

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Cheung & Ors v Brisbane City Council & Ors* [2021] QPEC 39

PARTIES: **PEARL CHEUNG & Ors**
(Appellants)
v
BRISBANE CITY COUNCIL
(First Respondent)

AND

DAVID AND DIANE TAYLOR
(Co-Respondent)

AND

JASON POWELL
(First Co-Respondent by Election)

FILE NOS: 4695 of 2019, 103 of 2020, 148 of 2020

DIVISION: Planning & Environment Court

PROCEEDING: Consolidated Appeals

ORIGINATING COURT: Planning & Environment Court of Queensland at Brisbane

DELIVERED ON: 13 August 2021

DELIVERED AT: Brisbane

HEARING DATE: 12 April, 13 April, 14 April and 16 April 2021

JUDGE: Muir DCJ

ORDERS:

1. Appeals numbered 4695 of 2019, 103 of 2020 and 148 of 2020 are dismissed.
2. The Council's decision to approve the proposed development is confirmed.
3. The parties will be heard as to the need for any consequential orders, including with respect to conditions.

CATCHWORDS: PLANNING AND ENVIRONMENT – CONSOLIDATED APPEALS – where the appellants appeal a decision by the Brisbane City Council to approve a development application to build a 28 dwelling unit complex on 5,335m² of land at

Ascot – whether the development is of such a bulk, form, intensity and height and scale that it complies with the assessment benchmarks of the Brisbane City Plan – whether the impacts of the development on local amenity comply with the assessment benchmarks of the Brisbane City Plan – whether the development is to be considered an ‘overdevelopment’ under the Brisbane City Plan – whether there are other relevant matters in favour of approval

- LEGISLATION: *Planning Act 2016* (Qld) ss 43, 59
Planning and Environment Court Act 2016 (Qld) ss 43, 45, 46(2), 47
Planning Regulation 2017 (Qld) s 31(1), Schedule 24
- CASES: *Abacus Funds Management v Sunshine Coast Regional Council* [2012] QPEC 46
Abeleda & Anor v Brisbane City Council & Anor [2020] QCA 257
Ashan Investments Unit Trust v Brisbane City Council [2019] QPEC 16; QPELR 793, 803-813
Ashvan Investments unit Trust v Brisbane City Council & Ors [2019] QPELR
Barro Group Pty Ltd v Sunshine Coast Regional Council [2021] QPEC 18
Bell v Brisbane City Council (2018) 230 LGERA 374
Body Corporate for Kelly’s Beach Resort v Burnett Shire Council & Ors [2003] QPEC 023
Body Corporate for Mayfair Residences v Brisbane City Council (2017) 22 LGERA 136
Brisbane City Council v YQ Property Pty Ltd [2020] QCA 253
Broad v Brisbane City Council & Anor [1986] 2 Qd R 317 at pages 319, 320
Calvisi v Brisbane City Council (2009) 164 LGERA 119
Cromar Pty Ltd & Cronin v Brisbane City Council & Anor [1996] QPELR 84
des Forges v Brisbane City Council [2001] QPEC 061
Dreamline Development Corporation Pty Ltd v Brisbane City Council & Ors [2021] QPEC 13
Eschenko v Cummins & Ors [2000] QPEC 37
Herbert & Ors v Brisbane City Council & Anor [2004] QPEC 017
Herbert v Brisbane City Council [2004] QPEC 017
Hunter v Canary Wharf Ltd [1997] AC 655
Jakel Pty Ltd v Brisbane City Council & Anor [2018] QPEC 21
K Page Main Beach Pty Ltd v Gold Coast City Council & Ors [2011] QPEC 1
K&K (GC) Pty Ltd v Gold Coast City Council [2020] QPEC 40
K&K GC Pty Ltd v Gold Coast City Council [2018] QPEC 9
Klinkert v Brisbane City Council [2019] QCA 40

Lennium Group Pty Ltd v Brisbane City Council & Ors
[2019] QPEC 17; [2019] QPELR 835
Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council and Anor [2019] QPEC 46; [2020] QPELR 328
Northern Properties Pty Ltd v Brisbane City Council [2020] QPELR 877
Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council [2014] QPELR 479
Peach v Brisbane City Council & Anor [2019] QPEC 41
SDW Projects Pty Ltd v Gold Coast City Council [2006] QPEC 074
The Purcell Family v Gold Coast City Council [2004] QPELR 521
Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & ors [2021] QCA 95
United Petroleum Pty Ltd v Gold Coast City Council & Anor [2018] QPEC 8,
Wattlevilla Pty Ltd v Western Down Regional Council [2014] QPELR 21
WBQH Developments Pty Ltd v Gold Coast City Council & Anor [2010] QCA 126
Wilhelm v Logan City Council & Ors [2020] QCA 273
Wingate Properties P/L & Anor v BCC & Ors [2001] QPE 005

COUNSEL: B.G. Rix for the appellants
R. Yuen instructed by City Legal for the first respondent
B.D. Job QC & J. Lyons for the co-respondents

SOLICITORS: Connor O’Meara Solicitors (on appeal 4695 of 2019)
Thynne & Macartney Solicitors (appeals 103 and 148 of 2020)

Overview

- [1] This is the determination of consolidated appeals by a number of residents of the inner northern suburbs of Albion and Ascot (“**the appellants**”). The appeals concern a 12 December 2019 **decision** by the Brisbane City **Council**, to approve a development application (made on 19 December 2017) by David and Diane Taylor (**the co-respondents**), to develop 5,336 m² of **Land** at 37 Lapraik Street Ascot.¹ The approval allows the co- respondents to build a 28 dwelling unit complex on the Land.
- [2] The appeals were started in December 2019 and January 2020 and fall to be assessed and decided pursuant to the provisions of **the Planning Act 2016** (Qld) and

¹ As set out in paragraph 11 of these Reasons the Land also includes 88 Lever Street Albion but the development is not over that part of the Land.

the *Planning and Environment Court Act 2016* (Qld) (“**the PEC Act**”).² In deciding the appeals, 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.³

- [3] The appeals are by way of hearing anew⁴ with the Court being required to stand in the shoes of the Council who was the assessment manager.⁵ The co-respondents bear the onus.⁶
- [4] Broadly speaking, the Council and co-respondents maintained that the proposed development is a well-designed and respectful one, striking an appropriate balance between built form and landscaping on the Land. The appellants meanwhile described the proposed development as an “overdevelopment” with substantive impacts arising from its bulk, height, scale, form and density warranting its refusal. Particularly concerning to many of the appellants is the loss of their spectacular city and river views.
- [5] The town planners who were engaged by each of the main protagonists in this case agreed in their joint expert report (**JER**) that the central issue to the appeal is whether, on an assessment of the development’s height bulk and scale, its resulting impact is acceptable.⁷
- [6] For the reasons that follow, the co-respondents have satisfied me that the proposed development has been sufficiently designed to respond to the characteristics of the location of the Land and, when assessed in the context of the relevant planning scheme provisions, it is appropriate to confirm the decision.

The overarching framework and relevant issues

- [7] As the proposed development is impact assessable, the decision of the Court must be based on the assessment outlined in ss 45(5) to (8) of the *Planning Act*.⁸ There is no dispute between the parties that the present assessment by the Court:
- (a) must be carried out: ⁹
- (i) against the assessment benchmarks in the **Brisbane City Plan 2014 V.8** to the extent relevant; ¹⁰ and

² These Acts both commenced on 3 July 2017.

³ PEC Act, s 47

⁴ PEC Act, s 43.

⁵ *Jakel Pty Ltd v Brisbane City Council & Anor* [2018] QPEC 21 at [93]. See also PEC Act, s.46(2).

⁶ PEC ACT s 45.

⁷ Mr Chris Buckley for the appellants; Mr John Gaskell for the Council; and Mr Greg Ovenden for the Co-respondents. Their joint expert report is Ex. 3.05.

⁸ Pursuant to s 59(3) of the *Planning Act*.

⁹ *Planning Act*, s 45(5)(a)

¹⁰ *Planning Act*, ss 45(5)(a)(i) & 43(1). The “categorising instrument” required by this subsection is identified in exhibit 3.05-Town Planning JER, at Para. 4.3 at p 8. as being version 8 of the *City Plan*, which was in force and effect at the time that the application was lodged. It is this version that the Court is required to use in undertaking its assessment; *Peach v Brisbane City Council & Anor* [2019] QPEC 41 at [59] with reference to *Klinkert v Brisbane City Council* [2019] QCA 40. Version 19

- (ii) having regard to any matters prescribed by the *Planning Regulation 2017*, which include the lawful use of adjacent premises and the common material¹¹ (including properly made submissions about the development application);¹²
 - (b) may be carried out against, or having regard to, any other relevant matter, other than a person’s personal circumstances, financial or otherwise.¹³
- [8] The parties have conveniently identified (and confined) the issues for my consideration into a “Consolidated List of Issues” document.¹⁴ These issues are addressed under the relevant headings below. From this list, three overarching issues fall to be determined by me:
- (a) First, whether the proposed development complies with the relevant assessment benchmarks, particularly whether it represents an over-development of the Land because of its bulk, scale, form and intensity;
 - (b) Secondly, whether there are relevant matters that support approval of the proposed development; and
 - (c) Thirdly, whether in the exercise of the planning discretion, the development application for the proposed development should be approved.
- [9] The authorities establish that a broad and flexible approach is to be taken when exercising the overall discretion identified in paragraph 8(c) above.¹⁵ It is well described as a “broad evaluative judgment.”¹⁶ The decision must be a balanced one in the public interest considered against the backdrop of the relevant planning scheme and proper planning practice.¹⁷ But what emerges from such a sensible and

was in effect at the time of the JER and Version 20 is the current version. In any event, there was no issue raised as to any material difference between the various versions for the purpose of these appeals.

¹¹ *Planning Act*, s 43(2); *Planning Regulation 2017* (Qld), s.31(1)(f) and (g). *Planning Regulation* (Qld), Schedule 24.

¹² *Planning Act*, s 45(5)(a)(ii);

¹³ *Planning Act* ss 45(5)(b) & 59

¹⁴ Ex. 1.06. It should be noted that issues 5 and 6 that were identified in that document, namely the landslide and traffic issues, were not pressed at the hearing of the appeals. This is reflected in Ex. 1.08. See also Transcript 1-22: lines 4-16.

¹⁵ See the recent discussion by Kefford DCJ in *Dreamline Development Corporation Pty Ltd v Brisbane City Council & Ors* [2021] QPEC 13 at [8] to [10] with particular reference to Williamson QC DCJ’s observations in *Ashan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16; QPELR 793, 803-813 [35] – [86]; as endorsed by the Queensland Court of Appeal in *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253 and *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257 and *Wilhelm v Logan City Council & Ors* [2020] QCA 273.

¹⁶ *Barro Group Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 18 at [43] per Williamson QC DCJ.

¹⁷ *Ibid Dreamline* at [10].

practical dichotomy is that not every non-compliance will warrant refusal of the proposed application.¹⁸

- [10] Before turning to address the relevant issues in the context of the proposed development, it is necessary to understand the layout of the Land and its general surrounds. The summary below is elicited from the uncontroversial parts of the joint expert report from the town planners and from the expert report of Dr Nicholas McGowan (an architect, design and landscaping expert called by the Council).¹⁹ Dr McGowan’s report also exhibited a useful photography and photomontage report of the proposed development and surrounds prepared by Mark Elliot Illustrations.

The layout of the land and its general surrounds.

Layout of the Land

- [11] The proposed development is to be built at 37 Lapraik Street, Ascot. The Land consists of two allotments (37 Lapraik Street and 88 Lever Street) but it is uncontroversial that the development is to be located at the Lapraik address only.²⁰ The Land sits on the western side of a landform known as Bartley’s Hill (on the higher part of Albion) and adjoins a large and prominent cut that frames the flat area based on Lever Street below.²¹ It has a 10-metre street frontage and is accessed from a narrow, 40-metre-long driveway handle off Lapraik Street to the east (located along the land’s southern boundary). Behind the driveway, the Land comprises of a large area of (approximately 40 metres to 50 metres by 100 metres). Because of the access arrangements, the Land is a “rear lot” (as defined in the Brisbane City Plan 2014).²² The Land is mostly regular in shape but for the narrow frontage and driveway²³.
- [12] The eastern section of the more regularly shaped part of the Land (north of the driveway) is presently improved by a dwelling house and tennis court. The balance of the Land is unimproved. Along the northern and north eastern boundaries, there is a cleared area, described as a “relatively level building pad”.²⁴ Otherwise, the Land is steeply sloped, falling from approximately 42.5 m AHD²⁵ at its eastern frontage to approximately 17 m AHD at its south-western corner.²⁶ It includes a steep escarpment drop of approximately 19m which extends across the adjoining

¹⁸ Ibid *Dreamline* at [11] with reference to *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council and Anor* [2019] QPEC 46; [2020] QPELR 328, 338 [22].

¹⁹ Ex. 4.01.

²⁰ The Land is more particularly described as Lot 3 on RP 895653 and Lot 1 on RP838935. It is uncontroversial that the 88 Lever St address (which is improved by a warehouse) was included in the development application “solely to achieve a lawful point of discharge downstream”; Ex. 3.05 p. 4 para. 2.3.

²¹ Ex. 3.05 at p. 4 para. 2.2.

²² Rear Lot “is defined in Schedule 1 of the Brisbane City Plan 2014; Ex. 7.00 – Planning Scheme extracts, p.215.

²³ Ex. 3.05 at pp. 4 and 5 para. 2.3, 2.4 and 2.5; Ex. 4.01 p. 4 para. 12 and 13 per McGowan.

²⁴ Ex. 3.05 at p. 5 para. 2.6.

²⁵ Australian Height Datum (AHD).

²⁶ Ex. 3.05 at p. 5 para. 2.6; Ex. 4.01 p. 4 para. 14 per McGowan.

land to the west and south of the Land.²⁷ The land to the north rises gently towards a ridge generally traced by Sandgate Road while land to the east rises more steeply towards the peak of Bartley's Hill, approximately 480 m east of the Land.²⁸

- [13] As this overview reveals, the Land is visually prominent; with a dramatic fall from east to west and from north to south, resulting in the most developable part being concentrated to the north and north east.

General surrounds

- [14] The Land is nestled in a locality of mixed character that incorporates a diverse mix of detached housing, multiple dwellings, community facilities (including Saint Margaret's College to the east, located on the opposite side of Lapraik Street) and an industrial development (to the south-west and south). The town planning experts agree that "[d]ue to the topography of the locality, there is not a uniform street pattern."²⁹
- [15] The Land is well located in terms of proximity to Sandgate Road, a school and the surrounding employment area; and is within comfortable walking distance to shops and facilities and bus stops.
- [16] The surrounding developments vary in terms of scale, form, lot size and pattern; and are further varied in appearance because of the steep topography and irregular road network around the local area.³⁰ The Land is immediately surrounded by residential and industrial development of various heights, ranging from two to seven storeys.³¹
- [17] On the northern side of the Land the adjoining properties include:
- (a) vacant land at 32 Highlands Street (which is owned by an entity associated with the co-respondents);
 - (b) a two-three storey multiple dwelling development at 37 Highlands Street, of which several of the appellants are residents or registered proprietors;³² and
 - (c) six detached two-storey houses on the adjoining properties, namely 33, 33A, 35, 38, 40 and 42 Highlands Street.³³
- [18] On the southern side of the Land, the adjoining properties include:
- (a) a single three storey detached house (to the south-east of the Land) at 39 Lapraik Street;

²⁷ Ex. 3.05 at p 5. para 2.6; Ex. 4.01 p. 4 para. 14 per McGowan.

