

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *DVB Projects Pty Ltd v Council of the City of Gold Coast*
[2022] QPEC 40

PARTIES: **DVB PROJECTS PTY LTD (ACN 169 015 712)**
(Appellant)

v

COUNCIL OF THE CITY OF GOLD COAST
(Respondent)

FILE NO/S: 1646 of 2021

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 14 October 2022

DELIVERED AT: Brisbane

HEARING DATE: 22 (site inspection), 23 to 25 November 2021 and further evidence received on 26 November 2021

JUDGE: Kefford DCJ

ORDER: **The appeal is listed for review at 9 am on 2 December 2022.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where the Council refused a code assessable development application seeking a development permit for a material change of use for a 26-storey multiple dwelling in the High density residential zone – whether the proposed development would unacceptably impact on the adjoining residential amenity – whether the built form is sufficiently setback from the side and rear boundaries to protect the amenity of the adjoining uses – whether the proposed development incorporates varying site cover sufficient to reduce the building’s dominance and provide areas for landscaping – whether the proposed development has a clearly defined tower and podium form – whether the proposed development appropriately interfaces with the street – whether the proposed development has a slender bulk form – whether the proposed development promotes an open, attractive and distinct skyline – whether the proposed development contributes to the character of the streetscape and the character and amenity of the neighbourhood – whether the

	proposed development should be approved
LEGISLATION:	<i>Planning Act 2016</i> (Qld), ss 43, 45, 59, 60 <i>Planning and Environment Court Act 2016</i> (Qld), ss 43, 45, 46, 47 <i>Planning Regulation 2017</i> (Qld), s 27
CASES:	<i>Brisbane City Council v Klinkert</i> [2019] QCA 40; (2019) 236 LGERA 88, cited <i>Heath v Brisbane City Council</i> [2008] QPEC 33; [2008] QPELR 566, approved <i>Klinkert v Brisbane City Council</i> [2018] QPEC 30; [2018] QPELR 941, approved <i>Parmac Investments Pty Ltd v Brisbane City Council & Ors</i> [2018] QPEC 32; [2018] QPELR 1026, approved <i>Smout v Brisbane City Council</i> [2019] QPEC 10; [2019] QPELR 684, approved <i>Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors</i> [2021] QCA 95, [2022] QPELR 309, applied <i>Wingate Properties Pty Ltd v Brisbane City Council & Ors</i> [2001] QPELR 272, approved
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Introduction

- [1] On the corner of Broadbeach Boulevard, First Avenue and Old Burleigh Road at Broadbeach is a vacant parcel of land. It is formally described as Lot 56 on SP 310444 (“*the subject land*”). It has a street address of 2 First Avenue and 88 Old Burleigh Road, Broadbeach. It is two blocks to the east of the Gold Coast Highway and the light rail stations and track.
- [2] The subject land has an area of 1,186 square metres. It has a generally rectangular shape, with its long sides facing First Avenue to the north and a multiple dwelling development known as Bedarra on the adjoining lot to the south. The northern frontage is approximately 50 metres, while the eastern and western frontages are 15 and 21 metres respectively. Opposite the subject land, on the other side of Broadbeach Boulevard, is a nature strip known as Sir John (Jack) Egerton Park, and then the Broadbeach Foreshore and the beach.
- [3] The subject land sits in Broadbeach, a suburb of the Gold Coast. It is located in the High density residential zone in the Gold Coast City Plan 2016 (version 8) (“*City Plan*”). The Building height overlay map in City Plan includes the subject land in an unlimited height area.
- [4] Broadbeach contains a mix of high-rise, medium-rise, and low-rise multiple dwelling buildings. The taller buildings are generally north of First Avenue (in the eastern part of Broadbeach).
- [5] Two of the buildings close to the subject land have a height of 25 storeys. They each have a frontage to First Avenue. There is also an 11-storey building on First Avenue and a 15-storey building on Second Avenue. The area also contains buildings up to 48 storeys in height.
- [6] On 16 February 2021, the Appellant, DVB Projects Pty Ltd, made a development application seeking a development permit for a material change of use for a multiple dwelling building containing 35 apartments in a 26-storey-high building. On 16

June 2021, the Council of the City of Gold Coast (“*the Council*”) notified its decision to refuse the development application. On 21 June 2021, DVB Projects Pty Ltd commenced this appeal against the Council’s decision.

What is the relevant framework for the decision?

- [7] The statutory framework in the *Planning and Environment Court Act 2016* (Qld) and the *Planning Act 2016* (Qld) applies.
- [8] The appeal is a hearing anew.¹ It is for DVB Projects Pty Ltd to establish that the appeal should be allowed.²
- [9] The development application required code assessment.³ As such, the Court’s assessment of the development application must be carried out only:
- (a) against the applicable assessment benchmarks in a categorising instrument; and
 - (b) having regard to any matters prescribed by regulation.⁴
- [10] The only applicable assessment benchmarks that the parties have put in issue in this case are in City Plan, which is a categorising instrument.⁵ The assessment must be carried out against the instrument in effect when the development application was properly made.⁶ In this instance, version 8 of City Plan was in effect at the relevant time.
- [11] Matters prescribed by regulation that the parties rely on in this appeal include the common material lodged in respect of the development application⁷ and any development approval for, and any lawful use of, the premises or adjacent premises.⁸ Relevantly, there is an existing development permit dated 18 March 2019 that has been granted for the eastern part of the subject land. It approves a material change of use for a nine-storey multiple dwelling with a ground floor site cover of 75.9 per cent and an upper-level site cover of 55.9 per cent.⁹
- [12] In deciding the appeal, the Court must confirm the decision appealed against, change the decision appealed against, or set it aside and either make a decision replacing it or return the matter to the Council with directions that the Court considers appropriate.¹⁰ The decision must be based on the assessment.¹¹ The Court must approve the application to the extent it complies with all the assessment benchmarks.¹² To the extent that the proposed development does not comply with all or some of the assessment benchmarks, the Court may decide to refuse the application only if compliance cannot be achieved by the imposition of

¹ *Planning and Environment Court Act 2016* (Qld) s 43.

² *Planning and Environment Court Act 2016* s 45.

³ City Plan Table 5.3.3: MCU – High density residential zone.

⁴ *Planning Act 2016* (Qld) s 45(3).

⁵ *Planning Act 2016* s 43(3)(a).

⁶ *Planning and Environment Court Act 2016* s 46, *Planning Act 2016* s 45(7).

⁷ *Planning Regulation 2017* (Qld) s 27(1)(g).

⁸ *Planning Regulation 2017* s 27(1)(f).

⁹ Exhibit 19.01.

¹⁰ *Planning and Environment Court Act 2016* s 47.

¹¹ *Planning Act 2016* s 59(3).

¹² *Planning Act 2016* s 60(2)(a).

development conditions.¹³ Even if the development does not comply with some of the assessment benchmarks, the Court may decide to approve the application.¹⁴

- [13] The question of whether departure from an assessment benchmark warrants refusal is a separate and distinct question. I respectfully agree with the observations of His Honour Judge Williamson QC (as His Honour then was) in *Klinkert v Brisbane City Council*.¹⁵ His Honour observed that although the discretion is expressed in permissive and broad terms, it is subject to an important constraint, namely the constraint expressed in s 59(3) of the *Planning Act 2016* requiring the decision to be based on the assessment carried out only against the assessment benchmarks and having regard to prescribed matters. I also adopt His Honour's observations in *Smout v Brisbane City Council*¹⁶ that given the size and complexity of modern performance-based planning schemes, not every non-compliance will warrant refusal.¹⁷

What are the issues to be determined?

- [14] In accordance with the usual practice of the Court,¹⁸ at the start of the hearing an agreed list of issues was tendered that identified the focus of the dispute between the parties. During closing submissions, Mr Wylie, Counsel for the Council, conceded that it was not necessary to determine the question of compliance with several of the assessment benchmarks that were nominated at the start of the hearing.¹⁹ The Council says that a determination of compliance or non-compliance with those assessment benchmarks that it no longer pursues would not, on its own, inform whether the development should be approved or refused.²⁰ Mr Wylie arranged for the concessions to be reflected in the Second Further Amended Agreed List of Issues.²¹ That document identifies only those issues that the Council says genuinely require adjudication. For that, I am grateful. The approach adopted by the Council in this case is to be commended.
- [15] The issues that remain to be determined relate only to the built form of the proposed development. They can be summarised as follows:
1. Is the amenity impact of the proposed development acceptable?
 2. Is the design of the proposed development appropriate?
 3. In the event of non-compliance, should the development application nevertheless be approved in the exercise of the planning discretion?

¹³ *Planning Act 2016* s 60(2)(d).

¹⁴ *Planning Act 2016* s 60(2)(b).

¹⁵ [2018] QPEC 30; [2018] QPELR 941, 957 [102]. Leave to appeal was granted by the Court of Appeal but the appeal was dismissed in *Brisbane City Council v Klinkert* [2019] QCA 40; (2019) 236 LGERA 88.

¹⁶ [2019] QPEC 10; [2019] QPELR 684, 694 [54].

¹⁷ This was conceded by the Council: Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 25 November 2021) 26-7.

¹⁸ Practice direction 2 of 2020 [25].

¹⁹ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 25 November 2021) 4.

²⁰ Amended Outline of Argument for the Council p 3 [11].

²¹ Exhibit 3.11.

[16] The determination of the first two issues calls for an assessment of the proposed development against applicable assessment benchmarks. To assist me in that regard, I had the benefit of:

- (a) the plans of the proposed development,²² which depict, amongst other things, design details of the proposed building, including the varying setback and extent of site cover of the floorplates for the various levels of the building, and building elevations and sections;
- (b) a schematic landscape design;²³
- (c) a statement of evidence from Mr Zac Petersen containing photographs and photomontages and an explanation of the process adopted in the preparation of the photomontages;²⁴
- (d) an aerial photograph of the local area annotated with details of building heights (in storeys) and building widths;²⁵
- (e) photographs of other buildings in the local area depicting their form and their extent of separation from adjoining buildings;²⁶
- (f) expert evidence with respect to architecture given by Mr Curtis and Mr Richards, the architects retained by DVB Projects Pty Ltd and the Council respectively;²⁷
- (g) expert evidence with respect to visual amenity impacts given by Mr Curtis and Dr McGowan, the visual amenity experts retained by DVB Projects Pty Ltd and the Council respectively;²⁸ and
- (h) expert evidence with respect to town planning given by Mr Buckley and Ms Morrissy, the town planners retained by DVB Projects Pty Ltd and the Council respectively.²⁹

[17] To determine each of the issues in dispute, it is necessary to understand the design of the proposed development and how its built form parameters and design informs its appearance. It assists to consider those matters before turning to the assessment against the assessment benchmarks.

What is the design and appearance of the proposed development?

[18] The proposed development is a 26-storey apartment development containing a total of 35 units. Car parking and services will be accommodated on three basement levels that will be accessed via a driveway from Old Burleigh Road. The driveway extends along the subject land's western boundary adjacent to three visitor car parks.³⁰

²² These form part of the common material.

²³ Exhibit 4.09.

²⁴ Exhibit 6.01.

²⁵ Exhibit 21.01.

²⁶ Exhibit 22.01.

²⁷ Exhibits 10.01 and 17.01 and oral testimony by the experts.

²⁸ Exhibits 7.01 and 16.01 and oral testimony by the experts.

²⁹ Exhibits 11.01, 13.01 and 15.01 and oral testimony by the experts.

³⁰ Exhibit 10.01 p 16 [28].

- [19] The ground storey (level 01) includes a residential lobby with the main pedestrian entrance from First Avenue and a secondary entrance from Broadbeach Boulevard. It also includes two offices and an additional space to be used as an office or meeting space, a deliveries room, and a surf craft workshop.
- [20] The first floor (level 02) will provide a communal recreation area that includes a sun deck, various pool and spa facilities, a sauna or steam room, and a gym or yoga space. The level is generally open to the east, north and west.
- [21] Levels 3 to 15 comprise two units per floor, with each unit having three bedrooms. Levels 16 to 23 have one unit per floor, with each unit having four bedrooms. Levels 23, 24 and 25 comprise a three-storey penthouse with five-bedrooms, extensive open-plan living, kitchen and dining areas. The top level is dedicated to a private recreation inclusive of a sun lounge along the northern elevation, hot and cold pools, gym or sauna, and kitchen and bar amenities.
- [22] Mr Curtis describes the design and appearance of the proposed development. He says the building comprises an extruded tower form from levels 3 to 26, with a generally consistent floor plate sitting on top of a two-storey podium.³¹ Mr Richards agrees with this description.³²
- [23] Consistent with the size and shape of the subject land, the proposed development will have its longest facades orientated to face north and south. The principal north facing façade optimises solar access to the internal spaces in the building by including extensive fenestration (such as windows) and balconies. These inform the appearance of the building.³³
- [24] Mr Curtis says the appearance is also characterised by the exposed projecting edges of the floor plates. He explains that the floor plate edges layer the appearance of the façade to create a stack of human scale floors that fragment the overall bulk of the building and the appearance of the built form.³⁴
- [25] The composition of the façade is symmetrical. It locates deep recessed balconies at each end of the façade with a deep central recess that accommodates a garden space between the adjacent apartment units. Mr Curtis opines that the depth of these elements, when viewed together as vertical stacks, modulate the width of the façade, and reinforce the tower's vertical proportion to balance the layered horizontal appearance provided by the projecting floor plate edges.³⁵
- [26] Mr Curtis also says that the depth of the corner balconies provides a feathered edge to the built form, which is complemented by the depth of the garden to visually erode the bulk of the built form. This visual erosion is complemented by the transparency of the extensive fenestration that, in Mr Curtis' opinion, further contributes to the effective mitigation of the built form's visual bulk.³⁶

31 Exhibit 10.01 p 19 [36].

32 Exhibit 10.01 p 32 [76].

33 Exhibit 10.01 p 19 [37].

34 Exhibit 10.01 p 19 [38].

35 Exhibit 10.01 pp 19-20 [39].

36 Exhibit 10.01 p 20 [40].

- [27] The south facing façade includes the external wall of the tower's central service core and the bedroom and bathroom spaces that flank it. The southern façade has a more solid appearance than the other facades. There is fenestration at the ends of the façade and within a narrow strip at the centre of the façade that provides access to views from the lift lobby. The fenestration is otherwise orientated at 90-degrees to the façade's south facing walls within the stepped breaks in the façade's horizontal alignment.³⁷ Mr Curtis explains that each of the southern wall panels has fluting, which he says contributes to its articulation.³⁸
- [28] Mr Curtis opines that the fenestration located at the ends of the south façade, together with the recessed corner balconies, provide a similar feathering to the built form as that provided by the balconies to the northern façade. He says the fenestration is complemented by the projecting horizontal floor plate edges. These elements frame the central stepped area of the southern façade. In Mr Curtis' opinion, the stepped alignment and fluted wall panels modulate the width of the southern façade and reinforce its vertical proportion. Mr Curtis says that the juxtaposition of the vertical central elements with the horizontal end or corner elements balances the façade's visual composition to mitigate its visual bulk and provide an attractive secondary façade appearance.³⁹
- [29] The widths of the northern and southern facades are contrasted by the extreme slenderness of the eastern and western facades, which share a similar appearance. The eastern and western facades are characterised by central fenestration flanked by corner balconies. Mr Curtis says that, when viewed together as vertical stacks, these elements modulate the narrow width of the façade and further accentuate the tower's extreme slenderness.⁴⁰
- [30] The tower is capped by the projecting roof top elements. Mr Curtis opines that they provide a distinctive skyline profile.⁴¹
- [31] Underneath the tower, on levels 01 and 02, is the podium. The podium is clearly differentiated from the tower by the projecting roof line of its canopy and by the open sides of the second storey that address all the adjoining street frontages. Mr Curtis explains that the projecting roof over the podium is disengaged from the floor plate above, giving it the appearance of floating and extending towards the subject land's three frontages.⁴²
- [32] Mr Curtis opines that the visual differentiation of the podium provides a transition in height from the tower to the pedestrian scale of the street and a visual reference to the low-rise development in the local area. He says these attributes contribute to creating a cohesive streetscape and assist to mitigate the visual impact created by the contrasting differences in building height that otherwise characterise the local area.⁴³

³⁷ Exhibit 10.01 p 20 [41].

