

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Clarry & Anor v Brisbane City Council & Anor* [2022] QPEC 49

PARTIES: **DANIEL CLARRY AND SARAH CLARRY**
(Appellants)

v

BRISBANE CITY COUNCIL
(Respondent)

and

4005 PROPERTIES PTY LTD
(Co-respondent)

FILE NO/S: 2616/2021

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 6 December 2022

DELIVERED AT: Brisbane

HEARING DATE: 11, and 14 – 18 November 2022

JUDGE: Everson DCJ

ORDER: **Appeal allowed to the limited extent of imposing conditions to give effect to minor changes to the approved plans**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – Appeal against refusal of a development application for a Multiple dwelling

PLANNING AND ENVIRONMENT – ASSESSMENT – Compliance with the planning scheme

CASES: *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257

Development Watch Inc v Sunshine Coast Regional Council & Anor [2022] QCA 6

Fabcot Pty Ltd v Cairns Regional Council & Ors [2021] QPELR 40

Grosser v Gold Coast City Council [2001] QCA 423

McKay v Brisbane City Council & Anor; Panozzo v Brisbane City Council & Anor; Jensen v Brisbane City Council & Anor [2021] QPEC 42

Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors [2022] QPELR 309

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

Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors [2014] QCA 147

LEGISLATION: *Planning Act 2016* (Qld)

Planning and Environment Court Act 2016 (Qld)

Planning Regulation 2017 (Qld)

COUNSEL: G Gibson KC and R Yuen for the Appellants

B Rix for the Respondent

M Batty and J Bowness for the Co-respondent

SOLICITORS: Connor O’Meara Lawyers for the Appellants

City Legal for the Respondent

Thynne + Macartney for the Co-respondent

Introduction

- [1] This is a submitter appeal against the decision of the respondent to approve, subject to conditions, a development application for a development permit for a material change of use for a Multiple dwelling (eight units) (“the proposed development”) on land situated at 28 Maxwell Street, New Farm (“the site”).
- [2] The appellants live next door to the proposed development at 30 Maxwell Street with their two children in the inter-war, Spanish-mission style home they own. It is called Neville Court and has been listed as a Local Heritage Place since 30 October 2000.¹ They assert that the proposed development is too large and overbearing and will have unacceptable impacts on the amenity of their home and Maxwell Street in general.

The site and the surrounding area

- [3] The site has an area of 842m² and is rhomboidal in shape. It has a road frontage of approximately 22 metres to Maxwell Street to the south-west and approximately 15 metres to Raff Lane to the north-east.² It currently contains a four-storey multiple dwelling consisting of nine units which appears to have been built in the early 1970s.³ It is constructed of clay bricks and appears entirely devoid of architectural merit.⁴ The site is centrally located in Maxwell Street in an elevated location overlooking the Brisbane River.⁵
- [4] Maxwell Street is located on the western side of the New Farm peninsula. Development on the opposite, south-western side of the street enjoys frontage to the Brisbane River.⁶ It is uncontentionous that the suburb of New Farm exhibits a mixed urban character,⁷ and that Maxwell Street itself is residential in character.⁸ The street is not characterised by any particular built form. It is a place where contemporary architecture adjoins traditional architecture.⁹ There is a preponderance of multiple dwellings of various heights and sizes.¹⁰ There is a range

¹ Exhibit 21, p 26.

² Exhibit 6, para 13.

³ Ibid, para 12 and Exhibit 20, p 9.

⁴ Exhibit 2, p 33.

⁵ Exhibit 6, para 12 and Exhibit 2, pp 2, 33 and 41.

⁶ Exhibit 6, para 18.

⁷ Ibid, para 19.

⁸ Exhibit 2, T4-49, ll 15 – 18.

⁹ T5-29, ll 5 – 21.

¹⁰ Exhibit 36 and Exhibit 2.

of storeys present and a range of styles, regardless of whether the building is a house or a multiple dwelling.¹¹ For example, a house being built at 36 Maxwell Street, which also adjoins the appellants' property, will apparently result in a building consisting of a garage and three storeys,¹² which is considerably taller than many of the multiple dwellings, particularly those in the eastern part of the street. Approximately 50% of the buildings in the street that were analysed by the visual amenity experts and the town planners who gave evidence before me were greater than two storeys.¹³ In the joint expert report of the town planners, the following summary appears:

“Maxwell Street shares elements of the mixed character of the wider suburb, and contains a number of generously proportioned detached dwellings of different styles, dual occupancies, and apartment buildings of different periods, heights, and styles.