²⁸ Ex. 4.01 at p. 4 para. 14 per McGowan.

²⁹ Ex. 3.05 at p. 6 para. 2.9.

³⁰ Ex. 4.01 at p. 4 para. 14 per McGowan.

³¹ Ex. 3.05 p. 5 para. 2.7 and p. 14 para. 6.9.

³² Mr Van Heerden Nel is the registered owner of Lot 2; Ms Ryan is the registered owner and resident of Unit 3; and Mr Cork is the registered owner and resident of Unit 4.

³³ Mr Powell, who is the co-respondent by-election in appeal no. 103/2020 is the registered owner and resident of the property at 38 Highlands Street. Ms Cheung who is the appellant in appeal no. 4695/2019 is the registered owner and resident of the property at 42 Highlands Street.

- (b) a two to three-storey multiple dwelling complex (to the south of the Land), at 55 Lapraik Street, known as ‘Ye-Olde Avalon’, which incorporates substantial undercroft areas, due to the steep slope of the land;³⁴ and
 - (c) industrial buildings on land to the south-west at 88 Lever Street.
- [19] On the western side of the Land, at 469 Sandgate Road, there is neighbouring six to seven-storey apartment building that forms part of a large retirement facility known as “The Clayfield”. It incorporates a substantial undercroft, due to the steep slope of land.
- [20] On the eastern side of the Land, there is an adjoining single two to three storey detached house at 35 Lapraik Street.

The proposed development

- [21] The proposed development is described in unison by the town planners as a “small scale” multiple dwelling development.³⁵ The proposal is for 28 multiple dwelling units with car and bicycle parking spaces as follows:
- (a) 12 two-bedroom units;
 - (b) 16 three-bedroom units;
 - (c) 44 resident car parking spaces and 28 resident bicycle parking spaces in the basement car park; and
 - (d) five visitor car parking spaces and seven visitor bicycle parking spaces on the ground level.
- [22] The units are split across three separate two to three-storey buildings aligned east-west across the Land. Buildings 1 and 2 are separated by three metres. Buildings 2 and 3 are separated by five metres.³⁶ The proposed development includes a communal open space of 266 m², with two barbeque areas to the north of Building 2 and a pool and pool terrace to the south of Building 1. It has a site cover which equates to 38 per cent of the site area of the Land.³⁷ Mr Ovenden described the site coverage as “low” due to the constrained nature of the Land.
- [23] The positioning of the buildings on the Land and their maximum dimensions are as follows:³⁸
- (a) Building 1: sits on the eastern side of the Land. It is 17 metres wide and 36 metres long with a maximum height of 9.7 metres.

³⁴ Mrs Ambroselli, who is the second appellant in appeal no. 103/2020, is the registered owner and resident of the property at 39 Lapraik Street and manages (and is on the body corporate committee for) the ‘Ye-Olde Avalon’.

³⁵ Ex 3.05 at p. 8 para. 4.8.

³⁶ Ex. 4.01 at p. 14 para. 23(c) per McGowan.

³⁷ Site cover is defined in Schedule 1 of the *Brisbane City Plan 2014*: Ex. 7.00 – Planning Scheme extracts, p.207 Ex. 4.01 – McGowan’s Statement, para 23(f) at p.15.

³⁸ Ex. 4.01 at p. 14 para. 23(a) per McGowan.

- (b) Building 2: sits between buildings 1 and 3. It is 22.5 metres wide and 32.5 metres long with a maximum height of 14.5 metres.
 - (c) Building 3: sits on the western side of the Land. It is 26 m wide and 33.5 metres long with a maximum height of 16.5 metres.
- [24] Most of the built form is less than 9.5 metres above ground level but some parts of the upper storeys of the southern side of each building protrude to a greater height.³⁹ The greater building height of the southern parts of the buildings is not caused by any substantial vertical stepping of the buildings, but rather by the falling away of the topography under the buildings.⁴⁰
- [25] The buildings have the following minimum setbacks:⁴¹
- (a) Building 1 is setback 7.96 metres from the eastern boundary and 4.08 metres (to the balcony) from the northern boundary of the Land;
 - (b) Building two is set back 5.46 metres (to the balcony) from the northern boundary and 11.9 metres (to the balcony) from the southern boundary of the Land;
 - (c) Building 3 is set back 4.40 metres (to the balcony) from the northern boundary, 8.37 metres (to the balcony) from the southern boundary, and 1.34 metres (to the balcony) from the western boundary of the Land.
- [26] The buildings are articulated incorporating courtyards and balconies across the northern and southern facades with various building materials and roof forms. Approximately 35 per cent of the Land will be covered by landscaping which includes deep planting of 1,744m² (approximately 33 per cent of the Land), of which 1,269m² (approximately 24 per cent of the Land) is capable of accommodating trees with canopy of five metres wide. Some of the deep planting coincides with the stormwater infrastructure, but Dr McGowan's opinion, which I accept, is that there is "ample space" on the Land to accommodate large trees.⁴²
- [27] Landscaping is proposed on both sides of the access driveway and all site boundaries of the Land. The landscaping in the southern section of the Land (adjacent to buildings 2 and 3) is proposed to consist of trees and shrubs.
- [28] The buildings are separated from the neighbourhood buildings as follows:
- (a) Between the proposed buildings and the residential buildings to the north (along Highlands Street) in the order of 12 metres to 20 metres.⁴³
 - (b) Between Building 3 and 'The Clayfield' by at least 20 metres.⁴⁴

³⁹ Ex. 4.01 at p 14. para. 23(b) and figure 17 per McGowan.

⁴⁰ Ex. 4.01 at p. 14 para 23(b) and figure 18 per McGowan.

⁴¹ Ex. 4.01 at p. 14 para. 23(d) per McGowan.

⁴² Ex. 4.01 at p. 15 para. 23(g) per McGowan.

⁴³ Gaskell (examination-in-chief) Transcript 3-43: lines 9-24.

⁴⁴ Ex. 3.05 at p. 17 para. 6.30.

(c) Between Buildings 1 and 2 and Mrs Ambroselli's house at 39 Lapraik Street and the 'Ye-Olde Avalon' by at least 20 metres.⁴⁵

[29] The proposed development will obviously present as units and not as detached dwellings.

[30] As a result of the topography of the Land, the buildings will present as two-storey buildings to the north (which interface with the neighbouring properties along Highlands Street); and three-storey buildings to the south (which interface with the vegetation consisting of trees and shrubs).⁴⁶ The buildings will not have a street presence as they are set back from Lapraik Street by some 54 metres. They also sit lower than Lapraik Street by at least three metres.⁴⁷

[31] It follows from the above overview that I accept that Dr McGowan's description of the proposed development as a "substantial development" is an apt one.

[32] Before turning to the specific issues in dispute between the parties, it is useful to firstly reflect on the relevant legal principles said to apply to the approach expressed in the relevant categorising instrument in this case (the City Plan) together with the extent of compliance with that plan that has been apparently achieved by the proposed development.

The City Plan

[33] The proposed development is included in the low-medium density residential zone (2 or 3 storey mix precinct) ("**LMDR Zone**") and the Albion Neighbourhood Plan ("**Albion NP**") area (but not in any particular precinct).⁴⁸

[34] The proposed development requires impact assessment. It must therefore be assessed against the City Plan as a whole (where relevant).⁴⁹ Under the City Plan, compliance with a code will only be achieved if the proposed development complies with the purpose, overall outcomes ("**OO**") and either the performance outcomes ("**PO**") or the acceptable outcomes ("**AO**") of the code.⁵⁰

[35] But compliance with the performance outcomes or acceptable outcomes is not sufficient to deem compliance with the purpose and overall outcomes of a given code. The purpose and overall outcomes are, in effect, separate benchmarks against which the proposed development must also be assessed.⁵¹

⁴⁵ Gaskell (examination-in-chief) Transcript 3-43: lines 32-34.

⁴⁶ Ex. 4.01 at p. 14 para. 23(b) per McGowan.

⁴⁷ Ex. 4.01 at p. 15 para. 23(e) per McGowan.

⁴⁸ Ex.3.05 at pp. 8 and 10 para. 4.9 and 4.15.

⁴⁹ See Ex. 7.00 at pp. 51-52 para. 5.3.3(5) and Table 5.5.2 and pp 70-71.

⁵⁰ See Ex. 7.00 pp. 51-52 para. 5.3.3(4) of the City Plan. 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 at 201 citing *United Petroleum Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 8, [118].

⁵¹ See Ex. 7.00 pp. 51-52 para. 5.3.3; see also *Dreamline* at [70]; *Lennium* at [201].

- [36] In *SDW Projects Pty Ltd v Gold Coast City Council* [2006] QPEC 074, Rackemann DCJ relevantly explained the performance-based approach as follows:

“... The performance criteria are generally outcome focussed, while the acceptable solutions indicate a “desirable” way to “ensure” compliance. The acceptable solutions however, are not the only solutions. Performance criteria generally ought not to be interpreted as requiring adoption of the acceptable solution, or even as requiring an alternative solution to be akin to the acceptable solution.

It is not legitimate to regard departure from the acceptable solution as necessarily indicating non-compliance with the code. In this regard, acceptable solutions differ from development standards which were often a feature of town planning schemes under the former regime. Compliance with such standards was commonly required unless a relation or dispensation was granted. Under the performance based approach, the acceptance of an alternative solution does not represent a “relaxation” or a “dispensation”. It is another way of achieving compliance with the relevant performance criterion.”⁵²

[Emphasis added]

- [37] In *Northern Properties Pty Ltd v Brisbane City Council* [2020] QPELR 877 Williamson QC DCJ made the following relevant observations:⁵³

“The structure of City Plan is such that compliance with a Performance Outcome can be demonstrated in one of two ways: (1) by demonstrating compliance with the Acceptable Outcomes applying to the Performance Outcome; or (2) by demonstrating compliance with the terms of the Performance Outcome itself.”

- [38] More recently in *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & ors* [2021] QCA 95, Justice Brown also relevantly observed that:⁵⁴

“While acceptable outcomes in a planning scheme may be relevant in ascertaining the legislative intention of a planning scheme in a particular area, it depends on the terms of the provision itself.”⁵⁵

- [39] It follows that in a performance-based planning scheme such as the City Plan, acceptable outcomes are not the only outcomes necessary to achieve compliance with a code.

- [40] The town planning experts all acknowledge that the proposed development is for a use expressly encouraged by the LMDR Zone and is consistent with the planning

⁵² *SDW Projects* at [47] and [48] was cited with approval by Kefford DCJ in *Lennium*.

⁵³ At [27].

⁵⁴ At [110] with Mullins and Philippides JJA agreeing.

⁵⁵ With reference to *WBQH Developments Pty Ltd v Gold Coast City Council & Anor* [2010] QCA 126 at [35]-[38]; McMurdo JA in *Bell v Brisbane City Council* (2018) 230 LGERA 374 at [20] and [70].

outcome sought by the City Plan for the delivery of housing in well-located and appropriately zoned land for the growing population in Brisbane.⁵⁶

[41] Relevantly to the issues in dispute, it was submitted on behalf of the Council, and I accept, that the proposed development also complies with many of the quantitative measures sought by the City Plan, which are found in the acceptable outcomes. For example:

- (a) the proposed development complies with the maximum site cover (AO14 of the Multiple Dwelling (**MD**) Code)⁵⁷ which means it is taken to be compliant with PO14. As the written submissions for the Council identified, it is in fact less than the maximum site cover by 7%;
- (b) the proposed development complies with the minimum side and front boundary setbacks (AO9.1 and AO11 of the MD Code)⁵⁸, which means it is taken to be compliant with PO9 and PO11. As the written submissions for the Council also identified, the northern side boundary setback is greater than that sought in AO11;
- (c) the proposed deep planting exceeds the minimum 10% (AO30.2 of the MD Code)⁵⁹;
- (d) the proposed development partially complies with the maximum building height of 2 storeys and 9.5m (AO5 and AO6.1 of the MD Code). Those parts of the buildings which protrude more than 9.5m above ground constitute 8% of the site cover;⁶⁰
- (e) the proposed development provides the minimum amount of communal open space (AO27.1 of the MD Code).⁶¹

[42] It was submitted on behalf of the Council that the appellants have not identified non-compliance with the following performance outcomes of the MD Code:

- (a) PO1 which deals with the adequacy of the site area and frontage width to accommodate the development footprint;
- (b) PO10 which deals with the rear boundary setback;
- (c) PO20 which deals with delivery of subtropical design outcome;
- (d) PO26 which deals with landscaping;
- (e) PO28 which deals with private open space for residents;
- (f) PO29 which deals with outdoor living space;
- (g) PO30 which deals with deep planting.

⁵⁶ Ex. 3.5 at p. 13 para. 6.2; See for example, SO3.4.1(1)(f), (g) and (h) and Element 2.2 SO1, L1, SO2 and L2 of the Strategic Framework.

⁵⁷ Ex.4.01 at p. 17 para. 29 per McGowan.

⁵⁸ Ex.4.01 at p. 17 para. 29 per McGowan.

⁵⁹ Ex.4.01 at p. 18 para. 32 per McGowan.

⁶⁰ McGowan (examination in chief) Transcript 2-24: lines 6-8.

⁶¹ Ex.4.01 at p. 18 para. 34 per McGowan.

[43] I accept this submission. At the end of the hearing, counsel for the appellants advised that non-compliance with PO7 and PO27 of the MD Code was not pressed.⁶² It follows that I have proceeded on the basis that there is no issue with the proposed development's compliance with any of the performance outcomes set out in the preceding paragraph or as now conceded.

[44] But as Dr McGowan identified and as discussed further under the relevant headings below, the proposed development does not necessarily satisfy the acceptable outcomes for height (AO5 and AO6.1); rear setback (AO5 and A010), building separations within the site (AO8.1); and building length (AO15.1).⁶³

The issues in dispute

[45] The issues in dispute have been agreed between the parties and are divided into two parts.⁶⁴

[46] The first part concerns the provisions of the City Plan which the appellants allege have not been complied with. The identified assessment benchmarks against which this court's discretion to either refuse or approve the proposed development is to be exercised, have been categorised by the parties under discrete and numbered headings as follows: overdevelopment; bulk scale form and intensity; height; and amenity.⁶⁵ But there is considerable overlap between these matters. As Mr Buckley relevantly observed: "considerations of height, scale, form, and intensity have a direct bearing on an understanding of whether a proposal represents an overdevelopment."⁶⁶

[47] It follows that for convenience the first part of these Reasons addresses these issues in the following order.⁶⁷

Issue One: Bulk, scale, form and intensity

Issue Two: Height

Issue Three: Amenity

Issue Four: Overdevelopment

[48] The second part is concerned with the ten Relevant Matters identified by the co-respondents as supporting the approval of the proposed development.⁶⁸ From these matters, the following three questions fall to be answered:

(a) First: Is the Land an appropriate location for multiple dwellings?