³⁸ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 48.

³⁹ Exhibit 10.01 p 20 [42].

⁴⁰ Exhibit 10.01 p 21 [43].

⁴¹ Exhibit 10.01 p 21 [43].

⁴² Exhibit 10.01 p 22 [45].

⁴³ Exhibit 10.01 p 22 [46].

- [33] Mr Curtis says that unlike the excessive bulk that often characterises typical podium forms, the proposed development has a hollowed-out appearance. This allows for views into the built form where human scale elements animate its appearance to provide complexity and visual interest.⁴⁴ During his oral evidence, Mr Curtis further explained that the open recreational space element on level 02 provides a high level of engagement. It provides an opportunity for people recreating there to avail themselves of the view out to the sea, and to overlook people walking past in the street.⁴⁵
- [34] Mr Curtis says the recreation space at level 02 has a double height volume. This means that the ceiling is roughly twice as high as the other floors. This double height volume of level 02 sits above the ground storey (level 01) to provide a dramatic void space with the tower perched above. The void exposes the building's skeleton of supporting columns and accentuates the podium's roof canopy. It also reinforces the podium's tropical, pavilion-like appearance.⁴⁶
- [35] Mr Curtis opines that the podium's open appearance is balanced by the robust solidity and materiality of the human scale elements on level 1, which assist to ground the built form and connect it with the street. He says these elements are complemented by the integrated coastal style landscaping within the setback, which softens the pedestrian level interface with the street.⁴⁷
- [36] The podium's pedestrian interface with the street frontages will be activated by the building entrances and communal facilities located at the ground level and the visual permeability provided by the extensive fenestration that extends along the frontages.⁴⁸
- [37] In Mr Curtis' opinion, the podium's interface with the neighbouring property to the south will protect the privacy of the adjoining property's communal open space and address it with a stepped alignment of solid walls. He says the stepped walls articulate and fragment the podium's bulk and allow landscaping to be accommodated within the setback.⁴⁹
- [38] Mr Curtis explains that the well-considered appearance and proportions of the façades are enhanced by a sophisticated palette of external finishes. He says the finishes balances recessive tones with brighter focal elements to add visual interest and complexity to the proposed development's detailed appearance.⁵⁰
- [39] Mr Curtis supports his evidence about the design of the proposed development, and the impact of the design elements on the building's appearance, particularly its apparent bulk, by reference to figures and perspectives. Mr Curtis' explanation accords with the details outlined in the plans, sections and elevations, and the depiction of the proposed development in the visual representations (including architectural perspectives) and photomontages.

⁴⁴ Exhibit 10.01 p 22 [47].

⁴⁵ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 44.

⁴⁶ Exhibit 10.01 p 22 [47].

⁴⁷ Exhibit 10.01 p 22 [48].

⁴⁸ Exhibit 10.01 p 24 [49].

⁴⁹ Exhibit 10.01 p 25 [50].

⁵⁰ Exhibit 10.01 p 21 [44].

- [40] Mr Curtis verified the accuracy of the visual representations and the photomontages.⁵¹ He says the photomontages provide an accurate depiction of the building that allows one to gain an appreciation of the actual appearance of the building, including how its articulated, its width, its height, its modulation and how it would appear to a person from the modelled viewpoints.⁵² Mr Curtis' evidence about the accuracy of the visual representations and the photomontages was unchallenged.
- [41] Mr Curtis' explanation of the built form elements of the proposed development and how, in combination, they influence the appearance of the proposed development does well to convey the appearance of the proposed development. I accept Mr Curtis' evidence.

Is the amenity impact of the proposed development acceptable?

- [42] The Council alleges that, because of a failure to adopt meaningful setback and varying (reducing) site covers to the southern boundary, the residents of the six-storey multiple dwelling development at 90 Old Burleigh Road, known as Bedarra, will be faced with a 90-plus-metre-high residence, with a three-metre boundary setback, that is without any meaningful fenestration. The Council says that this will have an unacceptable impact on the amenity for those residents because of the bulk and overbearing design of the proposed development that the residents will observe from their communal and private living spaces.
- [43] The Council alleges that the amenity impact is materially inconsistent with:
- (a) the overall outcomes in ss 6.2.3.2(2)(b)(vii), (d)(ii) and (iv) and performance outcomes PO1(a) and PO2(b) of the High density residential zone code; and
 - (b) the overall outcomes in ss 9.3.10.2(2)(a), (c) and (e) and performance outcome PO5 of the High-rise accommodation design code.⁵³
- [44] It is uncontentioned that each of the provisions to which the Council refers is a relevant assessment benchmark. This is unsurprising given:
- (a) the subject land is in the High density residential zone⁵⁴ and the assessment benchmarks in the High density residential zone code apply to all development in that zone;⁵⁵
 - (b) the proposed development involves a material change of use for multiple dwellings over 32 metres and the High-rise accommodation design code applies to all development applications for material change of use for development for multiple dwellings over 32 metres in height where indicated within Part 5 Tables of Assessment in City Plan;⁵⁶ and

⁵¹ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 39.

⁵² Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 43.

⁵³ Although the assessment benchmarks were not listed in the Second Further Amended Agreed List of Issues, Exhibit 3.11, in paragraphs 37 of the Amended Outline of Argument for the Council, it is said that they are put in issue.

⁵⁴ Exhibit 19.2.

⁵⁵ City Plan s 6.2.3.1.

⁵⁶ City Plan s 9.3.10.1.

- (c) the High-rise accommodation design code is listed as an applicable code within Part 5 Tables of Assessment in City Plan.⁵⁷

What do the relevant assessment benchmarks require?

[45] The relevant assessment benchmarks to be considered in this appeal are limited to those that the Council continues to put in issue, namely:

- (a) the overall outcomes in ss 6.2.3.2(2)(b)(vii), (d)(ii) and (iv) and performance outcomes PO1(a) and PO2(b) of the High density residential zone code; and
- (b) the overall outcomes in ss 9.3.10.2(2)(a), (c) and (e) and performance outcome PO5 of the High-rise accommodation design code.

[46] The purpose of the High density residential zone code is to provide for higher density multiple dwellings. That purpose is to be achieved through the overall outcomes.

[47] As I have noted above, the Council contends that the proposed development does not comply with the overall outcomes in ss 6.2.3.2(2)(b)(vii), (d)(ii) and (iv), which state:

“(b) Housing is provided at a form, scale and intensity that is appropriate for the zone and each particular locality it is in where the following outcomes are satisfied:

Design and amenity

- (vii) whether adjoining residential amenity is unreasonably impacted;
- (d) Built form (excluding Dwelling houses on small lots) –
 - (ii) is setback from side and rear boundaries to protect the amenity of adjoining uses;
 - (iv) has varying site cover to reduce building dominance and provide areas for landscaping.”

[48] The Council also alleges that the proposed development is materially inconsistent with performance outcomes PO1(a) and PO2(b) of the High density residential zone code, which state:

Performance outcomes	Acceptable outcomes	
Setbacks		
PO1 Setbacks: (a) assist in the protection of adjacent amenity; (b) allow for access around the building; (c) contribute to streetscape	AO1 Setbacks are as follows:	
	Setback	Minimum distances measured in metres (m)
		Height

⁵⁷ City Plan Table 5.5.3.

character; (d) allow for on-site car parking; and provide separation between buildings to maintain view corridors. Note: Building setbacks may also be influenced by the shadow provisions in 9.4.4 General development provisions code.	Front for covered car parking (excluding a basement)	all	6m
	Front (excluding covered car parking)	up to 23m	4m
		for that part exceeding 23m	6m
	Side and rear	up to 4.5m	1.5m
		for that part between 4.5m – 7.5m	2m
		for that part exceeding 7.5m	an extra 0.5m is added for every 3m in height or part thereof over 7.5m
	Between on site habitable buildings (where not attached)	Double the applicable side setback	

<p>PO2 Site cover: (a) is balanced between built form and green areas for landscaped private open space; (b) contributes to neighbourhood character and amenity; (c) promotes slender bulk form; (d) promotes an open, attractive and distinct skyline; and (e) facilitates small, fast moving shadows</p>	<p>AO2 Site cover does not exceed 50% for Dwelling houses on lots with areas equal to or greater than 400m and Dual occupancies. OR Site cover does not exceed 70% for Dwelling houses on lots less than 400m . OR For all other uses, site cover does not exceed a cumulative total of: (a) 50% of net site area up to 8 storeys; (b) 40% of net site area from 9 to 15 storeys; and (c) 30% of net site area or 750m per building, whichever is the lesser, above 15 storeys.</p>
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(emphasis reflects the Council's allegations)

[49] The Council contends that the planned outcomes reflected in the assessment benchmarks in the High density residential zone code referred to above are reinforced by the overall outcomes in ss 9.3.10.2(2)(a), (c) and (e) and performance outcome PO5 of the High-rise accommodation design code.

[50] The overall outcomes state:

- “(a) **Development is designed to** create attractive, high-quality visually appealing buildings and **protect the privacy and amenity of neighbouring residential premises.**
- (c) **Tower development mitigates negative visual and physical impacts through appropriate setbacks and design.**
- (e) **Development provides a high-standard of amenity and visual interest for users and neighbours,** including a high-standard of communal and private open space.”

(emphasis reflects the Council's allegations)

[51] Performance outcome PO5 of the High-rise accommodation design code states:

Performance outcomes	Acceptable outcomes
Tower form design	
<p>PO5 Tower form mitigates negative visual and physical impacts, including impacts on privacy, by setting back from streets, parks, open space and adjacent properties and tower forms.</p>	<p>AO5.1 Tower form (including balconies) along:</p> <ul style="list-style-type: none"> (a) single frontages step in at least 3m from the base (podium); or (b) corner frontages can have up to 1/3 tower width extended straight down at the corner point to reinforce the intersection if negative ground level wind effects are mitigated.
	<p>AO5.2 New towers are separated a minimum distance of 25m from any existing or approved adjacent and on-site tower(s).</p>
	<p>AO5.3 Tower form is coordinated to off-set with adjacent existing and proposed towers to ensure:</p> <ul style="list-style-type: none"> (a) prominent tower views to natural features like the beach and rivers are not obstructed; and (b) views of the sky and access to sunlight from the public realm and private open space areas are maximised.

(emphasis reflects the Council's allegations)

[52] With respect to the provisions of the High-rise accommodation design code, the Council submits:

- “38. The utility of Council placing the above HRAD Code provisions in issue is to demonstrate that the Scheme recognises the continued importance of the adoption of appropriate setbacks to mitigate adverse amenity impacts on adjoining properties, and to deliver *“diverse, innovative and engaging sub-tropical high-rise forms that enhance the city skyline”*.
- 39. However, in circumstances where Council accepts that the HDRZ Code has primacy (to the extent of inconsistency), and the HRAD Code provisions set out above in effect reinforce

the HDRZ Code provisions (but without materially adding to them), Council acknowledges that, for the purpose of determining development impacts upon the southern premises, findings of compliance or non-compliance with the HDRZ Code provisions set out above and below should be taken to amount to compliance or non-compliance with the HRAD Code provisions put in issue, such that the HRAD Code provisions need not be independently assessed and determined.”⁵⁸

[53] The Council’s allegations raise three factual considerations about the amenity impacts on the adjoining premises to the south of the subject land, namely:

1. Will the form of the proposed development unreasonably impact the adjoining residential amenity?
2. Is the built form sufficiently setback from the side and rear boundaries to protect the amenity of the adjoining uses?
3. Does the proposed development incorporate varying site cover sufficient to reduce the building’s dominance and provide areas for landscaping?

Will the form of the proposed development unreasonably impact the adjoining residential amenity?

[54] The subject land adjoins only one property to the south, being the property at 90 Old Burleigh Road. It extends between Old Burleigh Road and Broachbeach Boulevard. It is improved by a six-storey multiple dwelling, known as Bedarra, which is setback approximately 21 metres from the Broadbeach Boulevard frontage behind landscaped communal open space. That open space includes an open grassed area, a paved terrace, and a swimming pool. A large Norfolk Pine is located towards the north-east corner of the property, adjacent to the common boundary with the subject land.⁵⁹

[55] The Council alleges that the form of the proposed development will unreasonably impact on the amenity of the residents of Bedarra.

[56] At the commencement of the hearing, the Council alleged that the unacceptable impact would be occasioned by, amongst other things, overshadowing. The Council abandoned that ground before final submissions. Having read the evidence of the architects with respect to shadow impacts⁶⁰ and heard their oral testimony, the Council’s decision to abandon the issue was wise.

[57] Even though the allegation of adverse shadow impacts was abandoned by the Council, it is appropriate that I make a few observations about the evidence of Mr Richards on the issue as it informs my overall impression of Mr Richards’ evidence.

[58] Mr Richards opines that the proposed development would cause an unacceptable shadow impact. His opinion is premised on a comparison between the modelled

⁵⁸ Amended Outline of Argument for the Council p 11 (footnotes omitted).

⁵⁹ Exhibit 7.01 p 12 [19]; Exhibit 10.01 p 11 [18].

