the broader development site and the poor quality of the residential amenity that would exist on the subject land. In his oral evidence, Mr Schneider said:

> "a residential outcome here would need to contemplate putting 13 residential dwellings kind of in the back block of a centre surrounded by car parking looking into a hotel loading dock. It wouldn't be a fantastic residential amenity."[100]

[287] This observation is apt. The practicality of an outcome sought by the Council is questionable to say the least. The Council's position ignores the obvious reality of what has been built to date and approved to date. The subject land is in effect an island sitting in a centre environment bounded by a Hoppy's Carwash, the back of the tavern, the back of the medical centre's northern edge, and two car parks.

[288] I also accept the evidence of Mr Curtis that a residential development on the subject land would likely give rise to worsening amenity outcomes for the residents of the adjoining area to the east by reason of overlooking and overshadowing. This was acknowledged, to a degree, by Dr McGowan.

[289] Ms Morrissy sought to justify a residential use in this environment by saying the loss of amenity was a trade-off for being near vibrancy. That purported trade-off is entirely illusionary here because, at this fringe location at the rear of buildings and carparks, there is no vibrancy and the broader development site is not walkable nor does it provide a pedestrian environment.

[290] Ms Morrissy also opines that, with proper design, the subject land is still capable of providing pedestrian access between the residents to the east and the commercial development to the west. I reject Ms Morrissy's evidence in that regard. The prospect of moving a residential area substantially nearer to the tavern by developing the subject land for residential development, and the provision of some type of pedestrian access to existing residents to the east, would logically exacerbate potential amenity problems arising from the operation of the tavern. It would also be inconsistent with the conditions of the existing development approvals. There are limits to which one can speculate in this jurisdiction and there is no reason to surmise that the conditions that require acoustic barriers along the entire eastern boundary will now be deleted when they have been maintained in every version of the development approval to date.

[291] Having considered all the evidence of Ms Morrissy on this issue and the Council's submissions about City Plan's encouragement for other uses,[101] I conclude that the value of this land for uses encouraged in the Medium density residential zone or other centre activities is not such as to call for rejection of the proposed development.

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100 Transcript of Proceedings, *Self Storage Helensvale Holdings Pty Ltd v City of Gold Coast* (Planning and Environment Court of Queensland, 157/20, Kefford DCJ, 3 December 2020) 60.

101 See Respondent's Closing Submissions, [71] – [96].

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

[292] It is common ground that the exercise of the planning discretion should be approached on the basis outlined in paragraphs [8] to [11] above.

[293] The Appellant concedes that its proposed development does not accord with all the requirements of City Plan. Considered in isolation, the scale of the proposed development is a matter that tells strongly against approval of the proposed development. However, I am satisfied that the non-compliances with City Plan occasioned by the scale of the proposed development, and the other non-compliances that I have identified above, should not be decisive in this appeal for six reasons.[102]

[294] First, based on an assessment of the application against the assessment benchmarks, the Appellant has established that:

(a) the identified non-compliances with City Plan do not manifest in any adverse planning consequence;

(b) the proposed development will provide a direct service to the immediate neighbourhood;

(c) to the extent that the proposed development will also provide a service to a broader area, it will not threaten the city's established centre hierarchy or the role and function of other centres;

(d) the proposed development will maintain a compatible form and scale to nearby development;

(e) the proposed development will have no unacceptable impact on amenity or character of the local area;

(f) the extent of the built form is not discordant with the reasonable expectations of the neighbouring residents;

(g) the building height is acceptable;

(h) the built form accords with the planning goals to ensure that development of greater height than that nominated in the Building height overlay map achieves a reinforced local identity and sense of place; and a well-managed interface with, relationship to, and impact on nearby development, including having regard to the reasonable amenity expectations of nearby residents;

(i) the proposed development performs favourably against the provisions of the Strategic framework that govern the interrelationship between the potential for development of greater height and the countervailing goals relating to protection of the amenity and character of the area;

(j) the proposed development will provide an appropriate transition from the tavern on its western boundary to the residential development on its eastern boundary;

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102 The basis for each of the following findings is explained by the reasons I have already provided above.

(k) the site cover is appropriate in its context;

(l) it is the previous Council approvals, rather than the design of the proposed development, that will limit the activity along the service road to traffic attending any development approved on Lot 4 and traffic attending the medical centre car park, or the tavern car park or bottle shop drive-through;

(m) having regard to the context within which the subject land sits, as created by previous approvals granted by the Council, the proposed development makes adequate provision for street activation and visual integration; and

(n) the proposed development makes a reasonable attempt at encouraging pedestrian activity and interaction given the development approvals granted by the Council over the broader development site have authorised a vehicle-oriented environment that is not pedestrian friendly, pedestrian oriented or pedestrian focused.

[295] I accept that each of the above matters demonstrate that the non-compliances are of marginal significance. These are compelling grounds in favour of approval.

[296] Second, the October 2016 development approval and the Council's subsequent decisions provide compelling evidence that the planning outcomes sought for the broader development site (including the subject land) under the 2003 Planning Scheme have been overtaken by events, and that those outcomes encouraged in City Plan are not soundly based. The Appellant has established that, for all practical purposes, the outcomes for the broader development site are unlikely to be reversed. The Council's earlier decisions have affected the future of the broader development site, and the area generally, in a very significant way. They have compromised the planning outcomes in terms of built form, character, scale, and type of uses sought by the relevant assessment benchmarks in material respects. They have created a vehicle-oriented environment that is not pedestrian friendly, pedestrian oriented or pedestrian focused. They authorise non-residential development that is not small-scale development. The decisions permit the construction of large commercial buildings fronting Dixon Drive, such as the approved tavern and the approved medical centre. The non-residential uses approved on the broader development site are of a scale that will serve the needs of an area greater than the immediate neighbourhood and will cater to more than just the local residents. When viewed in that context, the town planning propriety of the location of non-residential uses on the subject land is readily apparent. This is a compelling factor that favours approval of the proposed development.

[297] Third, the Council's earlier decisions demonstrate that the assessment benchmarks that the Council relies on to oppose the development no longer have substantive relevance to the assessment of the proposed development. They also indicate that the City Plan designations for the subject land and the broader development site no longer represent an embodiment of what is in the public interest for the subject land and its surrounds. This is a compelling factor that favours approval of the proposed development.

[298] Fourth, the Appellant has established that there is a current need for the proposed development and that it will improve the well-being of the community.

[299] Fifth, while there is a theoretical potential that a self-storage facility could be established in a location where it is encouraged under City Plan, I have serious misgivings about whether it is reasonable to assume further facilities sufficient to satisfy the current need will be developed in the foreseeable future.

[300] Sixth, I am persuaded that the value of this land for uses encouraged in the Medium density residential zone or for other centre activities is not such as to call for rejection of the proposed development.

[301] In those circumstances, I am satisfied that the public interest, in a planning sense, is not better served by refusing the development application. The circumstances of this case justify approval of the proposed development.

Conclusion

[302] The Appellant has discharged its onus. The appeal should be allowed, and the application approved subject to lawful conditions.

[303] My orders will be as follows:

1. The appeal is allowed.
2. The decision of Gold Coast City Council notified by the decision notice dated 2 January 2020 is set aside.
3. The development application is remitted to Gold Coast City Council.
4. Subject to further order of the Court, by 28 June 2021, Gold Coast City Council is to give a decision notice approving the proposed development subject to lawful development conditions.

[304] I will hear from the parties about any other orders that may be appropriate.