⁶² Transcript 4-44: lines 36-39.

⁶³ Ex 4.01 at p. 17 para. 30.

⁶⁴ Ex. 1.06

⁶⁵ Ibid.

⁶⁶ Ex. 3.05 p. 17 para. 6.28 per Mr Buckley.

⁶⁷ Different approaches to the intersection and overlap of issues were taken by the legal representatives in their written submissions. This is not a criticism of any approach. All roads lead to Rome. For example, and as discussed under that heading in these Reasons, the appellants focused on the issue of amenity under the heading of Issue One: overdevelopment.

⁶⁸ Ex. 1.06 at para. 7 – 16 under the heading 'Relevant Matters'.

- (b) Secondly: Is the proposed development an appropriate design outcome for the Land?
- (c) Thirdly: Is there an economic need for the proposed development?

Issue One: Bulk, scale, form and intensity

- [49] Whether the proposed development results in an appropriate bulk, scale, form and intensity is to be assessed against the City Plan 2014: MD Code, 002(e) and PO5, PO8 and PO15.⁶⁹

General observations

- [50] The relevant assessment benchmarks under this issue focus on the development “fitting in” with the existing and intended character and form of the area.⁷⁰ The town planners described the area as a mix of dwelling typologies, including dwelling houses, multiple dwellings, community facilities (most notably the extensive St Margaret’s girls school campus), industry of varying eras and styles and a non-uniform street pattern.⁷¹ Local residents do not have a monopoly on expectations. Developers are entitled to rely on reasonable expectations as framed by the relevant planning regime.⁷²
- [51] It follows that the expectations for any development (or redevelopment) of land within the area includes multiple dwellings and houses of a height similar to that proposed.

002(e) of the MD Code

- [52] Overall outcome 002(e) of th MD Code provides as follows:

9.3.14.2 Purpose

2. The purpose of the code will be achieved through the following overall outcomes:
- (e) Development has a bulk, scale, form and intensity that integrates with the existing and intended neighbourhood structure for the area as expressed by zone, zone precinct and neighbourhood plan outcome, and is consistent with:
 - (i) the location and street context of the site;
 - (ii) Its proximity to an activity centre, higher capacity public transport services, or other community facilities;

⁶⁹ Ex. 1.06.

⁷⁰ As the co-respondents submitted in their written outline at [89].

⁷¹ Ex. 3.09 para. 2.9.

⁷² Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council [2014] QPELR 479 at [217] per Robertson DCJ.

(iii) the capacity of infrastructure.

[Emphasis added]

- [53] There is no suggestion that the capacity of infrastructure is an issue in this case. I am otherwise satisfied that the proposed development complies with OO2(e) of the MD Code for several reasons. First, it is an infill development on a large site of some 5,000m², with sufficiently sensitive transitions to the neighbouring houses and multiple dwellings.⁷³ In this sense, the development proposal is entirely consistent with its location and the street context of the Land. Secondly, it is well located with sufficient proximity to shops, high frequency bus and rail services, a school and other community facilities such as sporting venues and a park.

PO 5 of the MD Code

- [54] Performance outcome 5 provides as follows:

<p>PO5⁷⁴ Development is of a <u>bulk and scale</u> that is <u>consistent with the intended form and character of the local area</u> having regard to:</p> <ul style="list-style-type: none"> (a) existing buildings that are to be retained; (b) <u>significant infrastructure</u> or service constraints such as tunnels; (c) <u>existing and proposed building heights in the local area and street</u>; (d) <u>adjoining buildings and separation of buildings necessary to ensure impacts on residential amenity and privacy are minimised</u>; (e) <u>the impact of slope</u>. 	<p>AO5 Development is contained within the building envelope for the site created by applying:</p> <ul style="list-style-type: none"> (a) the maximum building height in Table 9.3.14.3.B; (b) front, rear and side boundary setback requirements in Table 9.3.14.3.C; (c) car parking boundary setback requirements in Table 9.3.14.3.E; (d) building separation requirements in Table 9.3.14.3.F; (e) Acceptable Outcomes for building height transitions where required. <p>Refer to Figure b and Figure c.</p> <p>Note — This acceptable outcome can be demonstrated by the preparation of a building envelope plan, elevations and sections.</p>
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[Emphasis added]

- [55] Whilst there are six detached two-storey houses on Highlands Street, the location features other large buildings such as the six to seven storey ‘The Clayfield’

⁷³ Ex. 3.05 p. 20 para. 6.51 per Gaskell.

⁷⁴ Ex.7.00 planning scheme extracts p.110; is set out below. The corresponding quantitative AO has been included – for completeness).

development, the industrial warehouses to the south and the substantial undercroft area in the ‘Ye-Olde Avalon’ development. Mr Ovenden’s evidence, which I accept, is that the third storey element and pier design of the proposed development is consistent with a number of other developments on the hillside and that it responds to the slope of the site, incorporating (without compromising) the surrounding built form context in which the Land sits.⁷⁵ This is consistent with Mr Gaskell’s evidence, which I also accept, that the proposed development responds similarly to existing developments in the area by stepping down the steep slopes towards the south and incorporating an undercroft.⁷⁶

[56] It follows that I am satisfied that the proposed development complies with the intended form and character of the local area in compliance with PO5 of the MD Code.

PO8 of the MD Code

[57] Performance outcome 8 provides as follows:

<p>PO8 Development separates buildings from existing or future buildings within a site or on an adjoining site to:</p> <ul style="list-style-type: none"> (a) be consistent with the form and character intent for the local area; (b) protect residential amenity including access to natural light, sunlight and breeze; (c) provide visual privacy to reduce the need for fixed screening. 	<p>AO8.1 Development provides building placement and design that:</p> <ul style="list-style-type: none"> (a) complies with Table 9.3.14.3.F; or (b) positions the primary balcony or private open space to face the street frontage or rear boundary or adjoining public open space; (c) offsets balconies or habitable rooms so that they are positioned outside the cone of vision of existing or approved habitable rooms or outdoor spaces. <p><u>Refer to Figure g and Figure h.</u></p> <p>Note—This is demonstrated by a site context plan that includes adjoining and adjacent buildings and strategies to address separation issues.</p> <p>Note— <u>Considered site planning and design and strategies such as offsetting balconies, the location of private space, selective screening or other design elements can reduce building separation requirements.</u></p>
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⁷⁵ Ex 3.05 p. 19 at para. 6.42.

⁷⁶ Ex 3.05 p. 20 para. 6.53.

	<p>AO8.2 Development with a secondary private open space or balcony used for drying or services is located to the side boundary with fixed screens.</p>
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[Emphasis added]

- [58] Plainly these provisions are directed at the preservation of privacy and consequential amenities. They are not concerned with the preservation of the views of adjoining properties. Although that issue is a real issue in this appeal and is dealt with later in these Reasons under the heading ‘Amenity’.
- [59] It is uncontroversial that the separation between the proposed development and neighbouring properties as required by AO8.1 is met. The effect of Mr Ovenden’s evidence, which I accept, is that this compliance is reflective of the proposed development being appropriate for maintaining the residential amenity of adjoining properties.⁷⁷
- [60] It is also uncontroversial that the separation between the three buildings within the proposed development do not meet the acceptable outcomes distances required under AO8.1 of the MD Code. But of course, such non-compliance does not inevitably lead to an overall finding of non-compliance with the MD Code in relation to building separation.
- [61] The issue of building separation must be considered in the context that:
- (a) First: the note to AO8.1 provides for design strategies to reduce building separation requirements;⁷⁸
 - (b) Secondly: the notes to Table F provide that separation distances are intended to protect amenity and provide open spaces on upper levels that do not require screening or privacy;⁷⁹ and
 - (c) Thirdly: the references within the MD Code, including AO8.1(c), that deal with building separation, show that the nominated distances in Table F increase as a building increases in height but they may be reduced where screening is provided.⁸⁰

⁷⁷ Ibid at 6.43.

⁷⁸ These notes state that “Considered site planning and design and strategies such as offsetting balconies, the location of private space, selective screening or other design elements can reduce building separation requirements.”

⁷⁹ Ex. 7.00 p. 139.

⁸⁰ See Ex. 7.00 p. 144 at figure g; Ex. 7.00 p. 145 at figure h shows (as the co-respondents submitted) that screening can include battens or lattice or the like, and that no screen is required where a blank wall is within a 45 degree angle of a view from a window from a habitable room.

- [62] An analysis of the proposed development plans reveals⁸¹ that the vast majority of the interface between buildings one and two are either blank walls or non-habitable rooms at ground level (except for the bedrooms at the northern part and the living space at the southern extent of the relevant unit). It follows that the “stepping” required for compliance with table F would result in a gap of 1.5 metres. But the plans allow for 5 metres. In relation to the separation between buildings two and three, there are no instances where more than 1.5 metres is required – and in any event the proposed plans provide for 3.5 metres. In relation to the upper level, the increased separation distance nominated for three to four storeys apply by application of Table F. The proposed plans show that much of that interface is one of blank walls or non-habitable rooms, which requires a 6-metre separation. The proposal allows for 5 metres.
- [63] The evidence of Mr Ovenden is that despite this non-compliance, the proposed development is otherwise consistent with the form and character of the area;⁸² and has been designed to ensure appropriate setback and building separation is achieved to maintain access to daylight, sunlight and breezes for future residences and adjoining residences as intended by PO8.⁸³
- [64] There was no evidence of any real privacy issues for residents of the proposed development.⁸⁴ Mr Buckley also accepted that the separation distance issues did not generate any privacy concerns for the residents of the existing dwellings.⁸⁵
- [65] In those circumstances, I find this to be a negligible and meaningless shortfall.⁸⁶
- [66] Overall, I am satisfied that the proposed development complies with PO8 of the MD Code because:
- (a) in terms of its interface with buildings external to the Land, there are adequate separations between the proposed buildings and the buildings on the adjoining properties;
 - (b) residential amenity including access to sunlight and breezes and the visual privacy of residents in the neighbouring properties is protected;⁸⁷ and
 - (c) the separation between the proposed buildings is not at odds with the building separation of the residential buildings along Highlands Street to the north.⁸⁸ There is also no evidence of amenity issues internal to the proposed development.

⁸¹ Ex. 2.01.

⁸² Ibid at para. 6.43.

⁸³ Ibid at para. 1.10(c).

⁸⁴ Buckley (cross-examination) Transcript 3 – 67: lines 6 -13.

⁸⁵ Transcript 3-70: lines 12-14.

⁸⁶ The findings in this paragraph are consistent with the evidence of Mr Buckley under cross examination at Transcript 3-63: line 30 to Transcript 3-30: line 10.

⁸⁷ Ex. 3.05 at p. 20, para. 6.56. per Gaskell.

⁸⁸ Ex. 3.05 Per Ovenden.

PO15 of the MD Code

[67] Performance outcome 15 provides as follows:

<p>PO15⁸⁹</p> <p>Development has a building depth and form that must be articulated to:</p> <p>(a) ensure that the bulk of the development is in keeping with the form and character intent of the area;</p> <p>(b) provide adequate amenity for building residents in terms of natural light and ventilation;</p> <p>(c) provide opportunities for dual aspect dwellings. Refer to Figure i.</p>	<p>AO15.1</p> <p>Development where in the Medium density residential zone, Low-medium density residential zone, in the Infill housing zone precinct of the Character residential zone or Low density residential zone, <u>the maximum length of a wall in any direction is 30m with substantial articulation provided every 15m.</u></p> <p>Note—Substantial articulation is a full building separation of 6m or a change in building line of plus or minus 2m for a length not less than 5m.</p> <p>[Emphasis added]</p>
	<p>AO15.2</p> <p>...</p>

[68] It is uncontroversial that two of the proposed buildings⁹⁰ exceed the nominated 30 metre length by about 2 metres and, while separated by 5 metres, do not achieve substantial articulation every 15 metres. But I find these exceedances are minor and will not result in the proposed buildings appearing incompatible in the context of larger buildings to the west and south-east, particularly given the proposed landscaping will assist to break up visible built form and, the buildings will incorporate substantial articulation.⁹¹ In any event, I am satisfied that the proposed development complies with PO15 of the MD code because:

- (a) the bulk of the proposed development is not materially different from other buildings in the area (i.e. ‘The Clayfield’ has a width of approximately 70m and the multiple dwellings at 34 Highlands Street and 55 Lapraik have a length of approximately 25-27m);⁹²
- (b) the bulk of the proposed development is in keeping with the form and character intent of the local area; and

⁸⁹ Ex.7.00 at p.114.

⁹⁰ Buildings two and three.

⁹¹ Ex. 4.01 at p. 22 para. 40(m); Transcript 2-18: line 22 to 2-19: line3; Transcript 2-22: line 43 to 2-23: line 8.

⁹² Ex. 4.01 at p. 18 para. 30(d) and p. 22 para. 40(m).

- (c) there is no evidence to suggest that residents within the proposed development will not be provided with adequate amenity in terms of natural light and ventilation; and
- (d) the proposed development has dual aspects.

Conclusion

- [69] The assessment of whether the ultimate outcome is acceptable in responding to the relevant performance and overall outcomes in this case requires an evaluative judgment.⁹³ Such a judgment is one on which reasonable minds might differ.⁹⁴ As indeed they do in this case.
- [70] In Mr Buckley’s opinion, a case may be made for “relaxation” in respect of individual requirements for compliance with some acceptable outcomes (such as height,⁹⁵ rear setback,⁹⁶ building separation⁹⁷ and building lengths⁹⁸) but the cumulative impacts of the requirements in this case “tip the balance of an assessment towards a refusal.”⁹⁹
- [71] This conclusion is underpinned by the following three propositions:¹⁰⁰
- (a) First: The purpose behind the MD Code provision is to create space about and around buildings and to ensure where units and single houses co-exist, they do so in a “compatible and respectful manner”;
 - (b) Secondly: Consolidating built form in one sector of the site is undesirable and leads to compromised spatial relationships; and distances between building boundaries and “the ability to see through a site” have a practical purpose and ought not be oppressed by bulk and scale.
 - (c) Thirdly: the proposed development results in a “tightness” of living on the already heavily constrained Land and has the “disbenefit” of there being no useable communal open space adequate for the intensity proposed.
- [72] The appellants referred to Mr Buckley’s evidence, outlined in the preceding two paragraphs, to support the submission that, consistently with the notion of overdevelopment, the proposed development’s bulk, scale form and intensity is unacceptable and therefore warrants refusal.¹⁰¹ I accept Mr Buckley as an experienced and credible witness. But in my respectful view the elegantly expressed, but very general propositions propounded by him, which were identified in the preceding paragraphs, are of limited assistance for the following reasons:

⁹³ See paragraph 9 of these Reasons.