⁶⁰ Exhibit 10.01 pp 36-9.

shadow impact of the proposed development and the shadow impact of “a development form that is more compliant with Acceptable outcomes for setbacks”.⁶¹ His analysis does not assist in ascertaining reasonable expectations about the extent of shadow impact as his “compliant” design only applies some of the acceptable outcomes and not others.⁶² Further, in examining the shadow impacts, Mr Richards pays no regard to the sizeable shadows cast by existing development in the area,⁶³ nor to that cast by substantial vegetation in the area, such as Norfolk Pines.⁶⁴ Mr Richards ignores that the adjacent site is shadowed by other buildings and vegetation, and will continue to be, regardless of what occurs on the subject land. His evidence with respect to shadow impacts was untenable. I am satisfied that there is no unacceptable impact caused by overshadowing.

- [59] With respect to the potential impact on privacy, Mr Curtis opines that the proposed development will provide a level of privacy consistent with that anticipated by the acceptable outcome AO1 of the High density residential zone code. He opines that the only potential exception might be the lift lobby window on level 6. With respect to that window, Mr Curtis says that, should it be deemed necessary, a condition could reasonably be imposed requiring the window to be translucent. Mr Curtis’ opinions are informed by the six-storey height of Bedarra, the setbacks of the proposed development, and the location of the Bedarra in relation to the proposed development.⁶⁵
- [60] Mr Curtis explains that the Bedarra building is setback between approximately 22 and 33 metres from its eastern frontage to Broadbeach Boulevard. All the units have fenestration facing towards the northeast, where they now look across the vacant subject land.⁶⁶
- [61] As for the proposed development, it will have a staggered setback alignment in relation to the common boundary with the adjoining property. The setback varies from almost zero setback to 2.0 metres on the ground floor (level 01), 1.57 metres to 2.48 metres at level 02 and 3.0 metres on the typical tower floors (levels 03 to 26).⁶⁷
- [62] Mr Curtis explains that the fenestration within the staggered setback is generally located within the east or west facing stepped walls that do not face the adjoining building. There are a few exceptions. They are:
- (a) the small central window to the lift lobby on the typical tower floors, which is setback approximately 3.8 metres from the common boundary and is separated approximately 7.3 metres from the adjoining building. The setback to the fenestration is consistent with the side and rear setback in acceptable outcome AO1 of the High density residential zone code for the part of a building at heights up to and including level five;

⁶¹ Exhibit 10.01 p 39 [96].

⁶² Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 79-81.

⁶³ For example, see Exhibit 10.01 pp 15 and 41

⁶⁴ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 78; Exhibit 10.01 p 37 figure 24 and p 38.

⁶⁵ Exhibit 7.01 pp 48-9 [119].

⁶⁶ Exhibit 7.01 p 46 [116].

⁶⁷ Exhibit 7.01 p 46 [117].

- (b) the balcony and fenestration at the eastern end of the typical tower floors, which are setback between 3.0 metres and approximately 4.2 metres from the common boundary. They are located opposite the communal open space for Bedarra, and not any residential units in the adjoining building. The setback to the fenestration and balcony is consistent with the side and rear setback in acceptable outcome AO1 of the High density residential zone code for the part of a building at heights up to and including level three; and
 - (c) the balcony and fenestration at the western end of the typical tower floors, which are setback approximately 8.7 metres from the common boundary.⁶⁸
- [63] Dr McGowan opines that there will be no unacceptable impact on privacy for residents of Bedarra. He relevantly observes that:
- (a) the proposed development generally satisfies the acceptable outcomes for side boundary setbacks to the southern boundary for the lower three levels, with only minor intrusions at levels four to six;
 - (b) there is limited fenestration on the southern side of the proposed development; and
 - (c) where there is windows of habitable rooms or balconies in the proposed development that are directed towards the neighbouring property, there is reasonable separation achieved between them and the Bedarra building.⁶⁹
- [64] Dr McGowan also considers that the proposed development will result in better privacy outcomes than that which existed with the (now demolished) six-storey multiple dwelling on the western part on the subject land, and that will pertain should the approved development on the eastern part of the subject land be constructed.⁷⁰
- [65] Mr Richards accepts that issues of privacy are managed to some extent due to the absence of living spaces on the southern side of the proposed development. Nevertheless, he says there are still habitable rooms (such as bedrooms) with full height glazing, and a balcony on the south-east corner of the proposed development. Mr Richards says the closeness of the proposed building to its neighbour and its overall height will create overlooking and noise from habitable rooms and balconies. He says this is exacerbated due to the height of the building.⁷¹ Mr Richards does not further explain these opinions.
- [66] A degree of overlooking is to be expected in an area zoned for high rise buildings. Having regard to the design shown in the plans, I prefer the evidence of Mr Curtis and Dr McGowan about privacy and overlooking to that of Mr Richards.
- [67] I do not accept Mr Richards' evidence about noise impacts. His curriculum vitae does not disclose any relevant expertise. Further, that Mr Richards considered it appropriate to express an opinion with respect to noise impacts causes me to be circumspect about reliance on his evidence generally. His evidence in that regard has the hallmarks of a witness who is acting as an advocate for his client's cause

⁶⁸ Exhibit 7.01 p 47 [118].

⁶⁹ Exhibit 7.01 pp 54-5 [137].

⁷⁰ Exhibit 7.01 pp 54-5 [137].

⁷¹ Exhibit 17.01 p 7 [28(a)].

rather than as an objective expert. An expert who adopts an advocate's approach risks presenting evidence that is regarded by the Court as unhelpful or self-defeating in the sense of the evidence not being reliable.⁷²

- [68] In relation to outlook, Mr Curtis opines that there is no unacceptable impact caused by the proposed development. He explains that although the units in the adjoining multiple dwelling have fenestration orientated to the northeast, their primary view is more directly to the east. He says views across the subject land to the northeast were previously obstructed by the former three-storey and five-storey multiple dwelling buildings on the subject land. Mr Curtis' opinion in this regard are supported by photographs. Mr Curtis also says that the proposed development will provide a similar obstruction to the eastern views from Bedarra as that which will result if the approved nine-storey development is constructed on the subject land.⁷³
- [69] Dr McGowan also gave evidence about impacts on outlook. He says that while the proposed development will completely obstruct views across the subject land, the impact is not unacceptable. In forming his opinion, Dr McGowan had regard to the fact that the previous buildings on the subject land and an approved development on the eastern part of the subject land, while involving smaller buildings with eight metres separation between them, would have had some impacts on those views. He also says that a development that complies with acceptable outcomes for setbacks and site cover would be likely to obstruct views to a similar degree at the lower six levels (which are the levels that correspond with the Bedarra building).⁷⁴ I accept the evidence of Dr McGowan in this respect. The existing approval is a matter to which it is appropriate to have regard.⁷⁵
- [70] Further, and in any event, during cross-examination Dr McGowan accepted that the Bedarra balconies (and units) have their most important or valuable view to the east, across the park, beach, and ocean. He says that view will not be unacceptably impacted by the proposed development.⁷⁶
- [71] With respect to outlook, Mr Richards opines that he expects that the views to the north enjoyed by residents of Bedarra will be impacted. He says the sheer scale and mass of the proposed development will reduce the views up and out to an open skyline. He considers that this creates an overbearing character and additional shadows from the scale of the façade.
- [72] As I have already observed, I did not find Mr Richards to be a compelling witness. I prefer the evidence of Mr Curtis and Dr McGowan about impacts on outlook as they provide cogent explanations in support of their opinions.
- [73] Having regard to the evidence of Mr Curtis and Dr McGowan referred to above, I am satisfied that the proposed development will not have an unacceptable impact on

⁷² *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33; *Collins Thomson Pty Ltd (in liq) v Clayton* [2002] NSWSC 366; *Insight Projects (Old) Pty Ltd v Hervey Bay City Council* [2007] QPEC 109; [2008] QPELR 321, 322 [5]; *Newman & Ors v Brisbane City Council & Ors* [2011] QPEC 87; [2011] QPELR 786, 809 [56].

⁷³ Exhibit 7.01 p 49 [120]-[122].

⁷⁴ Exhibit 7.01 p 55 [137].

⁷⁵ *Planning Act 2016* s 45(3)(b); *Planning Regulation 2017* s 27(1)(f).

⁷⁶ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 24 November 2021) 7.

the privacy of the existing residents of Bedarra, nor on the outlook from the existing units in Bedarra.

- [74] Despite the absence of unacceptable impacts in terms of shadow, privacy and outlook, the Council says the proposed development will unreasonably impact on the amenity of the residents of Bedarra by reason of its bulk. The Council says the proposed development will be unacceptably overbearing.⁷⁷ In that respect, it relies on the evidence of Mr Richards and Dr McGowan.
- [75] Mr Richards says the proposed development is a very tall and long building with minimal setbacks to the south. He notes that the southern wall is 50-metre-long and 90-metre-high with a façade area of around 4,000 square metres. It has few windows or balconies. Mr Richards describes the façade as comprising a series of continuous vertical planes and notes that over 60 per cent of the wall is solid. Mr Richards acknowledges that there are windows and balconies at the eastern end of the building. He says that they are close to the boundary, being about three metres from it. He opines that the inadequate setbacks are exacerbated by the number of storeys in the proposed development. Mr Richards opines that the consequence of this built form on the amenity of the adjoining southern development will be stark.⁷⁸
- [76] In addition, Mr Richards opines that the proposed development's reduced setbacks to site boundaries impacts the amenity of the street, as well as the adjoining site to the south. He says that this is exacerbated by providing a basement to almost all boundaries. He says that by reducing setbacks to site boundaries, there is little opportunity for deep planting or to accommodate meaningful landscaping to minimise the impact of the proposed development at the lower levels. He says that this is particularly an issue for the southern boundary, where a landscaped buffer (if it were possible to be planted) may have assisted to reduce the sense of overbearing and to offset the minimal setbacks.⁷⁹
- [77] In the Visual Amenity Joint Expert Report, Dr McGowan opines that the proposed development would cause a significant sense of overbearing for units in Bedarra. He says this is because of the height, length, and setbacks of the proposed development. In Dr McGowan's opinion, the photomontages for viewpoints D and E give some impression of the extent of overbearing that is likely, but they do not give the full picture. Dr McGowan opines that the proposed development will position a 46.5-metre-wide and 93.5-metre-high monolith just seven to 14 metres away from the Bedarra building. He says the horizontal stepping of the southern façade will do little to ameliorate the sense of overbearing.⁸⁰
- [78] Dr McGowan provides further explanation of his opinions in his individual statement. He says the proposed tower's setbacks from the rear boundary of between 3.0 and 3.7 metres provide insufficient separation from the boundary, particularly because those modest setbacks extend for the height of the tower. Dr McGowan says that such a large building so proximate to the boundary would create an acute sense of overbearing for residents of the neighbouring building. He

⁷⁷ Exhibit 3.11 p 1 [1].

⁷⁸ Exhibit 17.01 p 7 [28(a)].

⁷⁹ Exhibit 17.01 p 7 [28(a)].

⁸⁰ Exhibit 7.01 p 55 [137].

opines that whether the residents of Bedarra are inside their units, on their balconies, or on the rooftop space, they will be looking directly at the back of a 46.5-metre-wide and 93.5-metre-high monolith. He says that if the proposed building were to step away from the boundary, provide greater variations in the floorplates of the tower, and incorporate more substantial landscaping at the lower levels, such as on top of the podium, then the sense of overbearing would be materially less significant.

- [79] Mr Curtis disagrees with Mr Richards and Dr McGowan. He says the extent to which a development might be perceived as overbearing on one's amenity is informed, to a degree, by the character of the area. In this area, he says that there are many tall buildings, including buildings of a significantly greater scale. This informs the common experience in the area.
- [80] Mr Curtis also opines that the scale of the proposed development will be experienced most acutely by the residents of Bedarra when they are using the outdoor recreation areas in the front setback. Whether viewed from that location or from their units, Mr Curtis does not accept that the proposed development will be experienced as a monolithic structure. He considers that description to be apt for a structure like a dam wall, where there is nothing that fragments the built form. Here, there are stepped wall panels on the southern façade that fragment the built form. There is also some indication of the storeys at each end. Mr Curtis says that, most significantly, at the base of the building there is notable differentiation in terms of the stepping. There is also landscaping that helps mitigate the bulk of the proposed development. Mr Curtis opines that the attention of residents of Bedarra would be directed primarily to the landscaping and the lower parts of the building as that is the area that is the focus of a person's natural view cone.⁸¹ During cross-examination, Mr Curtis further explained that, although the southern façade has a different appearance to the north-facing elevation, if one was standing on the adjoining site to the south, either at the ground level or on one of the living spaces, the viewer would not be faced with an unarticulated façade. He says that both the stepping in the façade and the fluting in each of those wall panels will contribute to the articulation of the façade. He considers that the proposed development strikes an appropriate balance between the protection of the privacy of the adjoining residents and the articulation of the appearance of the building.⁸²
- [81] Whether the proposed development will be unacceptably overbearing calls for a value judgment about which reasonable minds might differ. I do not accept Mr Richards opinions about adverse impacts on Bedarra. They are little more than bald assertions. His limited explanation of the basis for his opinions relates to exceedances of built form metrics that appear in acceptable outcomes in City Plan.

⁸¹ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 41 and 49.

⁸² Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 48.

[82] The lack of cogent explanation for Mr Richards' opinions, other than by reference to exceedance of built form metrics, is explained by his approach to the issues. During cross-examination, when asked about his approach to assessment of the proposed development, Mr Richards said:

“... the question I was asking myself is what are the parameters that can define the right form of building on this site, and in a location where there is unlimited height, the only parameters within the planning scheme, really, to inform what the scale of development might be, and the bulk of development, are things like sight cover and setbacks. So I was trying to understand, if you applied those setbacks, what form of development could be achieved.”⁸³

[83] He also confirmed that he had used acceptable outcomes to interpret the performance outcomes and the overall outcomes.⁸⁴ Further attempts to clarify Mr Richards' approach left me with the distinct impression that Mr Richards' has poor understanding about the operation of a performance-based planning scheme. Further, during cross-examination Mr Richards was unable to meaningfully engage in relation to matters that inform a qualitative assessment. Instead, he relied on the quantitative metrics in the acceptable outcomes.

[84] I do not consider Mr Richard's approach to be appropriate. Compliance with acceptable outcomes is not mandated under City Plan. As is explained in s 6.1(8) of City Plan:

“Each zone code identifies the following:

- (a) the purpose of the code;
- (b) the overall outcomes that achieve the purpose of the code;
- (c) the performance outcomes that achieve the overall outcomes and the purpose of the code;
- (d) the acceptable outcomes that achieve the performance and overall outcomes and the purpose of the code;
- (e) the performance and acceptable outcomes for the precinct.”