⁹⁴ Body Corporate for Mayfair Residences v Brisbane City Council (2017) 22 LGERA 136 at [68] per Kefford DCJ.

⁹⁵ AO5 and AO6.1 of the MD Code.

⁹⁶ AO5 and AO10 of the MD Code.

⁹⁷ AO8.1 of the MD Code.

⁹⁸ AO15.1 of the MD Code.

⁹⁹ Ex. 3.05 at para 6.59, 6.60 per Buckley.

¹⁰⁰ Ibid at 6.61 to 6.63.

¹⁰¹ Written submissions on behalf of the appellants at para. 52.

- (a) First: The broad evaluative judgment that Mr Buckley has made is one that the court must make in the context of the relevant planning provisions (as identified by the parties);
- (b) Secondly: The purpose of the relevant code is to be found in the express provisions of the code itself. In terms of the MD Code, that purpose is “to assess the suitability of development to which this code applies.”¹⁰² Subparagraph (2) then expressly provides that “[t]he purpose of the code will be achieved through the following overall outcomes:¹⁰³” The overall outcomes applicable to the proposed development (as identified by the parties) are discussed under the relevant headings in these Reasons;
- (c) Thirdly: Whilst Mr Buckley correctly referred to the (uncontroversial) non-compliance with some acceptable outcomes and quite properly identified that performance outcomes are required, he does not specifically address the agreed assessment benchmarks relevant to this issue.¹⁰⁴ Although I accept as a matter of common sense that as a co-author of the joint report dealing with these assessment benchmarks that he was aware of them; and
- (d) Fourthly: Mr Buckley’s lack of consideration of the relevant performance outcomes is inconsistent with established principle.¹⁰⁵

[73] It follows from the analysis above that I am satisfied that the bulk, scale, form and intensity of the proposed development is acceptable when assessed against the agreed assessment benchmarks in this case.

[74] This conclusion is consistent with and supported by the evidence of:

- (a) Dr McGowan (given in the context of the photomontages prepared by Mr Elliott) that:¹⁰⁶

“Ultimately, the height,¹⁰⁷ bulk, scale, form, and intensity of the proposed development will be an appropriate fit for the varied character of the local area, and the exceedances beyond acceptable outcomes¹⁰⁸ would result in little adverse impacts on the character of the area, particularly when compared to a compliant form of development on the site.”;

¹⁰² 9.3.14.2 (1) of the MD Code.

¹⁰³ Those outcomes then set out in 9.3.14.2(2) (a) to (t) of the MD Code.

¹⁰⁴ Ex. 3.05; Mr Buckley’s opinion on Issue Two is set out at paras. 6.58 to 6.63. I have not overlooked that in relation to Issue Two, Mr Buckley referred to and relied on the opinions he expressed in relation to overdevelopment (issue four). But the same problem arises because in his discussion of that issue, he does not address the performance outcomes agreed to be relevant to the issue of bulk, scale, form and intensity.

¹⁰⁵ See paragraph 184 of these reasons.

¹⁰⁶ Referring to the photomontages at Appendix B to Ex. 4.01; Ex 4.01 at page 20 para 38.

¹⁰⁷ The issue of height of the proposed development is dealt with further under that heading below.

¹⁰⁸ As identified in para. 30 of his report and as set out in paragraph 44 of these Reasons.

- (b) Mr King (discussed in more detail under Issue Three: Amenity below) that in terms of “built form considerations” (in the context of access to breezes), there is no unacceptable impact;¹⁰⁹ and
- (c) both Mr Ovenden and Mr Gaskell.¹¹⁰

Issue Two: Height

- [75] Issues about height overlap with the issues of overdevelopment, bulk, scale form and intensity and amenity and are also discussed under those headings in these Reasons.
- [76] The parties have, however, collectively identified that the discrete issue of whether the height of the proposed development is appropriate is to be assessed against the City Plan 2014: Albion NP Code OO 3(c), 3(h) and PO1; LMDR Zone Code OO 5(b); and MD CODE, OO 2(h), 2(j) and PO5, PO6 (AO6.1 and AO6.2), PO7¹¹¹ and PO17.
- [77] It is uncontroversial that each of the proposed buildings exceed the 9.5 metre maximum building height contemplated by the City Plan because their maximum heights are follows: building one (9.7 metres); building two (14.5 metres) and building three (16.5 metres).¹¹²
- [78] The well-known adage that “reasonable expectations are largely informed by the planning scheme” is emphasised by the appellants on this issue. In doing so they focussed on the heights of the buildings not representing a “mere minor exceedance” but a substantial increase of some 52 to 74 percent over what is acceptable. Although they make the general concession that “some” of the height is represented by building undercroft.¹¹³

Context of the appellants’ submissions about height

- [79] Before turning to address each of the height assessment benchmarks, it is instructive to pause and give some context and perspective to the appellants overall submission about height.
- [80] The proposed development involves buildings of two to three storeys plus an undercroft. It is mostly less than 9.5 metres above ground, except for those parts of the upper levels that are on the southern side of each building. Those parts of the buildings which protrude more than 9.5 metres above ground constitute 8% of the site cover.¹¹⁴ The appellants criticise Dr McGowan’s view that, what he termed, the artificially created “podium-style structure” is a design feature supported by

¹⁰⁹ See the discussion about interference with breezes at paragraphs 143 to 148 of these Reasons. Mr Kings reports are Ex 4.03 and 4.06.

¹¹⁰ Ex. 3.05 p. 19 para. 6.40-6.46 per Ovenden; Ex. 3.05 pp. 20-21 para. 6.46-6.56 per Gaskell.

¹¹¹ As stated earlier in paragraph 43 of these Reasons, this performance outcome is no longer pressed.

¹¹² Ex. 4.01 at p. 14 para. 23(a).

¹¹³ Written submissions on behalf of the appellants at para. 60.

¹¹⁴ McGowan (examination in chief) Transcript 2-24; Dr McGowan’s evidence was given in the context of figure 17 of his report (Ex. 4.01 at p. 16).

the provisions of the City Plan. But I reject their submission for three main reasons.

- (a) First, the increased building height of the southern parts of the buildings is not caused by any substantial vertical stepping of the buildings. Rather, it is mainly a product of the topography of the Land.¹¹⁵
- (b) Secondly, in response to the steep slope of the Land, each of the proposed buildings incorporate undercroft areas which are similar to the two to three storey ‘Ye-Olde Avalon’ multiple dwellings development and the six to seven storey ‘The Clayfield’ retirement facility development.
- (c) Thirdly and most crucially, the three-storey component and associated undercroft areas interface with the three-storey house (to the south-east), the two to three storey ‘Ye-Olde Avalon’ multiple dwellings development (to the south) and the industrial buildings (to the south-west). The undercroft areas will be screened by mature vegetation in the southern section of the proposed development. On the other hand, the buildings are presented as two storey buildings to the north, with those parts of the buildings being less than 9.5 metres.

Albion NP Code provisions [OO3(c.)3(h) and POI]

[81] Overall outcome 3(c) and 3(h) of the Albion NP provides as follows:

7.2.1.2 Albion neighbourhood plan code¹¹⁶

7.2.1.2.2 Purpose

(3) The overall outcomes for the neighbourhood plan area are:

- (c) The form and scale of development in Albion is subservient to Bowen Hills and Fortitude Valley and maintains building heights sensitive to surrounding residential areas.
- (h) Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct or site and is only developed at a greater height, scale or form where there is both an economic need and the proposal addresses an identified lack of community facilities in the area.

[Emphasis added]

[82] Mr Ovenden’s opinion, which I accept is that the proposed development:¹¹⁷

¹¹⁵ Ex. 4.01 at p. 14, para. 23(b).

¹¹⁶ Ex. 7.00 at p. 86.

¹¹⁷ Ex.3.05 at 6.68 p. 22; see also Mr Ovenden’s evidence at Ex. 3.05 at p. 21, para. 6.64; Mr Gaskell agrees with this conclusion at Ex 3.05 at pp. 23-24, para. 6.71-6.80; Mr Buckley does not specifically address the provisions but I have taken into account his views expressed in Ex. 3.05 at pp. 17-18, para. 6.26-6.39. See also the evidence of Dr McGowan; Ex. 4.01 at p. 20, para. 40 (a); For the

- (a) which comprises of 28 units, is consistent with the anticipated density and assumed infrastructure demand having regard to the zoning/precinct designation of the land and the size of the site;
- (b) is aligned to the community expectations about the number of storeys to be built having regard to the zoning/ precinct designation, the topography of the site and that of the surrounding area, the surrounding built form context, the proximity to high frequency public transport and community facilities;
- (c) is of an appropriate scale and form of development having regard to the utility of the site; and
- (d) is situated such that it can comfortably co-exist with neighbouring properties, without prejudicing future development opportunities on adjoining sites.

[83] Having regard to the evidence identified in the preceding paragraph and the matters outlined under the heading “General surrounds” above, I am satisfied that in terms of height, the proposed development is sensitive to the surrounding residential areas and therefore complies with OO3(c) of the Albion NP Code.¹¹⁸

[84] The co-respondents submitted that OO3(h) does not apply to the proposed development because: the Land is not on a “site” specifically dealt with by the Albion NP Code; and the Land is not within a precinct of the Albion NP area nor one of the identified “catalyst sites”.¹¹⁹ The Council’s submissions do not address OO3(h) at all and the appellants refer to the provision as if it applies but otherwise do not respond to the co-respondents’ contention of non-applicability.

[85] I accept that Land is not within a precinct of the Albion NP area nor one of the identified “catalyst sites”¹²⁰ But I am not satisfied that it is not a “site” for the purpose of OO3(h) because the Land is identified on map NPM-001.2 as land in the Albion NP area.¹²¹

[86] It follows that I must consider this provision.

[87] Before doing so, it is instructive to recall that community expectations of the development of the Land are to be informed (in this case) by the City Plan and the existing developments “there on the ground.”¹²²

reasons discussed under Issue Four: Overdevelopment, I prefer the opinion of Mr Gaskell and Mr Ovenden on the issue of Overdevelopment and on Issue Two: Height.

¹¹⁸ See also the evidence of Dr McGowan; Ex. 4.01 at p. 20, para. 40 (a); Mr Ovenden’s evidence Ex. 3.05 at p. 21, para. 6.64; and Mr Gaskell’s evidence Ex. 3.05.

¹¹⁹ Submission on behalf of the co-respondents at para. 125.

¹²⁰ Submission on behalf of the co-respondents at para.125.

¹²¹ Ex. 7.00 at pp. 85 and 92; See 7.2.1.2.1 (2) of the City Plan.

¹²² See the observations of Quirk DCJ in *The Purcell Family v Gold Coast City Council* [2004] QPELR 521 at [20] and [23]; cited with approval by Rackemann DCJ in *K Page Main Beach Pty Ltd v Gold Coast City Council & Ors* [2011] QPEC 1 at [54] to [56].

- [88] It is uncontroversial that the two storey component of the proposed development (with a height of less than 9.5 metres) does not offend OO3(h) or PO1 (referred to below under that heading), as the City Plan contemplates buildings of this height limit being built on the Land. It follows that the height issue between the parties is confined to the three storeys and associated undercroft of the proposed development. The interaction of this component of the development with the local area is summarised in 79(b) and (c) above. Most relevantly, the proposed development interfaces with the three-storey house (to the south east), the two to three-storey ‘Ye-Olde Avalon’ (to the south) and industrial buildings (to the south west). Relevantly, buildings such as ‘Ye-Olde Avalon’ and ‘The Clayfield’ (to the west) incorporate substantial undercroft.
- [89] The appellants also submitted that “the Land is surrounded by more houses than units and that there is a relative predominance of two storey development, not three (or more).”¹²³ But this is a confined view of Mr Ovenden’s evidence. It overlooks that Mr Ovenden also said that: there were more houses than units or unit sites if considered in the context of the number of allotments (11 in the present case); there is a combination of two and three storeys houses; and the Aveo development sets a significant backdrop that influences character as well.¹²⁴
- [90] For the reasons outlined in the preceding two paragraphs, I am satisfied that the height, scale and form of the proposed development is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the Land.¹²⁵ I also accept Mr Duane’s unchallenged evidence that there are town planning, community and an economic need for the proposed development and that it “would involve efficient use of existing and proposed infrastructure throughout the surrounding region to the benefit of the community.”¹²⁶

PO1 of the Albion NP Code

- [91] Performance outcome one of the Albion NP Code provides as follows:

Performance outcomes	Acceptable outcomes
<p>PO1¹²⁷</p> <p><u>Development is of a height, scale and form that achieves the intended outcome for the precinct, improves the amenity of the neighbourhood plan area, contributes to a cohesive streetscape and built form character</u> and is:</p> <p>(a) Consistent with the anticipated density and</p>	<p>AO1</p> <p>Development complies with the number of storeys and building height in Table 7.2.1.2.3.B.</p> <p><i>Note – Neighbourhood plans will mostly specify a maximum number of storeys where zone outcomes have been varied in relation to building height. Some neighbourhood plans may also specify height in metres.</i></p>

¹²³ Referring to the evidence of Mr Ovenden in cross examination, Transcript 3-21: lines 17-31.

¹²⁴ Ibid Transcript 3-21: lines 21 to 36.

¹²⁵ Evidence of Dr McGowan; Ex. 4.01 at p. 20, para. 40(b).

¹²⁶ Ex. 4.02 at p. 38, para. 6.4 and p. 41, para. 8.1; Mr Duane is an economist with expertise in several areas including assessing economic impact. His statement was tendered without objection and Mr Duane was not required for cross-examination.

¹²⁷ Ex. 7.00 at p. 87, Table 7.2.1.2.3.A.

<p>assumed infrastructure demand;</p> <p>(b) Aligned to community expectations about the number of storeys to be built;</p> <p>(c) Proportionate to and commensurate with the utility of the site area and frontage width;</p> <p>(d) Designed so as not to cause a significant and undue adverse amenity impact to adjoining development;</p> <p>(e) Sited to enable existing and future buildings to be well separated from each other and to not prejudice the development of an adjoining site.</p>	<p><i>Development must comply with both parameters where maximum number of storeys and height in metres are specified.</i></p>
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[Emphasis added]

[92] It is uncontroversial that AO1 is not applicable as the Land is not contained within any of the precincts in Table 7.2.1.2.3. B. In terms of PO1, it is also uncontroversial that there is no “intended outcome for the precinct” because the Land is not located within a precinct of the neighbourhood plan.

[93] The co-respondents submitted, and I accept, that the requirement that the development “improves the amenity of the neighbourhood” is to be considered in the context of what the planning scheme intends to occur on the Land and surrounding area.¹²⁸ It follows that the requirement for an improvement of the amenity of the local area must be considered in the context of the uncontroverted evidence that two to three-storey multiple dwellings are appropriate for and encouraged by the Planning Scheme. Further issues of amenity are discussed later in these Reasons under that heading. But it is instructive at this point to observe that: the definition of amenity in the Planning Scheme includes “freedom from hazard or risk of threats to health and wellbeing of occupants.”¹²⁹ The joint geotechnical experts relevantly agree that:

“the proposed development will reduce the risk associated with landslip to an acceptable level and will improve the long-term stability of the slope through removal of uncontrolled fill materials, the use of deep piled foundation and improved stormwater management.”¹³⁰

[94] In this context I find that the improvement to slope stability can be considered an improvement in amenity.