[85] Statements to similar effect can also be found elsewhere in City Plan.⁸⁵ The structure of City Plan is such that compliance with a performance outcome can be achieved by demonstrating compliance with either the acceptable outcomes applying to the performance outcome or the performance outcome itself. While the acceptable outcomes may be relevant in ascertaining the legislative intention, they are not determinative of it.⁸⁶

⁸³ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 69.

⁸⁴ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 70.

⁸⁵ See, for example, City Plan s 5.3.3(4)(c).

⁸⁶ *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexu Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95, [2022] QPELR 309, 345 [110] with reference to *WBQH Developments Pty Ltd v Gold Coast City Council & Anor* [2010] QCA 126 at [35]-[38] per Fryber J with whom McMurdo P and Atkinson J agreed; and *Bell v Brisbane City Council* [2018]

- [86] Both Dr McGowan and Mr Curtis provide cogent explanations for their opinions. However, in general I prefer the evidence of Mr Curtis. It is consistent with my impression of the visual impact of the proposed development from my consideration of the plans (including the elevations and sections),⁸⁷ the visual representations,⁸⁸ and the photomontages.⁸⁹
- [87] I am prepared to assume that Dr McGowan is correct that if the proposed building were to step away from the boundary, provide greater variations in the floorplates of the tower, and incorporate more substantial landscaping at the lower levels, such as on top of the podium, then the sense of overbearing would be materially less significant. However, I do not consider that evidence to be compelling. It has long been recognised by this Court that it is not the function of the Court to redesign a development. The Court's function is to pass judgment on the development that is proposed.⁹⁰
- [88] I am not persuaded that the horizontal stepping of the southern façade will do little to ameliorate the sense of overbearing, or that the proposed development will be experienced as a monolith. As was accepted by Dr McGowan during cross-examination, the proposed development has design features and architectural treatments visible to the southern neighbour that assist in giving it human scale. They include the design of the podium, landscaping, balconies, and glazing.⁹¹ Further, Dr McGowan accepts that the design of the lower three levels of the proposed development, and its interaction with Bedarra, is acceptable.⁹²
- [89] Having regard to the evidence of Mr Curtis, the concessions by Dr McGowan, the photos (including those from Bedarra),⁹³ the plans (including the elevations and sections),⁹⁴ the visual representations,⁹⁵ and the photomontages,⁹⁶ I am satisfied that the proposed development will not unreasonably impact the residential amenity experienced on the adjoining land to the south. Although it is finely balanced, I consider that the stepped alignment of the southern façade, the use of fluted wall panels, the fenestration at the ends of the southern façade and the recessed corner balconies sufficiently mitigate the bulk of the proposed development such that it will not be overbearing.

QCA 84; (2018) 230 LGERA 374 at [20] and [70] per McMurdo JA with whom Sofronoff P and Philippides JA agreed.

⁸⁷ Exhibit 5.01.

⁸⁸ Exhibit 5.01.

⁸⁹ Exhibit 6.01.

⁹⁰ See, for example, *Wingate Properties Pty Ltd v Brisbane City Council & Ors* [2001] QPELR 272, 276 [21]; *Heath v Brisbane City Council* [2008] QPEC 33; [2008] QPELR 566, 569 [23]; and *Parmac Investments Pty Ltd v Brisbane City Council & Ors* [2018] QPEC 32; [2018] QPELR 1026, 1060 [162].

⁹¹ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 24 November 2021) 7 and 10-3.

⁹² Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 24 November 2021) 16.

⁹³ Exhibit 7.01 pp 73 - 80.

⁹⁴ Exhibit 5.01.

⁹⁵ Exhibit 5.01.

⁹⁶ Exhibit 6.01.

Is the built form sufficiently setback from the side and rear boundaries to protect the amenity of the adjoining uses?

[90] The setbacks of the proposed development are recorded in the Architecture Joint Expert Report as follows:

Level	North (First Avenue)	East (Broadbeach Boulevard)	West (Old Burleigh Road)	South	Corners
Ground (Level 01)	0m (booster) 2.18m (building wall)	0.5m (building wall)	0m (PMT) 0.46m (water meter) 1.6m (building wall)	0.4m (services) 0.7m (OMP to eastern stairs)	1.13m (First Ave / Broadbeach Blvd) 2.42m (First Ave / Old Burleigh Rd)
Mezzanine (Level 02)	2.18m (building wall)	0.5m (building wall)	1.6m (OMP) 2.15m (building wall)	0.4m (planter) 0.7m (OMP to eastern stairs)	1.13m (First Ave / Broadbeach Blvd) 0.16m (First Ave / Old Burleigh Rd)
Mezzanine Roof	2.18m (OMP)	3.86m (OMP)	2.07m (OMP)	0.4m (OMP)	0.85m (First Ave / Broadbeach Blvd) 0.16m (First Ave / Old Burleigh Rd)
Level 03 to Level 26	2.5m (slab edge) 3m (building wall)	4.8m (OMP)	2m (OMP)	2.5m (Tower OMP) Building wall varies	2.48m (First Ave / Broadbeach Blvd) 2m (First Ave / Old Burleigh Rd)

- [91] As is noted by Dr McGowan in the Visual Amenity Joint Expert Report, the proposed development exceeds, by a substantial extent, the acceptable outcomes for boundary setbacks that are applicable to the subject land. This exceedance increases with the height of the tower such that, for the upper part of the tower, almost the whole tower is beyond the acceptable outcomes for boundary setbacks.⁹⁷
- [92] Mr Richards makes similar observations about the exceedance of the acceptable outcome. He says that the acceptable outcomes for setbacks and site cover demonstrate a principle that is implicit within the performance outcomes, namely that taller buildings or higher parts of buildings have reduced site cover and greater separation than that of lower height buildings.⁹⁸ It is on that basis that he opines that the setbacks, and site cover, are not acceptable and will have a negative impact on adjoining properties. I do not accept Mr Richards' evidence. I can see no reason in the text itself, or otherwise, to construe the relevant overall outcomes and performance outcomes as implying a principle as contended by Mr Richards.
- [93] As I have already observed, where there is non-compliance with acceptable outcomes, it does not necessarily follow that the proposed development fails to comply with the High density residential zone code. Compliance with the code can be achieved by complying with the performance outcomes, the overall outcomes, and the purpose of the code.⁹⁹
- [94] As is evident from the provisions set out in paragraphs [46] to [48] above, to the extent they are put in issue, with respect to setbacks, the proposed development must be "*setback from side and rear boundaries to protect the amenity of adjoining users*" and "*to assist in the protection of adjacent amenity*".
- [95] For the reasons outlined in paragraphs [54] to [88] above, I am satisfied that the proposed development achieves these outcomes.

Does the proposed development incorporate varying site cover sufficient to reduce the building's dominance and provide areas for landscaping?

- [96] As I have mentioned in paragraph [47] above, the Council alleges that the proposed development is inconsistent with the planning intent that the built form "*has varying site cover to reduce building dominance and provide areas for landscaping.*"
- [97] Firstly, in relation to the proposed development's site cover, the term "*site cover*" is defined in sch 1 of City Plan as:

"Of a development, the portion of the site, expressed as a percentage, that will be covered by a building or structure, measured to its outermost projection, after the development is carried out, other than a building or structure, or part of a building or structure, that is:

- (a) in a landscaped or open space area, including, for example, a gazebo or shade structure; or
- (b) a basement that is completely below ground level and used for car parking; or

⁹⁷ Exhibit 7.01 p 44 [108].

⁹⁸ Exhibit 0.01 p 50 [163].

⁹⁹ City Plan ss 5.3.3(4)(c) and 6.1(8).

- (c) the eaves of a building; or
- (d) a sun shade.”

[98] Section 1.2.1 of City Plan states:

- “(1) A term used in the City Plan has the meaning assigned to that term by one of the following:
- (a) the *Planning Act 2016* (the Act);
 - (b) the *Planning Regulation 2017* (the Regulation);
 - (c) the definitions in **Schedule 1** of the City Plan;
 - (d) the *Acts Interpretation Act 1954*;
 - (e) the ordinary meaning where that term is not defined in any of the above.
- (2) In the event a term has been assigned a meaning in more than one of the instruments listed in **subsection 1.2.1(1)**, the meaning contained in the instrument highest on the list will prevail.”

[99] The term is not otherwise defined in an instrument higher on the list in s 1.2.1(1) of City Plan.

[100] The Council says that the definition of “*site cover*” contemplates that a development has a singular site cover figure. In those circumstances, the Council accepts that when the term “*site cover*” in s 6.2.3.2(2)(d)(iv) is read with the meaning it is assigned in sch 1, there is a difficulty with the construction of the assessment benchmark.

[101] The Council submits that it is trite that the word “*varying*” must be given work to do, notwithstanding the apparently immutable approach to the calculation of site cover adopted in the definition. In that respect, the Council notes that s 32A of the *Acts Interpretations Act 1954*, which applies to planning schemes as statutory instruments,¹⁰⁰ provides:

“32A Definitions to be read in context

Definitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires.”

[102] The Council submits that the definition of site cover must be subject to some variation to permit the overall outcome of the High density residential zone code to have any real meaning. It says that contextual indicators that assist in informing the meaning of the phrase “*varying site cover*” include:

- (a) the fact that the utility of the variation is to “*reduce building dominance and provide areas for landscaping*”;
- (b) the acceptable outcomes for site cover acknowledge and require differing site cover levels for differing storeys for non-dwelling house uses;

¹⁰⁰ *Statutory Instruments Act 1992* (Qld) ss 7 and 14 and sch 1.

- (c) figure 6.2.3-1, which is described as “*Illustration showing High density residential zone setbacks and site cover outcomes (excluding Dwelling houses on small lots)*”, depicts differing “*site covers*” for differing levels of development, and shows the site cover figures decreasing with height.
- [103] Having regard to these matters, the Council submits that the requirement for “*varying site covers*” should be construed as a requirement for variations in floorplate area between differing levels of development, with the floorplate areas decreasing in area with increasing height, to achieve the outcomes of reduced building dominance, and to provide areas for landscaping.
- [104] The Council says that its approach is consistent with that taken by His Honour Judge Rackemann in *Body Corporate for Lindor CTS 29204 & Anor v Gold Coast City Council & Anor*.¹⁰¹ In that case, his Honour considered a proposed high-rise mixed-use development, which he described as:
- “[6] The proposed building:
- (a) has a maximum building height of 82.05 metres;
 - (b) has a podium of 9.45 metres in height;
 - (c) is of considerable width, being in the order of 50–51 metres for the tower;
 - (d) has a total GFA of 19,714m² equating to a plot ratio of 11.33;
 - (e) has a site cover of:
 - (i) 97.1% at podium;
 - (ii) between 48.5% and 52.6% at tower levels; and
 - (iii) 65.8% at roof terrace;
 - (f) has varying building setbacks, including built-to-boundary sections at ground level; ...”¹⁰²

- [105] With respect to the overall outcome in s 6.2.3.2(2)(d)(iv) of the High density residential zone code, His Honour Judge Rackemann observed:

“[97] Overall Outcome 2(d)(iv) seeks a built form with varying site cover to reduce building dominance and provide areas for landscaping. The provision provides no guidance as to the nature or extent of any variation of site cover and reduction of building dominance or any provision of landscaping by reference to which compliance or non-compliance is to be judged. The provision should be construed as requiring a variation of site cover to reduce building dominance and provide for landscaping to more than a trivial or insignificant extent. The proposal does have varying site cover, but does not

¹⁰¹ [2018] QPEC 54; [2018] QPELR 265

¹⁰² *Body Corporate for Lindor CTS 29204 & Anor v Gold Coast City Council & Anor* [2018] QPEC 54; [2018] QPELR 265, 269 [6].

significantly reduce building dominance in context. The building remains, as I have found, one of excessive height, scale and intensity which is bulky and visually intrusive in its context notwithstanding the variation of site cover. The podium element, which has a site cover of 97.1%, is not a feature which assists in reducing building dominance. The provision of landscaping is not insignificant albeit that I have found it to be inadequate in the context of other provisions.”

[106] I agree with His Honour Judge Rackemann’s observations, and I accept the Council’s submission that the overall outcome calls for variations in floorplate area at different levels of the building to reduce building dominance and provide areas for landscaping. I do not accept that the requirement for “*varying site cover*” should be construed to import a requirement for a reduction in floorplate area with increasing height. There is nothing in the context that requires that limitation to be read into the provision. Although it is difficult to envisage a design that would reduce building dominance without reducing floorplates at higher levels, as was recognised by Ms Morrissy, the town planner retained by the Council, that is not the only means of complying with this overall outcome.

[107] Here, the proposed development incorporates floorplates of varying sizes, with:

- (a) a floorplate of 712.9 square metres for the podium (i.e., the ground floor and first floor),¹⁰³ equating to 60.1 per cent of the site area;¹⁰⁴
- (b) a floorplate of 649 square metres for the tower (i.e., levels 03 to 25), equating to 54.7 per cent of the site area;¹⁰⁵ and
- (c) a floorplate of 458.5 square metres for the rooftop terrace level (i.e., level 26), equating to 38.7 per cent of site area.¹⁰⁶

[108] As is noted by Dr McGowan in the Visual Amenity Joint Expert Report, levels 3 to 8 of the proposed development exceed the acceptable outcomes for site cover by 4.7 per cent, which is equivalent to approximately 56 square metres. Levels 9 to 15 exceed the acceptable outcomes for site cover by 14.7 per cent, which is equivalent to approximately 267 square metres. Levels 16 to 25 exceed the acceptable outcomes for site cover by 24.7 per cent, which is equivalent to approximately 293 square metres. Level 26 exceeds the acceptable outcomes for site cover by 8.7 per cent, which is equivalent to approximately 103 square metres. From the base of the tower to the penthouse private open space level, at a height of 72.6 metres, there is no variation in site cover.¹⁰⁷

[109] Dr McGowan opines that the limited variations in site cover do not have a meaningful impact on the overall dominance of the building. He says that they do not reduce the building’s dominance.¹⁰⁸

¹⁰³ The ground floor and first floor are also described as levels 01 and 02 in the plans: Exhibit 5.1.

¹⁰⁴ Exhibit 5.01 p 2; Exhibit 10.01 p 17.

¹⁰⁵ Exhibit 5.01 p 2; Exhibit 10.01 p 17.

¹⁰⁶ Exhibit 5.01 p 2; Exhibit 10.01 p 17.

¹⁰⁷ Exhibit 7.01 p 44 [108].

¹⁰⁸ Exhibit 7.01 p 45 [113].

- [110] Mr Richards opines that the proposed development does not comply with the outcomes sought with respect to site cover. As I have noted in paragraph [92] above, this is premised on his opinion that the acceptable outcomes for setbacks and site cover demonstrate a principle that is implicit within the performance outcomes, namely that taller buildings or higher parts of buildings have reduced site cover and greater separation than that of lower height buildings.¹⁰⁹ As I have already found, I do not accept Mr Richards' evidence. I can see no reason in the text itself, or otherwise, to construe the relevant overall outcomes and performance outcomes as implying a principle as contended by Mr Richards.
- [111] Mr Curtis says that the site cover of the proposed development varies in that the shape of the podium footprint is not a uniform shape. He also notes that the site cover of the podium (60.1 per cent of the site area) varies in relation to the site cover of the typical tower floor plates above (54.7 per cent of the site area) and in relation to the uppermost storey and roof structures (38.7 per cent of the site area).
- [112] With respect to landscaping and whether the proposed development provides sufficient area, Mr Richards opines that there is a lack of sufficient space for deep planting areas to sustain large shade trees. He says there is only one area for deep planting. It is in the north-western corner of the subject land and is situated beneath the tower overhang.
- [113] Mr Curtis says the ground storey of the proposed development includes landscaping around its perimeter that interfaces with the adjoining pedestrian footpath along the subject land's three street frontages and along the subject land's common boundary with the adjoining property to the south. Mr Curtis opines that when these matters are considered in conjunction with the proposed development's setting and design, they are sufficient to meet the requirements of the overall outcome in s 6.2.3.2(2)(d)(iv) and performance outcome PO2(a) of the High density residential zone code.¹¹⁰
- [114] The schematic landscape design plans show that, at the ground floor plane and podium level, the proposed development will include an area of deep planting in the northwest corner of the subject land, several areas of large shrub plantings, several street trees, and screen planting in deep soil. Landscaping is also proposed to be included on level 02 in a manner that will make the landscaping visible from the public realm. There is also landscaping proposed on each level of the tower form along its northern façade. On some levels, the landscaping extends for the full length of the northern façade.¹¹¹ The schematic landscape design plans also record that the landscaping layout has been designed with contiguous areas to maximise soil volume and to achieve optimal plant growth.¹¹²
- [115] During cross-examination, Dr McGowan accepted that it is at the ground floor plane and podium level that there is pertinent interaction with the public realm. Those levels provide the immediate interface for pedestrians. In that context, Dr McGowan accepts that the proposed landscaping will assist to provide a human

¹⁰⁹ Exhibit 0.01 p 50 [163].

¹¹⁰ Exhibit 7.01 p 37 [74]; Exhibit 10.01 p 45 [117].

¹¹¹ Exhibit 4.09; Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 24 November 2021) 12.

¹¹² Exhibit 4.09 p 23.

scale to the proposed development.¹¹³ He also accepts that the site boundary sections in the schematic landscape design depict a well-considered landscaping scheme, and that the landscaping will assist in mitigating the impacts from the proposed development.¹¹⁴ I accept this evidence.

[116] Having regard to the photos (including those from Bedarra),¹¹⁵ the plans (including the elevations and sections),¹¹⁶ the schematic landscape design,¹¹⁷ the visual representations,¹¹⁸ the photomontages,¹¹⁹ and for other reasons already provided above, I accept the evidence of Mr Curtis.

[117] The proposed development has varying site cover. While the variations are not as significant as those suggested in the acceptable outcomes, given the design features of the proposed development, to which I have already referred above, they are sufficient to appropriately reduce the building's dominance in its context and to provide an appropriate extent of landscaping.

Conclusion regarding amenity impacts

[118] Having regard to all of the evidence outlined in paragraph [16] above, and my findings above, I am satisfied that the proposed development complies with:

- (a) the overall outcomes in ss 6.2.3.2(2)(b)(vii), (d)(ii) and (iv) and performance outcomes PO1(a) and PO2(b) of the High density residential zone code; and
- (b) the overall outcomes in ss 9.3.10.2(2)(a), (c) and (e) and performance outcome PO5 of the High-rise accommodation design code.

[119] I am also satisfied that the proposed development complies with the overall outcomes in ss 9.3.10.2(2)(a), (c) and (e) and performance outcome PO5 of the High-rise accommodation design code.

Is the design of the proposed development appropriate?

[120] The Council alleges that the design of the proposed development is inappropriate in that:

- (a) it has insufficient setbacks;
- (b) it provides inadequate landscaping at lower levels;
- (c) it fails to adopt a slender built form;
- (d) it fails to incorporate varying (and reducing) site cover and setbacks at higher levels; and

¹¹³ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 24 November 2021) 11.

¹¹⁴ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 24 November 2021) 11-2.

¹¹⁵ Exhibit 7.01 pp 73 - 80.

¹¹⁶ Exhibit 5.01.

¹¹⁷ Exhibit 4.09.

¹¹⁸ Exhibit 5.01.

¹¹⁹ Exhibit 6.01.

- (e) it does not adopt a podium form at ground level.¹²⁰
- [121] The Council alleges that this results in the proposed development having an unduly bulky and monolithic built form that is inconsistent with the intended built form in the locality. It also alleges that the design of the proposed development results in an adverse impact on the street's character by reason of its presentation of an overly dominant built form to the street that is not of human scale.¹²¹
- [122] The Council alleges that it follows that the proposed development is inconsistent with:
- (a) the overall outcomes in ss 6.2.3.2(2)(b)(vi) and (d)(iv) and performance outcomes PO1(c) and PO2(b), (c) and (d) of the High density residential zone code;
 - (b) the overall outcomes in ss 8.2.12.2(3)(a)(i), (b)(i) and (e)(i)(B) of the Light rail urban renewal area overlay code; and
 - (c) the overall outcomes in ss 9.3.10.2(2)(b) and (c) and performance outcome PO5 of the High-rise accommodation design code.
- [123] It is uncontentious that each of these provisions to which the Council refers is a relevant assessment benchmark. I accept that to be the case for the reasons explained in paragraph [44] above and because the subject land is in the Light rail urban renewal area overlay.¹²²

What do the relevant assessment benchmarks require?

- [124] The relevant assessment benchmarks to be considered are limited to those that the Council continues to put in issue, namely:
- (a) the overall outcomes in s 6.2.3.2(2)(b)(vi) and (d)(iv) and performance outcomes PO1(c) and PO2(b), (c) and (d) of the High density residential zone code;
 - (b) the overall outcomes in ss 8.2.12.2(3)(a)(i), (b)(i) and (e)(i)(B) of the Light rail urban renewal area overlay code; and
 - (c) the overall outcomes in ss 9.3.10.2(2)(b) and (c) and performance outcome PO5 of the High-rise accommodation design code.
- [125] The overall outcomes in ss 6.2.3.2(2)(b)(vi) and (d)(iv) of the High density residential zone code state:
- “(b) Housing is provided at a form, scale and intensity that is appropriate for the zone and each particular locality it is in where the following outcomes are satisfied:

Design and amenity

- (vi) **retention of important elements of neighbourhood character and amenity**, and cultural heritage;

¹²⁰ Exhibit 3.11 p 1 [2] and [3].

¹²¹ Exhibit 3.11 p 1 [2] and [3].

¹²² Exhibit 19.2.

- (d) **Built form** (excluding Dwelling houses on small lots) –
 - (iv) **has varying site cover to reduce building dominance and provide areas for landscaping.”**

(emphasis reflects the Council’s allegations)

[126] The Council also alleges that the proposed development is inconsistent with performance outcomes PO1(c) and PO2(b), (c) and (d) of the High density residential zone code, which state:

Performance outcomes	Acceptable outcomes			
Setbacks				
<p>PO1 Setbacks: (a) assist in the protection of adjacent amenity; (b) allow for access around the building; (c) contribute to streetscape character; (d) allow for on-site car parking; and provide separation between buildings to maintain view corridors. Note: Building setbacks may also be influenced by the shadow provisions in 9.4.4 General development provisions code.</p>	<p>AO1 Setbacks are as follows:</p>			
	Setback	Minimum distances measured in metres (m)		
		Height	Setback	
	Front for covered car parking (excluding a basement)	all	6m	
	Front (excluding covered car parking)	up to 23m	4m	
		for that part exceeding 23m	6m	
	Side and rear	up to 4.5m	1.5m	
for that part between 4.5m – 7.5m		2m		
for that part exceeding 7.5m		an extra 0.5m is added for every 3m in height or part thereof over 7.5m		

	Between on site habitable buildings (where not attached)	Double the applicable side setback
<p>PO2 Site cover: (a) is balanced between built form and green areas for landscaped private open space; (b) contributes to neighbourhood character and amenity; (c) promotes slender bulk form; (d) promotes an open, attractive and distinct skyline; and (e) facilitates small, fast moving shadows</p>	<p>AO2 Site cover does not exceed 50% for Dwelling houses on lots with areas equal to or greater than 400m and Dual occupancies. OR Site cover does not exceed 70% for Dwelling houses on lots less than 400m . OR For all other uses, site cover does not exceed a cumulative total of: (a) 50% of net site area up to 8 storeys; (b) 40% of net site area from 9 to 15 storeys; and (c) 30% of net site area or 750m per building, whichever is the lesser, above 15 storeys.</p>	

(emphasis reflects the Council's allegations)

[127] As I have noted above, the Council also alleges non-compliance with the Light rail urban renewal area overlay code. The purpose of that code is to ensure development provides high quality urban environments that optimise the pedestrian environment and accessibility to light rail services and economic development opportunities. The code states that it supports development opportunity as a catalyst for transforming the city into a highly-connected, compact city with vibrant centres, specialist precincts and urban renewal corridors that will efficiently use land and offer an interesting and unique street life.¹²³ The purpose of the code is to be achieved through its overall outcomes.¹²⁴

[128] Those overall outcomes with which the Council alleges non-compliance are in ss 8.2.12.2(3)(a)(i), (b)(i) and (e)(i)(B), which state:

“Creating communities

(a) **Place making helps development contribute to strengthening communities' local character** through:

(i) neighbourhood analysis that evaluates the **distinct local character patterns**, opportunities, and challenges and how **the proposed development enhances** them;

¹²³ City Plan ss 8.2.12.2(1) and (2).

¹²⁴ City Plan s 8.2.12.2(3).

Streets and spaces for people

- (b) Built form interfaces with the street to create strong defined building edges and **provides opportunities to engage with street life by:**
 - (i) **integrating balconies, building overhangs and canopies into the built form that are carefully designed and scaled to support the street** and positioned to maximise function and pedestrian comfort;

Design buildings to foster distinct Gold Coast character

- (e) Local character reflects a combination of built form and mix of uses, and is characterised by the following areas and their outcomes:
 - (i) building form is characterised by either:
 - (A) medium rise buildings that have a ‘perimeter form’ with buildings generally built to street edges, interspersed or ‘fractured’ by public spaces, landscaped areas or pedestrian access ways; and
 - (B) **high rise buildings with a clearly defined ‘tower and podium form’,** where podiums are built to the street edge and may be interspersed or ‘fractured’ by public spaces, landscaped areas or pedestrian access ways.”

(emphasis reflects the Council’s allegation)

[129] The overall outcomes in ss 9.3.10.2(2)(b) and (c) of the High-rise accommodation design code state:

- “(b) **Slender towers** relate to existing high-rises and **enhance views of the city skyline.**
- (c) **Tower development mitigates negative visual and physical impacts through appropriate setbacks and design.**”

(emphasis reflects the Council’s allegation)

[130] Performance outcome PO5 of the High-rise accommodation design code states:

Performance outcomes	Acceptable outcomes
Tower form design	
<p>PO5 Tower form mitigates negative visual and physical impacts, including impacts on privacy, by setting back from streets, parks, open space and adjacent properties and tower forms.</p>	<p>AO5.1 Tower form (including balconies) along:</p> <ul style="list-style-type: none"> (a) single frontages step in at least 3m from the base (podium); or (b) corner frontages can have up to 1/3 tower width extended straight down at the corner point to reinforce the intersection if negative ground level wind effects are mitigated.
	<p>AO5.2 New towers are separated a minimum distance of 25m from any existing or approved adjacent and on-site tower(s).</p>
	<p>AO5.3 Tower form is coordinated to off-set with adjacent existing and proposed towers to ensure:</p> <ul style="list-style-type: none"> (a) prominent tower views to natural features like the beach and rivers are not obstructed; and (b) views of the sky and access to sunlight from the public realm and private open space areas are maximised.

(emphasis reflects the Council's allegations)

[131] These assessment benchmarks considered together with the Council's allegations with respect to the proposed development raise four factual issues for determination, namely:

1. Does the proposed development have a clearly defined tower and podium form and appropriately interface with the street?
2. Does the proposed development have a slender bulk form?
3. Does the proposed development promote an open, attractive, and distinct skyline?
4. Does the proposed development contribute to the character of the streetscape and the character and amenity of the neighbourhood?

- [132] Each of these issues, to a degree, require an appreciation of the local context in which the proposed development will be viewed. As such, before turning to each of the issues, it is convenient to address the evidence about the local context.

What is the relevant context in which the proposed development will be viewed?