¹²⁸ Submissions on behalf of the co-respondents at para. 127.

¹²⁹ Exhibit, planning scheme extracts at p 209.

¹³⁰ Ex. 3.02 at p. 4, para. 5.1.4; The joint reports of Geoff Hurley, Philp Shaw and Andrew Middleton are Ex 3.01 and Ex. 3.02.

[95] For all of the reasons discussed under the heading above in relation to the Albion NP Code Provisions¹³¹ I am satisfied that the proposed development fits with the built form character of the area, and that, together with the substantial landscaping, it will improve the residential amenity of the area. I am also satisfied that its height will not cause significant, unreasonable adverse amenity to adjoining properties, particularly given the reasonable building separations.¹³²

[96] I therefore find that the proposed development complies with PO1 of the Albion NP Code.

LMDR Zone Code OO 5(b)

[97] Overall outcome 5(b) of the LMDR Zone Code provides as follow:¹³³

6.2.1.2 Low-medium density residential zone code

5(b) Development provides for a building to have a building height and bulk that responds to:

- (i) the nature of adjoining dwellings;
- (ii) site characteristics, including the shape, frontage, size, orientation, slope, and nature of adjoining dwellings.

[98] The proposed development provides setbacks to adjoining buildings which comply with acceptable outcomes, with one exception: the rear boundary. But the evidence is that: this boundary involves a building which is substantially removed from the proposal with an intervening easement; is compliant with the required height of within 10 metres of the common boundary; and involves a height which does not exceed the acceptable outcome on the flatter parts of the Land.¹³⁴

[99] I am therefore satisfied that OO5(b) of the LMDR Zone Code has been satisfied as the proposed development appropriately responds to the adjoining dwellings and has been tailored in response to the characteristics of the Land, particularly its slope.¹³⁵

OO2(h) and (j) of the MD Code

[100] Overall outcomes 2(h) and (j) of the MD Code relevantly provides as follows:¹³⁶

9.3.14 Multiple dwelling code

9.3.14.2 Purpose

¹³¹ And with further reliance on the evidence of Mr Ovenden, Mr Gaskell and Dr McGowan discussed in paragraph 82 of these Reasons.

¹³² See paragraphs 62 to 65 of these Reasons.

¹³³ Ex. 7 at pp. 74-75

¹³⁴ Ovenden (cross-examination) Transcript 3-34: lines 27-44.

¹³⁵ Ex. 4.01 at pp. 20-21, para. 40(d) per McGowan.

¹³⁶ Ex. 7 at pp. 106-107.

(2) The purpose of the code will be achieved through the following overall outcomes:

(h) Development is of a height that is appropriate to the strategic and local context and meets community expectations consistent with the following:

(v) 2 or 3 storeys in the 2 or 3 storey mix zone precinct of the Low-medium density residential zone;

(j) Development in or adjoining lower density residential areas uses side boundary setbacks and built form height transitions to manage the interface with those areas and reflect the amenity, form and character and subtropical landscape of those areas.

[101] This provision emphasises that community expectations for the developments in the area are that they be generally consistent with two or three storeys. As discussed above, the height of the proposed development is appropriate in the context of where the Land sits. It is also instructive that there are many developments of a similar height and number of storeys (and more) in the area. I am therefore satisfied that the proposed development complies with OO2(j) of the MD Code in terms of height as it is appropriate in the context of the local area and meets the community expectations for height.

[102] I am also satisfied that the proposed development complies with OO2(j) of the MD Code because:

- (a) it achieves greater side boundary setbacks than those sought in AO1;
- (b) it achieves building height transition sought by AO6.2 where adjoining a dwelling house; and
- (c) there are reasonably generous separations between the proposed buildings and buildings on the adjoining properties; and
- (d) intervening landscaping will also advance the planning intent sought by this overall outcome.

PO5 of the MD Code

[103] PO5 of the MD Code is set out and discussed earlier under Issue One: Bulk, Scale, Form and Intensity. It is also discussed later under Issue Four: Overdevelopment. No additional discussion is useful or necessary at this point. But for completeness, I am satisfied that the proposed building height is consistent with the intended character of the local area, having regard to:

- (a) the building height of the existing surrounding buildings, ranging from two to seven storeys;
- (b) the generous building separations between adjoining buildings; and

- (c) the built form of the surrounding buildings, which has also been designed in response to slope of the area.

PO6 of the MD Code

[104] Performance outcome 6 of the MD Code provides as follows:¹³⁷

Performance outcomes	Acceptable outcomes
<p>PO6 Development has a building height that is consistent with the streetscape local context and intent for the area having regard to:</p> <ul style="list-style-type: none"> (a) Proximity to high-frequency public transport services; (b) The predominant height of existing or approved buildings in the street; (c) Providing appropriate separation and a sensitive transition between houses and higher scale building forms; (d) Street conditions such as street width; (e) The topography of the area and site slope (f) View points and corridors; (g) Solar access to key public spaces and adjoining buildings 	<p>AO6.1 Development has a maximum building height that complies with:</p> <ul style="list-style-type: none"> (a) a neighbourhood plan; or (b) if no neighbourhood plan applies or no requirements are specified in the neighbourhood plan, the requirements set out in Table 9.3.14.3.B.
	<p>AO6.2 Development in the 2 or 3 storey mix zone precinct of the Low–medium density residential zone where adjoining a lot containing a dwelling house (where no approval for development other than a dwelling house exists) has a building height within 10m of the common boundary that does not exceed 9.5m and 2 storeys.</p>

[105] The proposed development does not comply with AO6.1 which enlivens the need to assess whether there is compliance with PO6. But the proposed development's compliance with the building height transition sought by AO6.2 cannot be overlooked.¹³⁸ As discussed later under the issue of amenity, compliance with this acceptable outcome is also relevant to the various complaints of the appellants (particularly those on the northern boundary) lamenting their loss of views.

[106] I am satisfied that the proposed development complies with PO6 of the MD Code for the following reasons:

- (a) First: the Land does not have a prominent streetscape interface but otherwise provides the building height transition sought by AO6.2 and is consistent with the streetscape local context;
- (b) Secondly: the photomontages included in Dr McGowan's statement demonstrate that the height of the proposed buildings will not be conspicuous

¹³⁷ Ex. 7 at p. 110.

¹³⁸ Ex. 4.01 at p. 21, para. 40(j) per McGowan.

in the context of the surrounding built form visible from different viewpoints;¹³⁹

- (c) Thirdly: it is consistent with the intent for the area having regard to the Lands good proximity to various services;
- (d) Fourthly: there is no complaint regarding street width, and the topography of the area and site slope is appropriately responded to;
- (e) Fifthly: there are no viewpoints or corridors applicable to the Land; and
- (f) Sixthly: there is no complaint regarding solar access to public spaces and adjoining buildings.¹⁴⁰

PO7 of the MD Code¹⁴¹

[107] PO 17 of the MD Code provides as follows:

<i>Performance outcomes</i>	<i>Acceptable outcomes</i>
<p>PO17 Development reduces the appearance of building bulk, ensures a human-scale, demonstrates variations in horizontal and vertical profile, balances the height of the building, and supports neighbourhood and street character.</p>	<p>AO17.1 Development has a number of the following design elements:</p> <ul style="list-style-type: none"> (a) balconies, verandahs, terraces or recesses; (b) variation in the treatment and patterning of windows, sun shading devices or other facade features; (c) variation in materials, colours, and textures and finishes, including between levels; (d) recessions and projections in the roof and wall plane, such as steps, slopes or splays; (e) variations in building form, including elements at a finer scale than the main structural framing. <p>Refer to Figure j, Figure k and Figure l</p>

¹³⁹ Ex. 4.01 at p. 20, para. 39 per McGowan.

¹⁴⁰ The shadow diagrams at Ex 6.49 pp.9-10 show no impact upon any of the appellants; this was confirmed by Dr McGowan at Transcript 2-24: line 30; and at Transcript 3-72: lines 39-41; Mr Buckley confirmed there were no shadow issues. See the discussion on this use under the amenity heading later in these Reasons.

¹⁴¹ Ex. 7.00 at p. 115.

	<p>AO17.2 Development of the first 3 storeys of the building includes:</p> <ul style="list-style-type: none"> (a) balconies and outdoor living areas orientated to the street or public realm; (b) expression of entries, different uses or elements of the building in plan and elevation; (c) elements of a finer scale than the building's main structural framing that provide detail and modulate the elevation including awnings, sun shading, screening, variation in materials and finishes. <p>Refer to Figure j and Figure k.</p>
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[108] The appellants have not identified any non-compliance with these provisions. But in any event, I am satisfied that the proposed development complies with PO17 of the MD Code for three main reasons:

- (a) First: the buildings include articulation and design which reduce the appearance of the bulk of the buildings and achieve a human-scale appearance;¹⁴²
- (b) Secondly: the buildings include variations in horizontal and vertical profile through the stepping in and out of facades, the stepping up and down of the roof, and the balconies; and
- (c) Thirdly: the height of the buildings is modulated in response to the adjoining buildings, which support the neighbourhood character, which consists of two to seven-storey buildings and buildings with substantial undercroft.

Issue Three: Amenity

[109] Whether the proposed development results in an appropriate amenity outcome is to be assessed against OO 4(j) of the LMDR Zone Code and OO2(p) and 2(q) of the MD Code.

[110] The issue of amenity is intertwined with the concept of reasonable expectations.

[111] The local residents have expressed significant concern about the amenity related impacts of the proposed development.¹⁴³ These concerns were described by counsel for the appellants to be of “such sufficient extent as to cause them to progress this matter to hearing and determination ... in the face of continued

¹⁴² Dr McGowan (examination in chief) Transcript 2-18: line 22 to 2-19: line 4.

¹⁴³ These statements are Ex. 5.01-5.06; See also the objections made during the public notification of the proposed development at Ex. 6.25-6.44.

opposition from Taylor and approval by the Council.”¹⁴⁴ This level of concern is appreciable in the circumstances of this case. I also accept that the various views about the loss of amenity as they have been expressed by the residents are genuinely held by each of them.¹⁴⁵

- [112] Before turning to address the relevant assessment benchmarks it is necessary to make some initial observations about the appellants approach to the issue of amenity.

Appellant’s approach to the issue of amenity

- [113] The appellants submitted that the provisions of the LMDR Zone Code and of the MD Code identified as relevant to the assessment of overdevelopment in this case placed a high level of significance and importance on amenity concerns for the local area.¹⁴⁶ This submission is premised on the City Plan requiring that any development: ¹⁴⁷

- (a) be “of a height, bulk, scale and form which is tailored to its specific location and to the characteristics of the site.”¹⁴⁸ And that it be “well designed”¹⁴⁹ and include landscaping that “softens the scale of the dwellings”¹⁵⁰; and
- (b) provide a “high level of amenity”¹⁵¹ for both residents of the development and its surrounds. The appellants emphasised the use of the word “high” as opposed to other language used in the City Plan such as “adequate” or “acceptable”.¹⁵² The appellants also submitted that the scheme emphasised this point by going on to note that development must “protect residential amenity.”¹⁵³ Whilst accepting that it would not be fair to treat this provision as an absolute (on the basis that any development will have at least some impact), the appellants argued that its strong language nevertheless imposes a high bar for a prospective development;
- (c) ensure that “impacts on residential amenity and privacy are minimised.”¹⁵⁴ The emphasis being on minimised, not simply that impacts be adequate, sufficient, or acceptable;
- (d) “must be articulated”.¹⁵⁵ The appellants referred to the strong language used.

¹⁴⁴ Written submissions on behalf of the appellants at para. 64.

¹⁴⁵ But I have not given any weight to evidence which raises matters not in issue (ecology issues) or no longer pressed as warranting refusal (traffic and landslide matters); or that are non-expert opinion evidence.

¹⁴⁶ LMDR Zone Code, OO 5(a), (d) and (e); and MD Code: OO 2(p) and 2(q).

¹⁴⁷ Appellants’ written submissions para. 37.

¹⁴⁸ Referring to OO 5(a) of the LMDR Zone Code.

¹⁴⁹ Referring to OO 5(d) of the LMDR Zone Code.

¹⁵⁰ Referring to OO 5(e) of the LMDR Zone Code.

¹⁵¹ Referring to OO 2(l)(ii) of the Md Code.

¹⁵² Referring to Dr McGowan noting that such language can be used from time to time; Transcript 2-29: lines 38-40).

¹⁵³ Referring to PO8(b)

¹⁵⁴ Referring to PO5(d).

¹⁵⁵ Referring to PO15.

- [114] I accept, as a general proposition, that the issue of amenity is an important and relevant one that needs to be carefully considered under the provisions of the City Plan identified by the appellants (and other) provisions of the scheme.¹⁵⁶ But I reject the appellant’s apparent attempt to characterise or elevate the issue of amenity (including over other considerations) to one of “high significance and importance.” Such an approach is selective and overlooks that each of the City Plan extracts must be looked at in the context in which they appear and upon a reading of the scheme as a whole.
- [115] Amenity is a wide-ranging concept that may be difficult to articulate.¹⁵⁷ It covers a broad spectrum of tangible and intangible (sometimes “elusive”)¹⁵⁸ considerations. But any consideration is not to be undertaken in the abstract. It is informed by the planning scheme and the notion or reasonableness.¹⁵⁹ The standard of amenity that residents are entitled to enjoy or expect is to be assessed objectively.¹⁶⁰
- [116] The appellants have identified a range of issues about the amenity impacts of the proposed development to be assessed against the identified benchmark assessments under the heading of amenity. I will reference those benchmarks by way of conclusion. But it is relevant to note at this point that many of the amenity considerations raised by the appellants overlap with several of the assessment benchmarks discussed above¹⁶¹ and those considerations remain material to the present consideration.
- [117] The relevant impacts raised by the appellants include:¹⁶²
- (a) loss of views or outlook;
 - (b) privacy or overlooking concerns;
 - (c) interference with access to sunlight or overshadowing;
 - (d) interference with access to breezes;
 - (e) noise from the communal outdoor area, the car park and plant and equipment;
 - (f) odours from the communal outdoor area, the car park and the refuse area;
 - (g) lighting from the communal outdoor area and vehicles; and

¹⁵⁶ Ex. 3.05 at p. 8, para. 4.6; See also Dr McGowan (evidence in chief) at Transcript 2-27: lines 3-23; Mr Ovenden (evidence in chief) Transcript 3-17: lines 11-26; and Mr Gaskell (evidence in chief) Transcript 3 -44 lines 4-14.

¹⁵⁷ *Broad v Brisbane City Council & Anor* [1986] 2 Qd R 317 at pages 319, 320 (per Thomas J) and page 325 (per De Jersey J as his honour then was).

¹⁵⁸ *Ibid* Broad at page 320 (per Thomas J).