- [133] The architects and visual amenity experts agree about the extent of the local context in which the proposed development will be viewed. They say that the broader local context of relevance to the subject land and its development is an area bounded by Wharf Road to the north, the beach to the east, Chelsea Avenue to the south, and the Gold Coast Highway to the south. The experts agree that, while it is logical for the edges of the local area to coincide with obvious topographical features (such as roads), the built form on both sides of the roads that forms such edges (such as built form on the northern side of Wharf Street and the southern side of Chelsea Avenue) still contribute to the visual qualities of the local area. The experts also agree that the photos included in Exhibit 6.01 provide an appreciation of that local context.¹²⁵
- [134] The experts also agree about the building form parameters of the existing developments in the immediate vicinity of the subject land. They agree that relevant buildings that inform the context in which the proposed development will be viewed include:
- (a) the 11-storey-high and 29-metre-wide multiple dwelling known as Viscount on the Beach at 1-3 First Avenue, which is opposite and to the northeast of the subject land;
 - (b) the 30-storey-high and 53-metre-wide multiple dwelling known as La Sabbia at 74-86 Old Burleigh Road, which is opposite and to the northwest of the subject land, on the northeast corner of the intersection of Old Burleigh Road and First Avenue;
 - (c) the 26-storey-high and 44-metre-wide multiple dwelling known as Biarritz at 87 Old Burleigh Road, which is on the northwest corner of the intersection of Old Burleigh Road and First Avenue;
 - (d) the three-storey-high multiple dwelling on Old Burleigh Road and First Avenue, which is located opposite and to the west of the subject land;
 - (e) the single level house at 91 Old Burleigh Road, which is opposite and to the south-west of the subject land;
 - (f) the 25-storey-high and 30-metre-wide multiple dwelling known as Vue at 10 First Avenue, which is to the west of the subject land;
 - (g) the six-storey multiple dwelling known as Bedarra at 90 Old Burleigh Road, which adjoins the southern boundary of the subject land; and
 - (h) the multiple building development known as Vogue on Broadbeach at 5-7 Broadbeach Boulevard, which is to the south of Bedarra and occupies the remainder of the block on which the subject land is located. The development includes three low-rise buildings and a 16-storey-high and 33-

¹²⁵ Exhibit 7.01 p 17 [22]; Exhibit 10.01 p 14 [21].

metre-wide tower at the corner of Second Avenue and Broadbeach Boulevard.¹²⁶

[135] Dr McGowan opines that the local area is characterised by:

- (a) the prominent armature of the Gold Coast Highway, which defines the western edge of the local area and incorporates the light rail line and station, and the clear eastern edge created by the beach and adjacent parkland;
- (b) Wharf Road (to the north of the local area) and Chelsea Avenue (to the south of the local area), which both extend from the Highway to the beach and provide legible edges defining the northern and southern extents of the local area;
- (c) a varied road network which results in long north-south aligned blocks between Wharf Road and First Avenue and smaller west-east aligned blocks to the south of First Avenue (with the exception of the open space associated with the Bowls Club and Broadbeach Park, which disrupts the local road network);
- (d) the activity associated with the beach, the Bowls Club, the Surf Life Saving Club, Broadbeach Park, and a number of small food outlets in the vicinity of First Avenue;
- (e) the landmark developments of:
 - (i) the Crown Plaza tower (with its well-known revolving rooftop restaurant) at the corner of Gold Coast Highway and First Avenue, which is 30-storeys-high and 47-metres-wide; and
 - (ii) the prominent Jewel development at the corner of Wharf Road and Old Burleigh Road, which includes a building that is 48-storeys-high and 42-metres-wide, a building that is 41-storeys-high and 42-metres-wide and a building that is 35-storeys-high and 38-metres-wide;¹²⁷
- (f) a west-east gradation in development intensity, with a predominance of low-rise development through the western part of the local area, and a discernible band of high-rise buildings through the eastern part;
- (g) within the eastern band of the local area, a north-south gradation in intensity, with more towers and a higher average height to the north of First Avenue; and
- (h) a widening of the eastern band of high-rise towers in the vicinity of the subject land, such that the subject land sits amongst a cluster of high-rise buildings.¹²⁸

[136] Similar observations were made by the architects in the Architecture Joint Expert Report.¹²⁹

¹²⁶ Exhibit 7.01 p 13 [21]; Exhibit 10.01 pp 11-4 [19] – [20]; Exhibit 21.1.

¹²⁷ Exhibit 21.1.

¹²⁸ Exhibit 7.01 pp 42-3 [105(a)].

¹²⁹ Exhibit 10.01 p 16 [23].

- [137] Dr McGowan opines that compared to other parts of the high-rise spine, particularly further north through Surfers Paradise and south through Broadbeach, the local area enjoys a greater sense of openness and lower overall intensity. He opines that this is informed by the greater extent of low-rise development, the large areas of open space, the separation between towers, the lower frequency of towers, and because most of the larger towers sit on large sites that provide greater open space and separation around the towers.¹³⁰
- [138] Dr McGowan accepts that there are a number of long towers in the area, including La Sabbia, Biarritz, Oaks tower, Marakesh, and Jewel. However, he considers it to be of note that:
- (a) La Sabbia, Biarritz, Oaks tower, and Marakesh were constructed in the 1980s and 1990s;
 - (b) the more recent towers in the local area, such as Vue and Vogue on Broadbeach do not have such substantial horizontal dimensions;
 - (c) while the Jewel buildings have substantial horizontal dimensions and are recent additions to the skyline, they form part of a very large landmark development in the city;
 - (d) the longest building, Marakesh, is only 11 storeys high;
 - (e) the next longest, La Sabbia, has a substantial step in building form at level 23; and
 - (f) both Biarritz and La Sabbia, being the two longer buildings nearest the subject land, are located on large lots and are oriented on a north-west to south-east alignment.
- [139] Dr McGowan does not explain the relevance of his observations about the other long towers in the local area. When read in context with his other observations and opinions, it seems to me that Dr McGowan seeks to identify a point of difference between those buildings and the proposed development to discount any suggestion that the built form metrics of those developments set a precedent. That Dr McGowan felt it necessary to do so, to my mind, is because of his heavy reliance on built form metrics in explaining the basis of his opinions about the visual impact of the proposed development. In any event, I do not consider the mere existence of other buildings in the local area with similar or greater dimensions is a matter that justifies approval of the proposed development or demonstrates that the proposed development complies with City Plan.
- [140] Mr Curtis generally agrees with Dr McGowan's description of the character of the local area. However, with respect to Dr McGowan's observation that the local area enjoys a sense of openness and lower overall intensity, as compared to other parts of the high-rise spine (particularly further north through Surfers Paradise and further south through Broadbeach), Mr Curtis says this only applies to the area to the south of Armrick Avenue through to Chelsea Avenue. He says that the intensity of the local area in proximity to the subject land is otherwise comparable to the areas further north through Surfers Paradise and south through Broadbeach.¹³¹ He says

¹³⁰ Exhibit 7.01 p 43 [105(b)].

¹³¹ Exhibit 7.01 p 23 [38].

that La Sabbia and Biarritz are located on large properties where they are well set back from the intersection of Surf Parade and First Avenue. He says these setbacks, combined with the width of the roads that adjoin the subject land to the east, north and west, the Sir John Egerton Park, Kurrawa Beach and the Coral Sea opposite the subject land to the west locates the subject land within a relatively open context compared to other “boxed in” developments.¹³²

[141] I accept Dr McGowan’s evidence about the local context and the evidence of Mr Curtis that the subject land is located within a relatively open context compared to other “boxed in” developments in the local area. The evidence accords with the impression of the area I have formed from the photographs of the local area that are in evidence before me.

[142] The experts agree that the area is experiencing significant redevelopment. There are several medium-rise and high-rise developments that have been recently completed or approved. They include the Jewel tower development (comprising three towers) at the corner of Wharf Road and Old Burleigh Road, which was finished in 2020; the Vue tower to the west of the subject land at 10 First Avenue, which was finished in 2020; Vogue on Broadbeach to the south of the subject land, which was finished in 2003; and Opus tower at 16 Chelsea Avenue, which was finished in 2021.¹³³

[143] Although the built form in the area has been changing in recent times, and will likely continue to change, at present it is generally comprised of high-rise, medium rise and low-rise multiple dwellings and houses. The architects agree that the difference in the scale and bulk between the existing developments creates a robust contrast in the built form that is a defining attribute of the local area’s character and identity.¹³⁴ I accept this evidence.

[144] Having considered the evidence regarding the relevant local context, it is now convenient to address the issues identified in paragraph [131] with an appreciation of that relevant setting.

Does the proposed development have a clearly defined tower and podium form and appropriately interface with the street?

[145] The Council submits that the proposed development does not deliver an “orthodox and effective” tower and podium built form. Instead, the proposed development delivers a materially different built form outcome. The Council submits that the proposed development is designed with a void in the area where the podium should be located and with no meaningful setback of the tower to the front edge of the podium. The Council says that this does not comply with the requirement for a clearly defined tower and podium form in the overall outcome in s 8.2.12.2(3)(e)(i)(B) of the Light rail urban renewal area overlay code. The Council also says that the effect sought to be achieved by the delivery of a podium is evident from s 8.2.12.2(3)(b)(i) of the Light rail urban renewal area overlay code.¹³⁵

¹³² Exhibit 7.01 p 23 [39] – [40].

¹³³ Exhibit 10.01 p 16 [26].

¹³⁴ Exhibit 10.01 p 14 [22].

¹³⁵ Amended Outline of Argument for the Council pp 23-4 [80]-[83] and p 26 [88].

[146] In addition, the Council submits that the absence of an “*orthodox and effective*” tower and podium built form results in non-compliance with:

- (a) the overall outcome in s 6.2.3.2(2)(d)(iv) of the High density residential zone code because it does not does not adopt sufficient varying site cover between the tower and the podium with the result that the tower form adjoining the street will appear unduly imposing;
- (b) performance outcomes PO1(c) and PO2(b) of the High density residential zone code because anticipated streetscape and neighbourhood character requires the delivery of an effective podium built form; and
- (c) the overall outcome in s 9.3.10.2(2)(c) and performance outcome PO5 of the High-rise accommodation design code because of the failure to set back the tower from the front edge of the podium form.¹³⁶

[147] In support of its submissions, the Council relies on evidence given by Mr Curtis during cross-examination and the evidence of Mr Richards in his individual statement.

[148] The Council notes that the unusual nature of this podium was explored during cross-examination of Mr Curtis, wherein the following exchange occurred:

“Now, the manner in which towers and podiums operate, in the orthodox sense, is that the tower is set back from the podium such that the relationship between the building and the street is one of human scale, notwithstanding the tall tower. Would you agree that that’s an orthodox podium and tower arrangement?---Podiums, or bases of buildings, yes, do look to provide a different height reference, yes.

And the second part of what I just put to you was that, in the orthodox sense, the tower is set in from the podium to create that height differential?---More – most of the time. Yes.

And so what’s proposed here is, you’d agree, it’s a little unorthodox in that it doesn’t adopt that approach?---Yes. Innovative. Yes.

Unorthodox?---In being innovative. Yes.”¹³⁷

[149] In addition, the Council notes that Mr Curtis agreed that the setback between the edge of the lower built form and the residential tower was “*not highly appreciable*”¹³⁸ and that the void was a material element of the lower levels. The Council relies on the following exchange:

“But the podium, in your mind, is the void, isn’t it?---It is those elements, including the void. Yes. It’s the canopy. It’s the – what’s happening at the ground level, and then it’s the void above it, and its

¹³⁶ Amended Outline of Argument for the Council pp 26-7 [89].

¹³⁷ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 56.

¹³⁸ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 56.

– you can see into the void. You can see the columns of it in the void. There’s a lot going on there.”¹³⁹

[150] As is apparent from the exchange that immediately follows this one, Mr Curtis is of the opinion that the podium is comprised of levels 1 and 2, with level 2 being double height.¹⁴⁰

[151] As to the consequence of the failure to deliver an orthodox podium form, the Council relies on the evidence of Mr Richards as follows:

“12 In architectural terms, for high rise buildings a podium is the part of a building on the lower levels that defines, frames and addresses the street, and provides uses both on ground floor and above (including balconies and windows) that overlook the street and other public spaces. This achieves the further benefit of providing casual surveillance of the street. The City Plan states that high rise buildings ought to provide a “clearly defined tower and podium form, where podiums are built to the street edge”.

13 By way of example, Overall Outcome (3)(b)(i) of the LRUROC states that built form ought to interface with the street to create strong defined building edges and provide opportunities to engage with street life by “integrating balconies, building overhangs and canopies into the built form that are carefully designed and scaled to support the street and positioned to maximise function and pedestrian comfort.”

14 Typically, the tower forms are set back from the podium, which also breaks the scale of the tower when looking from the street and reduces the visual impact of the tower on the street.

15 These attributes are reinforced in Figures 8.2.12-2 and 8.2.12-10 in the LRURAOC and PO1, PO2 and PO3 of the HRAD code (including Figures 9.3.10-1, 9.3.10-2 and 9.3.10-3). These illustrations show strongly defined building edges with an articulated form (not just at ground level, but in the storey or two above). The tower forms are clearly set back from the podium edge.

16 While the proposal’s recessed terrace and the ceiling above are the height one would normally expect for a podium, the void does not achieve the objectives of overlooking and casual surveillance of the street. The tall columns and ceiling do not form a visual break between a podium form and the tower but accentuate the vertical height of the tower.

¹³⁹ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 58.

¹⁴⁰ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 58.

- 17 This design outcome also compromises one of the fundamental purposes of a podium, which is to permit otherwise very tall buildings to nonetheless present to the street at a “human scale”. I note that in the JER at paragraph 47 Mr Curtis appears to place weight on the existence of “human scale elements” within the lower floor area, but the existence of some human-scale elements is not responsive, in my opinion, to what is sought to be achieved by the Scheme’s requirement for tower and podium built form.
- 18 Further, the fact that the proposed “podium” is hollow in nature further emphasises difficulties in ensuring a human-scale nexus between the building and the street. Indeed, by way of example, in paragraph 47 of the JER Mr Curtis describes the hollowed out void as “providing a dramatic void space”—while architecturally impressive, this is the antithesis of what a typical podium form is supposed to achieve.”

[152] The terms “*podium*” and “*tower*” are not defined in the *Planning Act 2016*, the *Planning Regulation 2017*, the definitions in sch 1 of City Plan, nor the *Acts Interpretation Act 1954*. Nor is the phrase “*tower and podium form*”. As such, they are to be given their ordinary meaning.¹⁴¹

[153] “*Podium*” is defined in the Macquarie Dictionary as:

“2. *Architecture*

- a. a continuous projecting base of a building forming the front of the basement of the foundation behind it.
- b. a low continuous structure serving as a base or terrace wall.
- c. the stylobate or the structure under the stylobate of a temple.
- d. a raised platform surrounding the arena of an ancient amphitheatre.”¹⁴²

[154] “*Tower*” is defined as “*a building or structure high in proportion to its lateral dimensions, either isolated for forming part of any building*”.¹⁴³

¹⁴¹ City Plan s 1.2.1(1).

¹⁴² *Macquarie Dictionary Online*, 2021, Macquarie Dictionary Publishers, an Imprint of PanMacmillan Australia Pty Ltd, www.macquariedictionary.com.au.

¹⁴³ *Macquarie Dictionary Online*, 2021, Macquarie Dictionary Publishers, an Imprint of PanMacmillan Australia Pty Ltd, www.macquariedictionary.com.au.

[155] An illustration of a “clearly defined tower and podium form” is provided in City Plan in Figure 8.2.12-10 as follows:



[156] When one considers City Plan as a whole, it is apparent that the figures are intended to assist in the comprehension of the provisions of City Plan. They are not a definitive illustration of the development that is to be provided.

[157] Further guidance on the planning intent for podiums can be gleaned from other provisions of City Plan, including:

(a) the overall outcome in s 8.2.12.2(d)(iii) of the Light rail urban renewal area overlay code, which states:

“(d) Quality building form at the street-level interacts and enhances street life by

(iii) locating low-rise buildings or podiums to frame active edges of streets, parks, open space, and to reinforce street corners;”

- (b) the overall outcome in s 8.2.12.2(e)(ii) of the Light rail urban renewal area overlay code, which states:

“(e) Local character reflects a combination of built form and mix of uses, and is characterised by the following areas and their outcomes

- (ii) mix of uses are characterised by:

(A) ‘Primary focus areas’ encompass the established centres of Surfers Paradise and Broadbeach and allow for the highest concentrations of activity, commerce and intensity of buildings utilising tower and podium form;”

- (c) the overall outcome in s 9.3.10.2(2)(d) of the High-rise accommodation design code, which states:

“Where they occur (in accordance with zone intentions), podiums are designed to engage with the street and be of a scale that is complementary to adjoining and nearby buildings.”