¹⁵⁹ *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2008] QPELR 342 at 348-349 [40] per Dodds DCJ.

¹⁶⁰ *Wattleville Pty Ltd v Western Downs Regional Council & Anor* [2015] QPELR 21 at 45, [96] per Robertson DCJ.

¹⁶¹ For example, see the discussions in these Reasons under the headings PO5 and PO8.

¹⁶² As summarised in the Councils written submissions at [85]; as reflected in the statements from the appellants at 5.01 to 5.06.

(h) noise and emissions from the transformer.

[118] I will deal with each of these matters in turn below. But before doing so, it is instructive to observe again that:¹⁶³

- (a) the Land is appropriately zoned for multiple dwellings redevelopment; and
- (b) two storey and 9.5 metres high buildings with a side boundary setback of two to 2.5 metres are encouraged on the Land as an acceptable outcome;¹⁶⁴
- (c) the Land is in an established residential area permeated by a mix of uses and is five kilometres from the Brisbane CBD; and
- (d) the primary background noise of the area is traffic noise from surrounding roads.

Loss of views or outlook

[119] The uncontroversial evidence in this case is that the residents of the northern properties (along Highlands Street) will have their views to the south, including high quality views to the CBD (and potentially to the Brisbane River and Mt Coot-tha) obstructed by the proposed development.¹⁶⁵ It is understandable that the “obliteration”¹⁶⁶ of such amazing outlooks is of particular concern to many of the appellants. Such an interference has a significant impact on amenity.¹⁶⁷

[120] Dr McGowan accepted under cross examination by counsel for the appellants that: “views are considered important”¹⁶⁸; that a good development should be appreciative and responsive to visual concerns; and such a response was to the benefit of the “whole community.”¹⁶⁹

[121] But, it is well established that there is no common law right to have a view preserved.¹⁷⁰ It follows that a landowner is entitled to build on their land subject to “our system of planning controls.”¹⁷¹ As was relevantly observed by Brabazon QC DCJ in *Herbert & Ors v Brisbane City Council & Anor* [2004] QPEC 017:¹⁷²

“The question is, how does the Town Plan regard those losses of views? It is necessary to look at the Plan’s provisions, as the general law gives no rights to the protection of views, there is a good explanation of that basis proportion, in *Cromar Pty Ltd Cronin v BCC* [1966] QPELR 84.”

¹⁶³ As identified in the Council’s written submissions at para. 86.

¹⁶⁴ AO6.1 and AO11 of the MD Code, Ex. 7 at pp. 110 and 113.

¹⁶⁵ As acknowledged by Dr McGowan; Ex. 4.01 at para. 46(a).

¹⁶⁶ As Dr McGowan accepted under cross examination by counsel for the appellants at Transcript 2-50: lines 23 to 25.

¹⁶⁷ Dr McGowan (Cross examination) Transcript 2-33: lines 7-8.

¹⁶⁸ Transcript 2-27: lines 11-13.

¹⁶⁹ Transcript 2-27: lines 11-22.

¹⁷⁰ *Cromar Pty Ltd & Cronin v Brisbane City Council & Anor* [1996] QPELR 84 at 90; *Calvisi v Brisbane City Council (2009) 164 LGERA* 119 at [13] per Robin QC DCJ.

¹⁷¹ *Ibid* at [14] with reference to *Hunter v Canary Wharf Ltd* [1997] AC 655 at 8 per Lord Goff.

¹⁷² at [80].

- [122] In *Eschenko v Cummins & Ors* [2000] QPEC 37, Newton DCJ also relevantly observed as follows¹⁷³:

“... Interference with a view may, of course, result in the outlook from an adjoining allotment being unduly obstructed and this will be considered shortly. But to some extent, at least, interference with views and overlooking are inevitable in an urban environment ... A council may, in an appropriate case when exercising its discretionary power to grant approval of a proposed building, seek to balance the interest of one owner of land against those of another. Where it does so endeavour, a council undertakes a difficult and delicate task. Care must be taken not to give undue emphasis and importance to the interests of an owner who happens to have built first in an area where views are attractive and where people naturally do not wish to have those views obstructed. ...”

[Emphasis added]

- [123] There is no assessment benchmark in the Albion NP Code or the MD Code which specifically stipulates that the views or outlooks currently enjoyed by the residents of the properties north of the proposed development are to be protected or preserved.¹⁷⁴ However, any interference with those views or outlooks remains relevant to the issue of the amenity impact of the proposed development. But such interference must be considered in the context of the reasonable expectations that the community may have for the development of the Land. Such community expectation is to be derived from the statutory planning controls. These include the possibility that a development will be permitted by local government in an appropriate case.¹⁷⁵ Reasonable expectations are also affected by locational attributes.¹⁷⁶
- [124] The City Plan anticipates development of the Land for multiple dwellings, which involve two storeys and 9.5 metres in building height¹⁷⁷ and a two to 2.5m side (northern boundary) setback.¹⁷⁸ The evidence, which I accept, is that the parts of the proposed development obstructing those views are compliant with the AO for building height and setbacks (AO5 of the MD Code).¹⁷⁹ With wriggle room.¹⁸⁰ It follows that I accept Dr McGowan’s evidence that the impact on views is consistent with the outcomes contemplated for the Land under the relevant scheme.¹⁸¹

¹⁷³ at [32].

¹⁷⁴ Unlike other provisions of the City Plan, for example PO7 of the New Farm and Teneriffe Hill neighbourhood plan code. See Ex.7.25 at p.7.

¹⁷⁵ *K&K GC Pty Ltd v Gold Coast City Council* [2018] QPEC 9 at [84] per Kefford DCJ (footnotes omitted). These observations are not affected by Kefford DCJ’s later decision in *K&K (GC) Pty Ltd v Gold Coast City Council* [2020] QPEC 40.

¹⁷⁶ Dr McGowan (cross-examination) Transcript 2-33: line 12.

¹⁷⁷ See Ex.7.00 67, pp. 110 and 136 (Table 5.5.2 and AO5 and AO6.1 of the MD Code).

¹⁷⁸ See Ex.7.00 pp .112, 113 and 136 (AO11 of the MD Code).

¹⁷⁹ Ibid.

¹⁸⁰ Ibid at figure 20.

¹⁸¹ Ibid.

- [125] Dr McGowan’s evidence, which I also accept, is that “any development on the site to a height of 9.5 metres and complying with acceptable outcomes for side boundary setbacks would be likely to substantially, if not entirely, obstruct views from properties to the north.”¹⁸² It follows that the loss of the views or outlook by the residents of the properties along Highlands Street is inevitable when the Land is redeveloped.
- [126] This is not the end of the appellant’s concerns about the loss of views by the Highlands Street residents (in the context of amenity).
- [127] The appellants also raised the issue of building separation in the context of loss of views and amenity (and ultimately overdevelopment). It seems that the appellants rely on AO8.1 of the MD Code to support a development outcome that provides a 12m separation between the proposed buildings, and in turn, provides view corridors (or greater outlook) for the residents of the Highlands Street properties.
- [128] The appellants make the following three submissions:¹⁸³
- (a) First, because the acceptable outcomes for building separation, standards for building length and rear setback are not met in this case,¹⁸⁴ it follows that greater setbacks/and or shorter buildings naturally and self-evidently have a similar effect – namely smaller buildings;
 - (b) Secondly, building separation requirements are imposed by City Plan in part to provide privacy and to protect both amenity and privacy within the site and on adjoining sites. To that end, the appellants referred to Mr Buckley’s evidence that: the effect of separation (in concert with other provisions) “that go towards that envelope that PO5, I think, talks about” is to create space about buildings: and that space “brings with it opportunities for optimising privacy, creating space for landscaping and, in some locations, the ability to maintain or be respectful of existing outlooks);¹⁸⁵ and
 - (c) The proposed development does not comply with the acceptable outcomes in AO8.1 of the MD Code which properly set the framework for reasonable community expectation and will plainly result in adverse visual impacts.¹⁸⁶
- [129] Whilst I accept the self-evident proposition outlined in 128 (a) above, I reject the appellants’ submission in 128 (b) and (c) for four main reasons.
- [130] First, it is an over-simplification to apply the 12-metre separation uniformly between the proposed buildings. This is because the separation distance turns on whether or not habitable rooms are facing each other or a habitable room is facing

¹⁸² Ex 4.01 at para. 50(b) at p.27; Mr Gaskell (cross-examination) Transcript 3-49: lines 3-50 to the effect that any view or outlook to the south could be obstructed by landscaping in any development of the Land.

¹⁸³ Written submissions on behalf of the appellants at para. 49.

¹⁸⁴ AO8.1 of the MD Code.

¹⁸⁵ Transcript 3-62: lines 7-12.

¹⁸⁶ Written submissions on behalf of the appellants at para. 49.

a non-habitable room or blank wall.¹⁸⁷ It follows that I accept the Council's submission that exhibit 4.08 (which contains a hypothetical series of examples of a different design) should be given little, if any weight.¹⁸⁸

[131] Secondly, the building separation requirements¹⁸⁹ are planning controls which have been implemented primarily for managing amenity impacts such as visual privacy and access to sunlight. That is supported by the following:

- (a) The separation distance is determined by reference to whether or not habitable rooms are facing each other, or a habitable room is facing a non-habitable room or blank wall;
- (b) The first "Note" below Table 9.3.14.3.F expressly points to privacy. The second "Note" below the table contemplates design outcomes such as screening and positioning of private space which may be adopted to reduce building separation requirements. It follows that the adjoining neighbours' views or outlooks have no bearing on these design outcomes; and
- (c) the placement and design of building (in similar language as AO8.1.) to minimise visual impacts on a view corridor identified a neighbourhood plan is dealt with by AO48.1. It is uncontroversial that the Land is not within the view corridor identified in the Albion NP Code.

[132] Thirdly, I accept that the proposed development does not comply with AO8.1. But a departure from AO8.1 of the MD Code does not mean there is non-compliance with PO8. For the reasons discussed under that heading above I am satisfied that the proposed development complies with PO8.

[133] Finally, in my view, whilst protesting the contrary,¹⁹⁰ the effect of the appellants submission on this issue is that a "better development" could be designed and built on the Land. This conclusion is consistent with the appellants written submissions which refer to:

- (a) the evidence of Mr Gaskell (given under cross examination) that "alternative development forms" would be able to protect (at least) some of "those" views;¹⁹¹
- (b) any steps to reduce the length of built form presenting to the northern property boundary (for example greater building separations, greater rear

¹⁸⁷ Ex. 7.00 at p. 144 (figure g).

¹⁸⁸ As discussed in paragraph 134 of these Reasons the proposition that there could be a better form of development is wrong as a matter of principle.

¹⁸⁹ See para. 54-72 of these Reasons.

¹⁹⁰ I note that at para. 49. f of the written submissions on behalf of the appellants it is submitted that "[t]he Court should not be particularly concerned with what may or may not be possible with alternative design solutions." [Emphasis added].

¹⁹¹ Meaning the views of the residents along Highlands Street. Appellants' written submissions at para. 48.e; with reference to the evidence of Mr Gaskell under cross examination at Transcript 3-56: lines 1-13.

boundary setback, shorter building lengths) could reduce the visual impacts otherwise occasioned by the proposed development;¹⁹² and

- (c) increased separation as between the buildings comprising the proposed development would lessen the impact of the proposed building on breezes.¹⁹³

[134] Any submission that there could be a “better form of development is wrong as a matter of principle and is therefore rejected. As Judge Brabazon QC observed in *Wingate Properties P/L & Anor v BCC & Ors* [2001] QPEC 005:¹⁹⁴

It is not the function of this Court (or indeed any planning authority) to refuse an application because it considers that the proposed use is not the best possible use for the site. It is not the function of the Court to redesign a proposal. Its function is to pass judgment on that which is proposed. In this case, the issue is whether or not the current proposal has been shown to be acceptable. The fact that some alternative proposal may be thought to be even more acceptable is by the way. If the current proposal is acceptable, then that is enough.

[Emphasis added]

Privacy or overlooking concerns

[135] In considering the impact of privacy and overlooking concerns on the neighbouring residents along Highlands Street, the matters set out in paragraph 118 of these Reasons are both instructive and relevant. It is also relevant to observe that:

- (a) the parts of the proposed development facing those residents are presented as two storeys and below 9.5m and have a side boundary setback greater than 2m;
- (b) as the proposed development complies with the side boundary setback requirements in AO11 of the MD Code, it is taken to comply with PO11, which relevantly provides that it “minimises the impact of development on the amenity and privacy of neighbouring existing residents.”¹⁹⁵;
- (c) relevantly too, and as the Council submitted, the north-facing main balconies of Building 1 do not present to any building as 32 Highlands Street is vacant. With respect to Buildings 2 and 3, only small bedroom balconies are presented to the northern boundary of the Land. Their main balconies are located on the southern side of the buildings.¹⁹⁶

¹⁹² Written submissions on behalf of the appellants at para. 46.h (footnotes omitted).

¹⁹³ Ibid at para. 66.a with reference to Mr King (cross examination) Transcript 2-12: lines 1-10.

¹⁹⁴ *Wingate Properties P/L & Anor v BCC & Ors* [2001] QPE 005 at [21]; cited with approval on many occasions including most recently in *Ashvan Investments unit Trust v Brisbane City Council & Ors* [2019] QPELR 793 at [206] per Williamson QC DCJ.

¹⁹⁵ See PO11(a) of the MD Code, ex. 7.00, p. 113.

¹⁹⁶ Respondent’s outline of submissions at para. 111; Ex.4.01 at p. 24. para. 46(b) per Dr McGowan.

[136] At this point the following observations of Skoien SJDC in *Body Corporate for Kelly's Beach Resort v Burnett Shire Council & Ors* [2003] QPEC 023, remain apposite:¹⁹⁷

“It is trite to recall that probably all uses of land have some adverse effects on the occupants of a neighbouring residence. Even the most desirable neighbour must occasionally create noise or other activity which to some extent, even minor, is an annoyance to others. Less desirable neighbouring residences may be the site of barking dogs, noisy children, over-loud television or stereo sets, over-frequent lawn mowing, a noisy vehicle. Human activities which disturb others may be annoyingly early or annoyingly late. The perfect neighbour does not exist except for the most tolerant person. So, the test is not whether the amenity would be degraded but whether would be unreasonably degraded.”
[Emphasis added]

[137] I am satisfied that any impact on the privacy of the neighbouring residents along Highlands Street will be appropriately mitigated through:¹⁹⁸

- (a) screening around the proposed ground level terraces;
- (b) building separation of at least 12m;
- (c) intervening landscaping, which include trees and shrubs.

[138] I am also satisfied that the proposed development will have minimal impact on the outlook of those residents in the neighbouring properties to the west (‘The Clayfield’ retirement facility), to the east (two detached houses at 35 and 39 Lapraik Street), and to the south-east (the ‘Ye-Olde Avalon’ units complex) because of: the significant building separation of at least 20m to each of the neighbouring properties; and the intervening landscaping located on the neighbouring properties and included in the proposed development, which is expected to be mature vegetation consisting of trees and shrubs.