- (d) performance outcome PO1 of the High-rise accommodation design code and the associated acceptable outcomes, which state:

Performance outcomes	Acceptable outcomes
Tower base (podium)	
<p>PO1 Where podiums are envisaged by the zone, tower base form respects the framework of established built form, adjacent streets, parks and public or private open spaces.</p>	<p>AO1.1 Tower base heights:</p> <ul style="list-style-type: none"> (a) are well-proportioned to frame adjacent park land and on-site open space; (b) match neighbouring low-set built form; or (c) are no greater than 10.5 metres in height where no neighbouring low-set built form exists. <p>AO1.2 Tower base setbacks:</p> <ul style="list-style-type: none"> (a) match adjacent established setbacks; and (b) continue public open space areas provided along street frontages.

- [158] During cross-examination, Mr Curtis accepted the Council’s propositions that the purposes of a podium under City Plan are to:
- (a) provide a space that interfaces and interacts with the street by providing an opportunity for passive surveillance of the street and for engagement with street life; and
 - (b) complement the size and scale of existing lower-rise buildings in the locality.¹⁴⁴
- [159] I accept these propositions. They are consistent with the provisions referred to in paragraph [157] above. I do not accept the Council’s contention that the absence of an “*orthodox and effective*” tower and podium built form results in non-compliance with City Plan. There is nothing in the text itself, or otherwise, that calls for a podium to be delivered in “*an orthodox manner*”. To the contrary, s 8.2.12.2(3)(e)(iii) of the Light rail urban renewal area overlay code encourages “*innovative high rise towers*”.
- [160] Whether there is a clearly defined tower and podium form is a question of fact that requires a value judgment. It is a matter about which reasonable minds might differ. On this issue, in addition to the evidence relied on by the Council to which I have referred above, I had the benefit of additional evidence from Mr Richards, and evidence from Ms Morrissy, Dr McGowan and Mr Curtis.
- [161] In oral evidence, Mr Richards contended that a podium had to contain balconies and habitable spaces.¹⁴⁵ He also contended that the proposed podium did not provide opportunities for overlooking the street and may not be used at night.¹⁴⁶
- [162] Ms Morrissy opines that the proposed development does not comply with the requirement to provide a clearly defined tower and podium form. She considers that, in this respect, City Plan requires the distinction between the tower base or podium and the tower form to be obvious and easily recognisable, not blurred and ambiguous. Ms Morrissy opines that whether the proposed development is regarded as including a podium or not, it does not have a clearly defined podium such as that which is represented by figure 8.2.12-19 in the Light rail urban renewal area overlay code. Ms Morrissy also relies on the evidence of Mr Richards that the development does not contain a podium because the lower portion of the building, which sits closer to the street, does not have internal spaces to use and windows and balconies to provide casual surveillance of the street.¹⁴⁷
- [163] Dr McGowan’s evidence on this issue was more limited. During cross-examination, he conceded that there was a clear visual difference between the lower levels and the tower.¹⁴⁸ Dr McGowan also accepted that the high-quality

¹⁴⁴ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 55-6.

¹⁴⁵ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 85-6.

¹⁴⁶ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 86.

¹⁴⁷ Exhibit 11.01 p 27 [102]; Exhibit 10.01 pp 32-3 [78].

¹⁴⁸ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 24 November 2021) 16.

landscaping in and around the podium would assist in giving the proposed development an effective and appropriate human scale.¹⁴⁹

- [164] In the Architecture Joint Expert Report, Mr Curtis opines that the proposed development is clearly defined by a tower and podium form. He explains that the tower is shown to have a consistent appearance from levels 3 to 26. The tower's form and appearance are then terminated and crowned by the penthouse roof terrace. He opines that the podium is clearly differentiated from that tower by four design elements. First, the projecting roof line of its canopy above level 2, which is disengaged from the floor plate above and appears to float and extend towards the subject land's three frontages. Second, the hollowed-out appearance that allows for views into the built form, where human scale elements animate the appearance and provide complexity and visual interest. Third, the double height volume of the recreation space at level 02 that sits above the ground storey (level 01) and provides a dramatic void space with the tower perched above. The void exposes the proposed building's skeleton of supporting columns, accentuates the podium's roof canopy, and reinforces the podium's tropical pavilion-like appearance. Fourth, the robust solidity and materiality of the human scale elements at level 1, which ground the built form and connect it with the street. These grounding elements are complemented by the integrated coastal-style landscaping within the setback, which soften the pedestrian level interface with the street.
- [165] Mr Curtis says this visual differentiation of the podium provides a transition in height from the tower to the pedestrian scale of the street and a visual reference to the low-rise development in the local area. He opines that these attributes contribute to a cohesive streetscape and assist to mitigate the visual impact created by the contrasting differences in building height that otherwise characterise the local area. He says that the clear differentiation between the tower and podium will result in a distinctive and innovative compositional juxtaposition of architectural elements to provide a dynamic visual aesthetic that will animate and activate the adjoining streetscape.¹⁵⁰
- [166] I accept the evidence of Mr Curtis. I prefer it to that of Mr Richards and Ms Morrissy for each of the following four reasons.
- [167] First, in my view, the proposed development provides clear definition between the podium and tower as required by City Plan. It has been sensitively designed to interface with the street and present a pedestrian or human scale to the street. It does not dominate the streetscape or the character of the local area in which it is proposed. This is demonstrated by the elevations and perspective views provided as part of the plans¹⁵¹ and extracted in the Architecture Joint Expert Report¹⁵² and by the photomontages.¹⁵³ Mr Curtis' evidence accords with what is evident from those elevations, perspective views, and photomontages.

¹⁴⁹ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 24 November 2021) 11.

¹⁵⁰ Exhibit 10.01 p 29 [55] - [58].

¹⁵¹ Exhibit 5.01.

¹⁵² Exhibit 10.01 p 23 figure 15, p 24 figures 16 and 17, p 26 figures 18 and 19

¹⁵³ Exhibit 6.01.

- [168] Second, I do not accept the evidence of Mr Richards that a podium is to contain balconies and habitable spaces.¹⁵⁴ No such requirement appears in the assessment benchmarks with respect to podiums. Further, his opinion is not supported by the illustrations in the figures in the Light rail urban renewal area overlay code, some of which show blank walls or recreation spaces, or large commercial spaces in podiums.
- [169] Third, I do not accept the evidence of Mr Richards that level 2 of the proposed development does not achieve the objectives of overlooking and casual surveillance of the street. The level 2 plan shows sun beds, pools and spas in that area (i.e., communal open space areas), which would allow for casual surveillance of the street and interaction from the street with those on level 2. Further, there is no suggestion in the material that the communal facilities would only be available during the day, and I am not prepared to infer that will be the case.
- [170] Fourth, I do not accept the opinions of Ms Morrissy. They are founded on evidence from Mr Richards that I do not accept. In addition, there is no requirement for the “*clear definition*” of tower and podium to be provided in the manner depicted in the illustration in the Light rail urban renewal area overlay code.
- [171] In the circumstances, I am satisfied that the proposed development will have a clearly defined tower and podium form and will appropriately interface with the street.

Does the proposed development have a slender bulk form?

- [172] The Council alleges that the proposed development does not exhibit a slender tower form or a slender bulk form.
- [173] The terms “*slender tower form*” and “*slender bulk form*” are not defined in the *Planning Act 2016*, the *Planning Regulation 2017*, the definitions in sch 1 of City Plan, or the *Acts Interpretation Act 1954*. As such, they are to be given their ordinary meaning.¹⁵⁵
- [174] “*Slender*” is defined in the Macquarie Dictionary as “*small in circumference in proportion to height or length: slender column*”.¹⁵⁶ “*Bulk*” is defined in the Macquarie Dictionary as “*magnitude in three dimensions*”.¹⁵⁷
- [175] Considered in the abstract, with only the assistance of these definitions, it is difficult to ascribe a meaning to the phrase “*slender bulk form*”. The architects were not able to assist with a meaning as “*slender bulk*” is not an architectural term.¹⁵⁸

¹⁵⁴ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 85-6.

¹⁵⁵ City Plan s 1.2.1(1).

¹⁵⁶ *Macquarie Dictionary Online*, 2021, Macquarie Dictionary Publishers, an Imprint of PanMacmillan Australia Pty Ltd, www.macquariedictionary.com.au.

¹⁵⁷ *Macquarie Dictionary Online*, 2021, Macquarie Dictionary Publishers, an Imprint of PanMacmillan Australia Pty Ltd, www.macquariedictionary.com.au.

¹⁵⁸ Transcript of Proceedings, *DVB Projects Pty Ltd v Council of the City of Gold Coast* (Planning and Environment Court of Queensland, 1646/21, Kefford DCJ, 23 November 2021) 50.

- [176] The Council submits that these provisions require consideration of the tower, which is a three-dimensional object. It says that the proposed development should not be considered two-dimensionally. I agree.
- [177] It is not otherwise necessary to define the phrase “*slender bulk form*” as City Plan ultimately calls for a value judgment about whether the proposed development, considered in its three-dimensional form, could properly be regarded as a slender tower and whether the site cover promotes a slender bulk form. These are questions of fact to be determined by reference to the circumstances that pertain in the case under consideration.
- [178] In terms of empirically defined bulk, the proposed development has:
- (a) a height of 26 storeys and approximately 93.5 metres measured from ground level to the top of the roof;
 - (b) an overall length (for the tower component, i.e., above level 2) of approximately 45 or 47 metres; and
 - (c) an overall width (for the tower component, i.e., above level 2) of approximately 18 metres.¹⁵⁹
- [179] The length and width of each façade is less than the overall length and width of the proposed development due to the stepping employed in its design. The northern façade, which presents to First Avenue, is approximately 40 metres long. That part of the southern façade that is closest to the southern boundary is approximately 15 metres wide. The eastern façade, which presents to Broadbeach Boulevard, and the western façade, which presents to Old Burleigh Road, are each approximately 13 metres wide.¹⁶⁰
- [180] Mr Curtis says that the appearance of a development’s bulk or visual mass is informed by four qualitative considerations. First, the overall distribution of the proposed development’s volume in space vertically and horizontally. Second, the visual articulation of surfaces to avoid a homogeneous appearance by introducing a variety of materials, colours and smaller elements that reflect the human scale. Mr Curtis says a combination of smaller elements will enhance a building’s visual interest and reinforce its appearance as an aggregation of parts as opposed to a monolithic form. Third, the extent of open space that surrounds the development. Mr Curtis explains that a building located on a corner site will be viewed in a more open setting and the extent of the adjoining “*borrowed*” open space can balance the apparent volume of a building. In contrast, where a building is viewed obliquely along a street with other buildings, it can create the appearance of a contiguous wall of aggregated bulk. Fourth, the appearance of the surrounding development. Mr Curtis explains that the surrounding development provides a visual frame of reference within which individual developments will be viewed. The other buildings also provide a point of comparison, with the result that one may appear bulkier than another.¹⁶¹

¹⁵⁹ Exhibit 5.01.

¹⁶⁰ The dimensions are an approximation, having been scaled from the plans in Exhibit 5.01 using marked dimensions on the plans.

¹⁶¹ Exhibit 7.01 p 25 [43] – [44].

- [181] With respect to the overall distribution of the proposed development's volume in space vertically and horizontally and its visual articulation, Mr Curtis opines that the appearance of the northern façade is characterised by three design features. First, the exposed projecting edges of the floor plates, which layer the appearance of the façade to create a stack of human scale floors that fragment the appearance of the built form's overall bulk. Second, the symmetrical composition of the façade, which locates deep recessed balconies at each end of the façade and a deep central recess that accommodates a garden space between the adjacent apartment units. Mr Curtis says that the depth of these elements, when viewed together as vertical stacks, modulates the width of the façade, and reinforces the tower's vertical proportion to balance the layered horizontal appearance provide by the projecting floor plate edges. Third, the depth of the corner balconies, which provide a feathered edge to the built form. This is complemented by the depth of the garden. Mr Curtis says that those design features visually erode the bulk of the built form. He says that the visual erosion is complemented by the transparency of the extensive fenestration, which further contributes to the effective mitigation of the built form's visual bulk.¹⁶²
- [182] Although the southern façade adjoins Bedarra, parts of it will be visible from the street. Mr Curtis observes that the southern façade has a more solid appearance than the northern façade. He says it is characterised by four design features. First, the external wall to the tower's central service core and the bedroom and bathroom spaces that flank it. Second, the fenestration located at the ends of the façade and within a narrow strip at the centre of the façade (which provide access to views from the lift lobby). Third, the fenestration, located at the ends of the southern façade, and the recessed corner balconies that reflect and provide a similar feathering to the built form as that provided to the northern façade by the balconies. Mr Curtis says that the fenestration and recessed corner balconies frame the central stepped area of the façade, where the stepped alignment and fluted wall panels modulate its width and reinforce its vertical proportion. Fourth, there is a juxtaposition of the vertical central elements with the horizontal end or corner elements, which balances the façade's visual composition to mitigate its visual bulk and provide an attractive secondary façade appearance.¹⁶³
- [183] Mr Curtis says that the extreme slenderness of the eastern and western facades provides a contrast to the widths of the northern and southern facades. The eastern and western facades share a similar appearance. Mr Curtis describes that appearance as characterised by central fenestration flanked by corner balconies. The stepped design of the southern portion of the building results in several corner balconies, which present to the east and west. Mr Curtis says that when those stepped elements are viewed together as vertical stacks, they modulate the narrow width of the façade and accentuate the tower's extreme slenderness, which is then capped by the projecting roof top elements to provide a distinctive skyline profile.¹⁶⁴
- [184] In both the Architecture Joint Expert Report and the Visual Amenity Joint Expert Report, Mr Curtis provides a detailed analysis of how the proposed development

¹⁶² Exhibit 7.01 p 26 [47].

¹⁶³ Exhibit 7.01 p 26 [48].