Interference with access to sunlight or overshadowing

[139] The issue of the proposed development's interference with access to sunlight or overshadowing was not seriously agitated by the appellants at the hearing of the appeals. This is not surprising given Mr Buckley's frank concession that shadowing was not an issue.¹⁹⁹

[140] But as it remains a live issue, I will address it briefly.

[141] Dr McGowan's unchallenged evidence based on shadow diagrams in evidence is that:²⁰⁰

¹⁹⁷ *Body Corporate for Kelly's Beach Resort v Burnett Shire Council & Ors* [2003] QPEC 023 per Skoien SJDC at [60].

¹⁹⁸ Ex. 4.01 at p. 24 para. 46(b) per Dr McGowan.

¹⁹⁹ Transcript 3-72: line 41.

²⁰⁰ Submitted as part of the common material for the development application, Ex. 6.49, response to further issues letter dated 2 October 2018, at pp.9-10; Ex. 4.01, Dr McGowan's Statement, para.44(b) at p.23. This evidence is consistent with Mr Ovenden's evidence (at exhibit 3.05 para

“ shadow impacts would generally be consistent with what could occur from 9.5m high development on the site (with lesser setbacks), except from minor intrusions on the vacant land to the west (the view corridor easement) and on industrial land to the south. These increased shadow impacts are minor and would not be substantially greater than will be caused by retained or proposed vegetation through the southern part of the site.”

[142] It follows that any overshadowing impact caused by the proposed development on the properties at 39 and 55 Lapraik Street would not be significantly greater than could be caused by a compliant 9.5m high development with lesser setbacks.

[143] In response to Mrs Ambroselli’s concerns on this issue, Dr McGowan’s evidence is that:²⁰¹

“Notably, because the proposed built form will be approximately 22 metres away from the house at 39 Lapraik Street, located to the north-west of that house, and with ground levels approximately 1-4 metres lower than the ground level of that house, there would not be significant impact on access to daylight for that house (as alleged in the statement). I also disagree with the witness’ opinion at paragraph 20 of the statement, that the proposed development would block the early morning sun to the house at 39 Lapraik Street. The proposed development is located to the north-east of the house and could not block early morning sun from the south-east.”

[144] For the reasons outlined above, I am satisfied that there is no significant or unreasonable, unacceptable impact on access to sunlight or overshadowing arising from the proposed development.

Interference with access to breezes

[145] During oral submissions, counsel for the appellants accepted that if the issue of breezes was the only issue with the proposed development “we wouldn’t be here.”²⁰² But he maintained that, given it is an impact, it must go into the “melting pot” of cumulative matters that justified the overall refusal of the proposed development.

[146] The evidence of Mr King, which I accept, is that the proposed development will impact on the breezes of some of the residents of the adjoining properties in the following ways:²⁰³

- (a) the breezes from the eastern and western sectors that the residents presently enjoy would not be affected by the proposed development;

6.85, p 24) that the shadow impacts are consistent with that which would result from a compliant 9.5m high development – with lesser setbacks that could be achieved under the code provisions; and Mr Gaskells evidence at para 6.91, p 25 of exhibit 3.05.

²⁰¹ Ex. 4.01 at p. 27 para. 50(a) per Dr McGowan.

²⁰² T4-23, l 45 to 48-4-24 ll 1 to 7.

²⁰³ Ex.4.06. at p. 2 para. 5; see also Mr King (cross-examination) at Transcript 2-11: lines 14- 36.

- (b) The Highlands Street's properties will continue to enjoy the breezes from the northern sectors but their enjoyment of the breezes from the southern sectors may be interrupted, but would not be significant;
- (c) Similarly, the properties at 39 and 55 Lapraik Street will continue to enjoy the breezes from the southern sectors as this is the dominant direction. But their enjoyment of the breezes from the northern sectors may be interrupted (in particular, for the property at 55 Lapraik Street), but again that would not be significant.

[147] Mr King's evidence was that this impact would not be significant because:²⁰⁴

- (a) ambient breezes can flow around, between and over the proposed buildings; and
- (b) the proposed development is not at such scale that it would create a localised area of adverse impact in terms of cooling breezes at surrounding residential areas.

[148] It follows that while there will be some impact on breezes, I am satisfied that the proposed development will not have a significant or unreasonable and unacceptable impact on access to them.

Noise from the communal outdoor area, vehicles and plant and equipment

[149] Any noise impact must be considered in the context of an established residential environment of an inner suburb such as that in which the Land is located. As Mr King appositely observed, the planning documents do not require "inaudibility."²⁰⁵

[150] The evidence is that the communal outdoor area is subject to limited hours of operation, namely from 7am to 10pm.²⁰⁶ In a residential environment of an inner suburb, these operating hours are reasonable and an appropriate means of amenity control for a residential use.²⁰⁷

[151] As to noise of vehicles, the proposed development is a low traffic generation use. Access to the proposed development by service vehicles, including refuse collection is not expected to be frequent. I accept Mr King's evidence that the level of noise generated by service vehicles will not exceed the relevant noise criteria or requirements. But, in any event, noise generated by site vehicle activity is not out of character within a typical residential environment.²⁰⁸

[152] Finally, I accept Mr King's opinion (informed by the testing he has undertaken) that the relevant noise criteria can be readily met for plant and equipment such as

²⁰⁴ Ex. 4.06 at p. 2 para. 5 per Mr King.

²⁰⁵ Transcript 2-13/5

²⁰⁶ Ex. 6.68 at p.4.

²⁰⁷ Ex.4.03 at p 11. para. 26 per Mr King.

²⁰⁸ Ex.4.03 at pp. 10-12 para. 22, 29-36 per Mr King.

air-conditioning, mechanical fans for car parking, refuse areas and the pool filtration equipment.²⁰⁹

- [153] I am therefore satisfied that the proposed development will not cause an unacceptable noise impact.

Odours from the communal outdoor area, vehicles, car park and refuse area

- [154] The barbecue areas in the communal outdoor area are close to units within the proposed development. As Mr King relevantly observed, any odour generated by residential cooking on outdoor barbecues will be “somewhat self-regulating”.²¹⁰

- [155] I am also satisfied that the evidence established that refuse storage will not give rise to adverse odour because:²¹¹

- (a) the refuse storage room (where the bulk bins are to be located) is an enclosed area in the basement, which will be ventilated;²¹² and
- (b) the refuse collection area at ground level will only be used on bin collection days (i.e. twice per week). This area is roofed to avoid direct sun exposure and adverse odour generation.²¹³

- [156] It is accepted that the proposed development is a low traffic volume generation use. It follows that vehicle-related odour is unlikely to be significant. Leaving aside the five visitor carparks on ground floor, the car park is in the basement, which is fully enclosed, other than for the driveway entry/exit ramp. As noted above, the basement will be provided with a suitable exhaust ventilation system which must be designed in compliance with the Australian Standard and Building Code of Australia requirements.²¹⁴

- [157] I accept Mr King’s evidence that a suitable exhaust ventilation system for both the refuse storage room and the car park in the basement will be designed to meet the requisite requirements.²¹⁵

- [158] It follows that I am satisfied that the proposed development will not cause unacceptable odour impact.

Lighting from the communal outdoor area and vehicles

- [159] The uncontroverted evidence is that the external site lighting has been conditioned by the Council requiring compliance with the Australian Standard. It follows that

²⁰⁹ Ex.4.03 at p. 11. para. 28 per King; Ex. 4.06 at p. 3 para. 12 per Mr King.

²¹⁰ Ex. 4.03 at p. 13 para. 44-45 per Mr King.

²¹¹ Ex. 4.03 at pp. 11 and 13 para. 30, 41-43 per Mr King.

²¹² The design of the ventilation system is required to comply with the Australian Standard and Building Code of Australia requirements with discharge points located away from sensitive uses to protect the amenity of surrounding and on-site sensitive uses.

²¹³ Ex. 4.03 at pp. 11 and 13 para. 30, 41-43 per Mr King.

²¹⁴ Ex. 4.03 at pp. 14-15 para. 46-53 per Mr King.

²¹⁵ Ex. 4.03 at pp. 14-15 para. 51-53 per Mr King.

design of site external fixed lighting, which complies with the Australian Standard, will prevent nuisance to adjacent residents by minimising spill light and glare.²¹⁶

- [160] In response to specific concerns raised by the lay witnesses in respect of the adequacy of the 1.8 metre high boundary fence to provide adequate light/visual screening, Mr King has recommended installation of supplementary 1.8 metre high fencing around part of the BBQ areas.²¹⁷ The supplementary fencing will provide the appropriate light screening, as well as visual and acoustic screening. This is a matter for conditions.²¹⁸
- [161] Mr King also considered the impact of headlights of cars entering and exiting the proposed development, in particular residential properties to the south. His view, which I accept, is that there is unlikely to be any unacceptable light impact which may be caused by cars entering and exiting the proposed development.²¹⁹
- [162] As Mr King also relevantly observed in relation to lighting, the planning documents do not require that no lighting can be seen.²²⁰
- [163] I am therefore satisfied that the proposed development will not cause an unacceptable lighting impact.

Noise and emissions from the transformer

- [164] Mrs Ambroselli raised concerns about potential impacts the transformer for the proposed development may have on the private enjoyment of her property, given its close proximity to her deck.²²¹ The transformer is located approximately 3m from the southern boundary of the Land. It is some 20m away from the nearest dwelling to the south and 30m away from the dwelling to the east.²²²
- [165] In Mr King's opinion, modern transformers generate very little noise. Emissions such as electric and magnetic fields associated with the transformer are not of concern given how far the transformer is located from the adjoining dwellings. Notably, a personal computer has a greater output of magnetic field strength than a distribution transformer.²²³ But to alleviate any concerns, as Mr King well observed, any future transformer can be selected, located and shielded as required and in accordance with common practice.²²⁴

²¹⁶ Ex. 4.03 at p. 16 para. 55-57 per Mr King.

²¹⁷ Ex. 4.03 at p. 25 Figure 3 per Mr King.

²¹⁸ Ex.4.03 at pp. 17-18 para. 61-69 per Mr King.

²¹⁹ Ex.4.03 at pp. 18-19 para. 70-74 per King; In reaching this view I note that Mr King considered the configuration of the vehicle access arrangement, the design of car headlights, the provision of landscaping and fencing to the boundaries, and the elevation or separation of the adjacent residential properties.

²²⁰ T2-13/20

²²¹ Ex.5.01 at p. 4 para. 26 – Mrs Ambroselli's Statement.

²²² Ex.4.06 at p. 3 para. 11 - King's Supplementary Statement.

²²³ Ex.4.06 at p. 3 para. 10-11- King's Supplementary Statement.

²²⁴ Ex.4.06 at p. 2 para. 9 - King's Supplementary Statement.

- [166] I am therefore satisfied there will not be any unacceptable noise or emissions impact arising from the transformer.

Conclusions Amenity

- [167] The overall issue of amenity is intertwined with the concept of reasonable expectation. Amenity cannot be considered in a vacuum. It is informed by the Planning Scheme and its intent for development of the area.²²⁵
- [168] As the analysis of his evidence above reveals, Mr King confirmed the appropriateness of the development proposal in terms of amenity aspects of noise, light, air quality and odour, and breezes.
- [169] Overall, I accept Mr King's evidence that the proposed development does not impose any particular constraints that are unusual for a development of a residential use in a residential area; and the amenity of adjoining residents and the people living in the proposed development is also appropriately protected.²²⁶

OO4(j) of the LMDR Code

- [170] Overall outcome 4(j) of the LMDR Zone Code provides as follows:²²⁷

“Development reflects and supports the level of comfort, quiet, privacy and safety (including impacts of glare, odour, light, noise, traffic, parking, servicing and hours of operation) reasonably expected within a low-medium density, but predominantly permanent residential environment.”

- [171] On the analysis above, it follows that I am satisfied that OO4(j) of the LMDR Zone Code has been met.

OO2(p)-(q) of the MD Code

- [172] Overall Outcomes 2(p)-(q) of the MD Code provides as follows:²²⁸

(p) Development provides parking which is integrated into the site and building and does not negatively impact on the site or adjoining sites or the quality and amenity of the streetscape.

(q) Development interfaces with adjoining residential uses and is managed to mitigate amenity impacts including protecting visual privacy through appropriate separation of buildings and screening.

- [173] Traffic matters are no longer in issue.²²⁹ It is therefore unnecessary to consider OO 2(p).

²²⁵ *Wattlevilla Pty Ltd v Western Down Regional Council* [2014] QPELR 21 at [96] per Robertson DCJ.

²²⁶ Transcript 2-8: line 15.

²²⁷ Ex.7.00 at p. 75.

²²⁸ Ex.7.00 at p. 108.

²²⁹ Ex. 1.07.

- [174] I am otherwise satisfied that OO 2(q) has been met because, as the above analysis reveals, any amenity impacts are appropriately mitigated, and are not beyond what should be reasonably expected on the Land.

Issue Four: Overdevelopment

- [175] Mr Buckley described the concept of “overdevelopment” as follows:²³⁰

“The notion of overdevelopment requires the balancing of all the design sitting and locational inputs to form a view as to whether the collective impact or outcome of those inputs creates a development reasonably anticipated on any given site. Overdevelopment conveys that any proposal, by the sum of its parts or by a combination of some parts, represents an outcome beyond such reasonable expectations.”

- [176] This observation does not expressly reference the relevant planning regime but is otherwise generally consistent with the definition of “overdevelopment” proffered by the co-respondents as being a development which “pushes the envelope” resulting in impacts beyond those reasonably expected or anticipated by the planning documents.²³¹
- [177] The concept of overdevelopment is not found in any of the relevant legislation or planning schemes but has been identified to mean “development to excess” and described as “a convenient way of condemning certain development proposals.”²³² As a matter of common sense and, as appears to be accepted in the authorities, the yardstick must always be the level of development that the applicable planning scheme invites.
- [178] In the present case, consideration has been confined to whether the proposed development represents an overdevelopment of the Land when assessed against:²³³
- (a) the LMDR Zone Code, OO 5(a), (d) and (e); and
 - (b) the MD Code, OO 2(i), (l) and (n) and PO5, PO8 and PO27²³⁴.
- [179] Many of these provisions have already been discussed under their respective headings above.

²³⁰ Ex. 3.05 at p. 17 para. 6.27; Both Mr Overden and Mr Gaskell agreed with this general statement. Mr Overden at Transcript 3-19: lines 10-25 and Mr Gaskell at Transcript 3-45: lines 15-28.

²³¹ Written submissions on behalf of the co-respondents at para. 55.

²³² See the discussion of various authorities by Robin QC DCJ *Abacus Funds Management v Sunshine Coast Regional Council* [2012] QPEC 46 at 43 to 45. Particularly at 44 where he referred to the submitter appellants in *des Forges v Brisbane City Council* [2001] QPEC 061 complaining of “overdevelopment” and nothing Brabazon QC DCJ’s agreement with the appellant’s planner that the proposal “pushes the envelope too far”; and also Brabazon DCJ’s agreement with the objectors in *Herbert v Brisbane City Council* [2004] QPEC 017 at [2] and [114] that a proposal was an “overdevelopment”: which “simply tries to put too large a building into a relatively small space”.

²³³ Ex. 1.06 at para. 1(a) and (b).

²³⁴ As stated earlier in paragraph 43 of these Reasons, reliance on this provision as a basis for non-refusal is no longer pressed.

[180] Before considering the assessment benchmarks put in issue by the parties, it is both instructive and relevant²³⁵ to observe that the proposed development:

- (a) achieves a high level of compliance with acceptable outcomes in respect of site cover, side and front boundary setbacks, building height transitions, separation to neighbouring buildings²³⁶ and deep planting and communal open space;²³⁷ and
- (a) complies with the performance outcomes of the MD Code set out in paragraph 42 above.

Overall outcomes 5(a), (d) and (e) of the LMDR Zone Code

[181] The relevant sections of the LMDR Zone Code are as follows:

6.2.1.2 Low-medium density residential zone code

- (5) Development form overall outcomes are:
 - (a) Development for a residential building occurs on appropriately sized and configured lots and is of a height, bulk, scale and form which is tailored to its specific location and to the characteristics of the site within the Low-medium density residential zone and the relevant zone precinct and reinforces a distinctive subtropical character of low to low-medium rise buildings with a landscaped streetscape and recreation areas.
 - ...
 - (d) Development supports a subtropical character by ensuring that:
 - (i) the building form, spacing, orientation and design ensure dwellings are well designed and sensitive to the city's climate;
 - (ii) residents on the site, as well as residents of existing or future dwellings on adjoining sites, have sufficient privacy and good access to daylight, sunlight and breezes to enable the intended use of indoor and outdoor spaces.
 - (e) Development provides quality private and public open spaces and landscaping, including deep planting that softens the scale of the dwellings, provides spaces for outdoor activity areas and encourages outdoor living.

²³⁵ In cross examination Mr Buckley acknowledged that many of these factors were indicative of overdevelopment; Transcript 3-70: line 18 and Transcripts 3-18 and 3-72: lines 6-37.

²³⁶ Ex. 3.05 at p.19 para. 6.40.

²³⁷ Dr McGowan (cross examination) at Transcript 2-50: lines 5-40; see also Written submissions on behalf of the co-respondents at para. 60 (with reference to the relevant planning scheme extracts in Ex. 7.00).

The Multiple Dwelling Code

[182] The relevant sections of the MD Code are as follows:

9.3.14 Multiple dwelling code

9.3.14.2 Purpose

(2) The purpose of the code will be achieved through the following overall outcomes:

- (i) development provides setbacks and separation of buildings that contribute to the amenity of residents within and adjoining the site and to Brisbane’s high-quality subtropical streetscapes and public spaces.
- (l) Development ensures that the proportion of built and natural features, including buildings, design features, services and infrastructure, on-site open spaces and landscaping, provide:
 - (i) an attractive streetscape interface and reduction in the dominance of built form at a street level that contributes to Brisbane's character and identity, high-quality subtropical streetscapes and public space network;
 - (ii) a high level of amenity for occupants and adjoining residents including access to open and landscaped spaces, natural light, sunlight and breeze to support outdoor subtropical living.
- (n) Development provides open space consistent with the following:
 - (i) communal open space and covered outdoor private open spaces provided for each multiple dwelling capitalise on Brisbane’s subtropical climate, maximise outdoor living opportunities and enhance amenity for residents;
 - (ii) large-scale multiple dwelling development provides useable high-quality communal open space for residents that is accessible and attractive;
 - (iii) small-scale multiple dwellings provide increased areas for private open space for each dwelling as a substitute for communal open space.

Analysis of expert evidence

[183] In assessing the proposed development as an overdevelopment, Mr Buckley sought to emphasise the importance of observing the cumulative impact of “certain design and sitting contributors to scale form and height” in a development setting. In reaching this view, Mr Buckley focused almost entirely upon non-compliance with “quantitative” acceptable outcomes, with little focus on the corresponding

performance outcomes. For example, his evidence that the design “is aligned with the east-west dimension of the site and it features a building form which overall is 110 metres long with only minor variations in alignment over such a very long dimension”²³⁸ was premised on the designs (accepted) non-compliance with AO15.1 in one dimension. Further, in cross examination, Mr Buckley accepted that he thought that some of the quantitative measures were included in the performance outcomes but when taken to the planning scheme he accepted that they were in fact acceptable outcomes.²³⁹

- [184] Mr Buckley’s lack of consideration of the corresponding performance outcomes (by which compliance can be demonstrated in the alternative) is wrong as a matter of principle.²⁴⁰ It is instructive too that a number of other expert witnesses were cross examined about non-compliance with acceptable outcomes with little focus on the corresponding performance outcomes.²⁴¹
- [185] Overall, I found Mr Buckley’s general theory that the proposed development is an overdevelopment difficult to reconcile when considered in the context of the corresponding performance outcomes. For example: his criticisms of the design as (amongst other things): “bulky”; “not sitting lightly” on the Land; one that “necessitates substantial undercroft; with nothing in common with the scale and siting of the adjoining development”; and “with little usable communal open space”, are not directly referable to the Planning Scheme – or the facts; and his view that the “apparent” compliance with “footprint and landscaping” (including deep planting) does not fully reflect the impact of the proposed development on the Land and, in its setting, is not underpinned by any relevant considerations.
- [186] Overall, I preferred the approach and consequential evidence of Dr McGowan, Mr Ovenden and Mr Gaskell as they all focused more on the relevant assessment benchmarks as identified by the parties.

Specific findings re identified assessment Benchmarks

- [187] I am satisfied that the proposed development does not represent an overdevelopment when assessed against the overall outcomes of the LMDR Zone Code identified above (005(a), 5(d) and 5(e)) and 002(i) of the MD Code, for the following four reasons:
- (a) First: the design of the proposed development has been tailored in response to the site constraints and characteristics of the Land.²⁴² As identified earlier in 135(a) of these Reasons, the northern portion of the proposed development

²³⁸ Ex. 3.05 at p. 17 para. 6.32.

²³⁹ Transcript 3-62: lines 14-25.

²⁴⁰ See the discussion of the principles with reference to the relevant authorities and to paragraphs [34] to [39] of these Reasons.

²⁴¹ Dr McGowan at Transcript 2-41: line 25, Transcript 2-42: 40, Transcript 2-43: line 35, Transcript 3-45: lines 20-30, Transcript 3-49: lines 30-35; Mr Ovenden at Transcript 3-25: line 45, Transcript 3-26: line 35, Transcript 3-31: line 25, Transcript 3-32: lines 30-35; MR Gaskell Transcript 3-48: lines 25-45, Transcript 3-54: line 5, Transcript 3-55: line 40.

²⁴² Ex. 4.01 at p. 20 para. 40(c) per McGowan; See also evidence of Mr Ovenden at Ex. 3.05 pp. 13-15 paras. 6.8-6.10; and evidence of Mr Gaskell at Ex. 3.05 pp. 15-17 paras. 6.14-6.25.

presents as two storeys (with less than 9.5 metres in height). I accept the evidence of Dr McGowan that this presentation “sensitively” interfaces with the residential buildings along Highland Street;²⁴³

- (b) Secondly: the southern portion of the proposed development has a building height which exceeds the two storey and 9.5 metre height limit, incorporating an undercroft. The exceedance of the two storey and 9.5 metre height limit is, as a matter of common sense, a product of the topography of the Land. It is a feature in other developments in the area. I am satisfied that the topography of the Land necessitates such a building design response;²⁴⁴
- (c) Thirdly: The only setback that does not comply with the quantitative measure contained in acceptable outcomes of the MD Code is the rear set back to the west. I accept the evidence of Mr Ovenden and Mr Gaskell that no material consequence follows from this;
- (d) Fourthly, the proposed buildings are appropriately and sufficiently separated from neighbouring buildings;
- (e) Fifthly, the proposed development will be significantly landscaped with ample room for deep planting, particularly along the southern section.²⁴⁵ This will screen the undercroft area and soften the appearance of the bulk of the proposed buildings; and
- (f) Sixthly, whilst the appellants do not appear to contend that the development lacks the requisite subtropical character, I am satisfied that by virtue of its siting, orientation and separation, and its proposed landscaping that the proposed development represents an appropriate subtropical design outcome.²⁴⁶

[188] The objective of OO2(l) of the MD Code is to ensure an appropriate “proportion of built form and open space and landscaping”. It is relevant that the development proposal more than adequately complies with the acceptable outcomes in relation to site cover and landscaping; and that, except for the consequential rear setback, setbacks are otherwise compliant.

[189] The appellants point to the need for appropriate proportionality to provide a high level of amenity for occupants and adjoining residents. But I accept the co-respondents’ submission that the reliance upon “high amenity” overlooks:

- (a) that the proposed development has an appropriate mix of built form and open space and landscaping;
- (b) the high amenity referred to expressly references access to open and landscaped spaces, natural light, sunlight and breeze. As discussed under those heading above, I am satisfied that the proposed development does not adversely affect those matters; and

²⁴³ Ex. 4.01 at pp. 20-21 para. 40(d) per McGowan.

²⁴⁴ Ex.4.01 pp. 20-21 para. 40(d) per McGowan. See evidence of Mr Ovenden at Ex. 3.05 pp. 13-15 para. 6.8-6.10; See evidence of Mr Gaskell at Ex. 3.05 pp. 15-17 paras. 6.14-6.25.

²⁴⁵ Co-respondent’s oral submissions Transcript 4-40: lines 37-46.

²⁴⁶ Ex. 4.01 at p. 22 para. 43(a) per McGowan.

- (c) any consideration of amenity must be in the context of realistic expectations as dictated by the Planning Scheme in the context of the Land.

[190] I am therefore satisfied that the proposed development complies with OO2(1) of the MD Code.

[191] I am also satisfied that the proposed development complies with OO2(n) of the MD Code as it provides an appropriate amount of communal open space and private open space for each unit.²⁴⁷

[192] The proposed developments compliance with PO5 and PO8 are discussed at respectively at paragraphs of 54 to 56 and 57 to 65 of these Reasons respectively.

[193] It follows from the above analysis that I am satisfied that the development proposal complies with each of the assessment benchmarks identified. I therefore find that the proposed development does not represent an overdevelopment of the Land.

Relevant Matters

[194] In the exercise of this Court's broad discretion, various relevant matters have been identified by the appellants as representing outcomes that are in the public interest and which favour approval. It is relevant at this point to observe that the appellants do not raise any adverse matters in the public interest, other than the matters raised in terms of the assessment benchmarks, which, as the above analysis reveals, I have found to have been satisfied in this case.

[195] It follows that the three questions identified for determination at paragraph 48 of these Reasons can be addressed briefly.

Question one: Is the land an appropriate location for multiple dwellings?

[196] The town planners agree that the Land is an appropriate site for multiple dwellings.²⁴⁸ The appellants submitted that this is the starting not the finishing point. I accept this submission. But it is a good start.

[197] The answer to question one is therefore "yes".

Question two: Is the proposed development an appropriate design outcome for the Land?

[198] The appellants submitted, for the reasons argued under the benchmark assessment analysis pertaining to the design of development (for example its scale and form etc), that the Court would not be satisfied that the relevant matters are made out, at least to such an extent as to justify approval in the face of the identified planning scheme non-compliances.

[199] I reject this submission. As these Reasons conclude, I am satisfied that the proposed development meets the relevant assessment benchmark identified under the Planning Scheme and is an appropriate design outcome for the Land.

²⁴⁷ Ex. 4.01 p. 23 para. 43(d) per McGowan.

²⁴⁸ Ex. 3.05 p. 13 para. 6.2 and p. 26 para. 7.2.

[200] The answer to question two is therefore “yes”.

Question three: Is there an economic need for the proposed development?

[201] Need is an example of a relevant matter given by s.45(5) (b) of the Planning Act.

[202] The uncontested evidence of Mr Duane is that there is a planning, community and economic need for the proposed development.²⁴⁹ Mr Duane also emphasised that the proposal:

- (a) aligns with the planning goals expressed within the South east Queensland Regional Plan 2017 and the Planning Scheme (including urban consolidation²⁵⁰);
- (b) responds to its local planning context as follows:²⁵¹

“However, in the context in consideration of issues relating to need, a note reflecting the planning context, this area is a very popular area, particularly with families and workers in the CBD and surrounding areas, close to public transport and a range of facilities. It is an attractive location where vacant or under-utilised land is being developed for a range of different types of accommodation and residential densities resulting in increasing population density (consistent with the provisions of the SEQRP 2017). For those reasons, there will continue to be economic pressure for development in the locality to increase population density.”

- (c) is proximate to major infrastructure both in and around the Land and within the area more generally including its proximity to the CBD, Fortitude Valley, industrial areas and other employment lands at the airport.²⁵² He also relevantly observed:²⁵³

“The above indicates there is a substantial amount of infrastructure which the subject development would make greater economic use of due to increased population density and greater economic efficiency. The proposed development would involve efficient use of existing and proposed infrastructure throughout the surrounding region to the benefit of the community.”

[203] The answer to question three is therefore “yes”.

Overall Discretion

[204] I am required to make a balanced decision in the public interest.

[205] Overall, I am satisfied that:

²⁴⁹ Ex. 4.02.

²⁵⁰ Ex. 4.02 at pp 6-10 paras. 2.2-2.18.

²⁵¹ Ex. 4.02 p. 14, para. 2.27.

²⁵² Ex. 4.02, pp 38-39 paras. 6.1-6.4.

²⁵³ Ex. 4.02 p. 39 para. 6.4.

- (a) the proposed development is for an appropriate use which is encouraged by the City Plan;
- (b) the proposed development complies with the City Plan;
- (c) any non-compliance with the City Plan will not result in any adverse town planning consequence; and
- (d) the absence of unacceptable amenity impacts on the surrounding residents as demonstrated and the improvements of the long term stability of the slopes resulting from the proposed development are relevant matters for the purposes of s 45(5)(b) of the *Planning Act* which further support approval of the proposed development.

Conclusion

[206] In response to the three overarching issues identified at the outset,²⁵⁴ I find that:

- (a) the proposed development complies with the relevant assessment benchmarks, and does not represent an over-development of the Land because of its bulk, scale, form and intensity;
- (b) there are relevant matters that support approval of the proposed development; and
- (c) in the exercise of the planning discretion, the development application for the proposed development should be approved.

Orders

[207] I therefore order and direct that:

1. Appeals numbered 4695 of 2019, 103 of 2020 and 148 of 2020 are dismissed.
2. The Council's decision to approve the proposed development is confirmed.
3. I will hear from the parties as to the need for any consequential orders, including with respect to conditions.²⁵⁵ The appeal will be mentioned at 9.30am on Thursday 19 August 2021 for that purpose.

²⁵⁴ Paragraph 8 of these Reasons.

²⁵⁵ At the outset of the hearing of the appeals, counsel for the appellants advised that traffic and geotechnical matters were no longer pressed as reasons for a refusal but that the appellants reserved their rights to be make submissions with respect to any necessary conditions.