¹⁶⁴ Exhibit 7.01 pp 26-7 [49].

would be perceived in the local context. His analysis includes detailed consideration of each of the photomontages.¹⁶⁵

- [185] Mr Curtis explains that from locations such as the corner of Wharf Road and Old Burleigh Road and the corner of First Avenue and Beach Parade, views of the proposed development will be partially obstructed by other existing towers. He opines that the other development will conceal the separation between individual towers and will result in the visual merging of the buildings' combined bulk. In those situations, the width of the proposed development is partially obscured by the visual obstruction provided by other development. Mr Curtis also opines that, to the extent that the proposed development's width is visible, it will be perceived as slender relative to the comparative proportions of the other buildings in the visual cluster of which it forms a part.
- [186] Mr Curtis says that from locations such as the beach, the proposed development will be set against the sky and will be viewed as having a relatively slender tower form. He says that it will not appear to be significantly wider than the neighbouring existing development and will appear to be significantly less bulky than the La Sabbia tower located opposite to the north.
- [187] Mr Curtis opines that when viewed from locations to the south, such as the corner of Amrick Avenue and Surf Parade and near the corner of Chelsea Avenue and Old Burleigh Road, the lower levels of the proposed development will be partially or fully obstructed by low-rise development or vegetation in the foreground. Depending on the location, the middle portions of the proposed development will be viewed either as part of a cumulative bulk with other mid-rise development or views of the middle portions of the proposed development will be obscured by low-rise development or vegetation in the foreground. Mr Curtis opines that the upper portions of the proposed development will appear as a relatively slender tower form, with its vertical visual proportion reinforced by the elements that articulate the appearance of the southern façade. He also says that the perception of bulk will be mitigated by the very narrow width of the proposed development's eastern façade, and by the proposed development's appearance relative to the bulk of other development.
- [188] When viewed from locations that are very close to the subject land, such as near the corner of Old Burleigh Road and Second Avenue, Mr Curtis explains that the viewer will see only part of the proposed development. Although the upper storeys will not be part of the normal field of vision of the person on the street and, as such, will not balance the appearance of the tower's width, Mr Curtis opines that the visible lower storeys will not appear excessively wide or bulky. This is due to the modulated appearance of the façade and the vertical resolution of its vertical proportion.
- [189] Mr Curtis also says that the proposed development will not appear bulky when compared to the height and scale of adjoining and nearby developments.
- [190] In addition, Mr Curtis notes that the proposed development will be adjoined by three street frontages (i.e., to the east, north and west), with the beach and the Coral Sea also opposite to the west. He says that these locational attributes provide

¹⁶⁵ Exhibit 7.01 pp 29-32 [51] – [61]; Exhibit 10.01 pp 25-8 [51] - [52].

greater separation from neighbouring development than what is typically provided to a tower.¹⁶⁶ Mr Richards agrees.¹⁶⁷

- [191] Mr Curtis opines that the proposed development will not appear excessively bulky or monolithic in relation to the local context. He says it will not present a long urban wall that is appreciably greater than or incompatible with the bulk of existing development of a similar scale within the local context.¹⁶⁸ In Mr Curtis' view, the separation provided by the streets to the nearby towers will promote view corridors between nearby towers. In addition, he says that the proposed development's relatively open setting will allow its distinctive form and appearance to enhance views of the city skyline.¹⁶⁹ Mr Curtis opines that the proposed development will have a slender tower form that will be innovative, attractive and visually appealing and will advance and enhance views of the Gold Coast's iconic skyline.¹⁷⁰ Mr Curtis' opinions in this regard are premised on his views about the overall distribution of the proposed development's volume in space vertically and horizontally, the treatments and design measures used to provide visual articulation to the proposed development, the extent of open space that surrounds the development and the visual frame of reference within which the proposed development will be viewed. I have outlined those opinions in paragraphs [181] to [190] above.
- [192] Mr Richards says that the form of a building is understood in three dimensions and appreciated from many viewpoints as one moves about an area. As such, building facades are not seen on their own in isolation from the other facades. Mr Richards observes that the form of the building is long on the north and south facades, and narrow on the east and west facades. He says that although the east-west views are slender if viewed in isolation, the north-south views are less slender, and the east-west views cannot be said to "*cancel out*" the north-south views.¹⁷¹
- [193] Mr Richards opines that when the building is viewed from various viewpoints as one moves about the area, both facades are visible, and the long façade visually dominates the building form. As such, he says that the development could not be said to have a slender form. By way of comparison, Mr Richards says that a building of the same floor plate with a square plan would have a slenderer form.¹⁷²
- [194] Dr McGowan does not cavil with Mr Curtis' evidence about:
- (a) the qualitative considerations that inform the appearance of the bulk or visual mass of a development;
 - (b) the overall distribution of the proposed development's volume in space vertically and horizontally;
 - (c) the treatments and design measures used to provide visual articulation to the proposed development; or

¹⁶⁶ Exhibit 10.01 p 31 [72].

¹⁶⁷ Exhibit 10.01 p 33 [81].

¹⁶⁸ Exhibit 10.01 p 29 [53].

¹⁶⁹ Exhibit 10.01 p 31 [73].

¹⁷⁰ Exhibit 10.01 p 57 [181].

¹⁷¹ Exhibit 17.01 p 8 [29(c)].

¹⁷² Exhibit 17.01 p 8 [29(c)].

- (d) the appearance of the proposed development when viewed in its local context, including Mr Curtis' analysis of the photomontages.

[195] In Dr McGowan's opinion, the proposed development seeks to capitalise on the undefined height designation whilst also adopting high site cover and modest setbacks to all boundaries. He opines that the outcome is a particularly long, high-rise building that extends across most of the subject land with little variation in site cover of the tower. Dr McGowan emphasises that:

- (a) the proposed tower will have a height in the order of 93.5 metres and a relatively uniform length of 46.5 metres;
- (b) levels 3 to 8 of the proposed development exceed the acceptable outcomes for site cover by 4.7 percent, which is equivalent to approximately 56 square metres on the subject land;
- (c) levels 9 to 15 exceed the acceptable outcomes for site cover by 14.7 per cent, which is equivalent to approximately 267 square metres on the subject land;
- (d) levels 16 to 25 exceed the acceptable outcomes for site cover by 24.7 per cent, which is equivalent to approximately 293 square metres on the subject land;
- (e) level 26 exceeds the acceptable outcomes for site cover by 8.7 per cent, which is equivalent to approximately 103 square metres on the subject land;
- (f) from the base of the tower to the penthouse private open space level, being a height of 72.6 metres, there is no variation in site cover; and
- (g) the proposed development exceeds, by a substantial extent, the acceptable outcomes for boundary setbacks applicable to the subject land, with the extent of exceedance increasing with the height of the tower such that, for the upper part of the tower, almost the entirety of the tower is beyond the acceptable outcomes for boundary setbacks.¹⁷³

[196] Having regard to those built form metrics and the extent of exceedance of the acceptable outcomes in City Plan, Dr McGowan says that what is proposed is a building that is particularly long due to reduced setbacks and high site cover. He opines that the form of the proposed development is vertically extruded with little variation in site cover or vertical articulation in circumstances where the building sits close to the three street frontages and the neighbouring property to the south.¹⁷⁴

[197] Dr McGowan opines that, even recognising the treatments and design measures that have been adopted, the proposed development has a monolithic form when seen from the north or the south. He says that the virtues of the design identified by Mr Curtis do not ultimately ameliorate the overall bulk and form of the tower.¹⁷⁵

[198] Dr McGowan accepts that the tower has a floor plate of less than 750 square metres, which is the acceptable outcome for site cover in the High density residential zone code. He also acknowledges that the proposed development is slender when viewed from the west and east. However, he says the proposed development does not

¹⁷³ Exhibit 7.01 p 44 [108].

¹⁷⁴ Exhibit 7.01 pp 44-5 [110].

¹⁷⁵ Exhibit 7.01 p 45 [111].

present a slender tower form to the north or south. Dr McGowan opines that the lack of slenderness, when seen from the north or south, combined with reduced setbacks to all boundaries, will adversely affect the permeability of the local skyline and reduce sky views and the general sense of openness. He says that although the impacts on permeability and openness are less apparent from some static viewpoints, such as from the corner of Wharf Road and Old Burleigh Road, he says it would be apparent as people move through the local area and achieve views to the tower from a range of viewpoints. In Dr McGowan's opinion, the impacts on the permeability of the skyline and openness of the area would become more apparent as future development occurs in the area, particularly if future towers adopt a similar form as the proposed development.¹⁷⁶

[199] For the reasons identified in paragraphs [195] to [198] above, Dr McGowan opines that the site cover of the proposed tower does not promote a slender bulk form and the proposed development is not a slender tower.¹⁷⁷

[200] Although the proposed development has an elongated east to west axis, the proposed development is a three-dimensional structure that will be viewed from various vantage points. Having regard to the plans, elevations, and perspective views,¹⁷⁸ including those extracted in the Architecture Joint Expert Report,¹⁷⁹ and the photomontages,¹⁸⁰ I accept the evidence of Mr Curtis. I prefer the evidence of Mr Curtis to that of Mr Richards and Dr McGowan, each of whom placed too heavy an emphasis on the built form metrics and gave little weight to the appearance of the proposed development in its context. I am satisfied that the proposed development is a slender tower, and that the site cover promotes a slender bulk form.

Does the proposed development promote an open, attractive, and distinct skyline?

[201] The Council alleges that that the proposed development does not have a site cover that promotes an open, attractive, and distinct skyline. It also alleges that the proposed development is not a slender tower that enhances views of the city skyline.

[202] In terms of the requirement for an open skyline, Mr Curtis notes that the proposed development is adjoined by three street frontages to the east, north and west, and has the ocean beach and the Coral Sea opposite to the west. He opines that these locational attributes provide separation from neighbouring development and that the proposed development responds to these locational attributes with an appropriate form that promotes an open skyline.

[203] Mr Curtis acknowledges that whether a skyline is attractive and distinct calls for a value judgment about which reasonable minds may differ. In his opinion, having regard to his observations about the design attributes and the context in which the proposed development will be viewed, the proposed development will have a well-resolved appearance that effectively mitigates visual bulk, provides visual interest and complexity, reflects the human scale, and differentiates the built form from

¹⁷⁶ Exhibit 7.01 p 45 [112].

¹⁷⁷ Exhibit 7.01 p 45 [113].

¹⁷⁸ Exhibit 5.01.

¹⁷⁹ Exhibit 10.01 p 23 figure 15, p 24 figures 16 and 17, p 26 figures 18 and 19

¹⁸⁰ Exhibit 6.01.

neighbouring development. He considers these qualities to be consistent with promoting an attractive and distinct skyline.¹⁸¹

- [204] Mr Richards opines that the long, narrow form of the tower, with the long axis east-west, produces a sense of enclosure (rather than an open skyline) when viewed from the north and south. He says this is exacerbated by the reduced setbacks to the street and the neighbours.¹⁸²
- [205] For the reasons identified in paragraphs [195] to [198] above, Dr McGowan opines that the proposed development does not promote an open skyline and does not enhance views of the city skyline.¹⁸³
- [206] Having regard to the plans, elevations, and perspective views,¹⁸⁴ including those extracted in the Architecture Joint Expert Report,¹⁸⁵ and the photomontages,¹⁸⁶ I accept the evidence of Mr Curtis. I prefer the evidence of Mr Curtis to that of Mr Richards and Dr McGowan, each of whom placed too heavy an emphasis on the built form metrics and gave little weight to the appearance of the proposed development in its context. I am satisfied that the proposed development will have a site cover that promotes an open, attractive, and distinct skyline, and that the proposed development is a slender tower that relates to existing high-rises and enhances views of the city skyline.

Does the proposed development contribute to the character of the streetscape and the character and amenity of the neighbourhood?

- [207] The Council alleges that:

“the proposed development does not adopt a podium form at ground level, has insufficient front setbacks and provides inadequate landscaping at lower levels, and fails to apply varying (and reducing) site cover and setbacks at higher levels, resulting in development at the street level that is not “human scale” and presents an overly dominant built form to the street adversely impacting upon the street’s character ...”¹⁸⁷

- [208] As is apparent from the quote above, the Council’s allegation about the inappropriate impact on the character of the streetscape and the character and amenity of the neighbourhood is informed by its position with respect to the absence of a podium, the insufficient variation in site cover and setbacks and the building’s dominance. These are issues that I have already addressed above.
- [209] The opinions of Mr Curtis, Mr Richards, and Dr McGowan with respect to the proposed development’s impact on the character of the streetscape and the character and amenity of the neighbourhood are likewise informed by matters already addressed above.

¹⁸¹ Exhibit 7.01 p 38 [83] - [84].

¹⁸² Exhibit 17.01 p 8 [29(d)].

¹⁸³ Exhibit 7.01 p 45 [113].

¹⁸⁴ Exhibit 5.01.

¹⁸⁵ Exhibit 10.01 p 23 figure 15, p 24 figures 16 and 17, p 26 figures 18 and 19

¹⁸⁶ Exhibit 6.01.

¹⁸⁷ Exhibit 3.11 p 1 [3].

[210] As such, it is unnecessary for me to address this question in detail. It is sufficient to observe that, for the reasons already provided above, and having regard to the plans, elevations, and perspective views,¹⁸⁸ including those extracted in the Architecture Joint Expert Report,¹⁸⁹ and the photomontages,¹⁹⁰ I accept the evidence of Mr Curtis. I prefer the evidence of Mr Curtis to that of Mr Richards and Dr McGowan. I am satisfied that the proposed development will have no unacceptable visual or physical impacts. It has been sensitively designed to interface with the street and present a pedestrian or human scale to the street. It does not dominate the streetscape or the character of the local area in which it is proposed. It fits comfortably with the character of the area intended in City Plan and that which exists. I am satisfied that the proposed development will positively contribute to streetscape character and the neighbourhood character and amenity.

Conclusion regarding the design of the building

[211] Having regard to all the evidence identified in paragraph [16] above, and my findings above, I am satisfied that the proposed development complies with:

- (a) the overall outcomes in s 6.2.3.2(2)(b)(vi) and (d)(iv) and performance outcomes PO1(c) and PO2(b), (c) and (d) of the High density residential zone code;
- (b) the overall outcomes in ss 8.2.12.2(3)(a)(i), (b)(i) and (e)(i)(B) of the Light rail urban renewal area overlay code; and
- (c) the overall outcomes in ss 9.3.10.2(2)(b) and (c) and performance outcome PO5 of the High-rise accommodation design code.

In the event of non-compliance, should the development application nevertheless be approved in the exercise of the planning discretion?

[212] Paragraph 7 of the Second Further Amended Agreed List of Issues sets out several matters that DVB Projects Pty Ltd relies on to support approval in the event of non-compliance with one or more of the assessment benchmarks. As I am satisfied that the proposed development complies with all the assessment benchmarks, it is not necessary to deal with these discretionary considerations.

Conclusion

[213] DVB Projects Pty Ltd has discharged the onus.

[214] In due course, the appeal will be allowed, and the Council's decision changed to a development approval subject to lawful conditions.

[215] The appeal is listed for review on 2 December 2022.

¹⁸⁸ Exhibit 5.01.

¹⁸⁹ Exhibit 10.01 p 23 figure 15, p 24 figures 16 and 17, p 26 figures 18 and 19

¹⁹⁰ Exhibit 6.01.