Both sides of the entrance to Maxwell Street from Merthyr Road feature apartment buildings. The larger of the two is a significant apartment complex (‘River Gallery Apartments’) which extends from the south-western corner for approximately half the length of Maxwell Street....The buildings are between two and five storeys in height, but with the ground level of some of the Maxwell Street buildings...below the level of Maxwell Street.”¹⁴

- [5] Maxwell Street terminates in a cul-de-sac at its western end, and contentiously in this appeal, contains mixed zoning. All of the land on either side of Maxwell Street, from the intersection with Merthyr Road to the east to the head of the cul-de-sac, is zoned in the Low-medium density residential (2 or 3 storey mix) zone (“the LMDR2Z”),¹⁵ pursuant to the respondent’s planning scheme (“the planning scheme”).¹⁶ The site lies within this zone. The land at the head of the cul-de-sac and to the west, and all of the land on the northern side of Raff Lane at the rear of the site, is located in the Medium-density residential zone (“the MDRZ”).¹⁷ In the vicinity of Raff Lane there are several tall multiple dwellings in the MDRZ which overlook the site and the appellants’ property next door.¹⁸

¹¹ Exhibit 2, p 41 and Exhibit 38.

¹² Exhibit 38.

¹³ Exhibit 38, T4-113, ll 1 – 8.

¹⁴ Exhibit 6, paras 21 and 22.

¹⁵ Exhibit 6, para 50 and Exhibit 2, pp 42 – 45.

¹⁶ Brisbane City Plan 2014, version 20 (in effect on 7 October 2020 when the Notice of Appeal was filed).

¹⁷ Exhibit 2, p 42.

¹⁸ Exhibit 2, pp 2, 32 and 91.

- [6] The site is also included in the New Farm and Teneriffe Hill neighbourhood plan (“the NP”) in the Low-medium density precinct NPP-002 (“the LMD precinct”).¹⁹

The proposed development

- [7] The proposed development incorporates a six-storey building consisting of six three-bedroom-units and two four-bedroom-units with a maximum site cover of 65%.²⁰ Basement level car parking is to be provided with a single vehicle crossover from Maxwell Street. A ground level gymnasium, recreation lounge and swimming pool is included in the design, as is extensive landscaping.²¹ Only one architect gave evidence before me, Mr Curtis. He did so in the context of the visual amenity evidence. He provided a useful, and in my view, accurate summary of the proposed development in the following terms:

“The proposed development will have a height of 5-storeys and is generally characterised by the following elements:

- a) The projecting balconies that articulate the southwest facing street façade. The balconies layer the building’s height and reflect the human scale of the individual storeys. They also reinforce the horizontal proportion of the built form to balance its height...
- b) The depth of the balconies ‘erodes’ the visual mass of the façade.
...
- c) The balustrades to the balconies are a combination of fluted concrete planter boxes with glass above. The combination of the decorative flute appearance, the cascading vegetation within the planter boxes and the transparency of the glass will enhance the articulation to provide visual interest and further fragment the visual mass of the building’s bulk.
- d) The supporting columns that are setback from the balustrade within the balcony will be visible from the street, where their sculptural form will provide further interest and complement the curvilinear styling used for the balconies and the arched windows that are visible on the side elevations.
- e) The side elevations that are visually articulated by recessed wall sections, the arched fenestration and awnings, the recessed balconies, and the reveals cast into the precast panels. The fenestration will include frosted glass to protect visual privacy between adjoining properties.

¹⁹ Exhibit 6, para 54.

²⁰ Exhibit 6, para 36.

²¹ Ibid.

- f) The setback of the fifth storey in relation to the storeys below from the street and to the side and rear. These setbacks reduce the visibility of the fifth storey from the street and neighbouring properties. It also modulates the overall building bulk, ...
- g) The projecting basement within an under-croft at the front of the building where it is setback from the frontage beneath the ground storey.
- h) The building is aligned to be parallel with the side boundaries, which sets it at an angle in relation to the site's frontage. This angled relationship provides the building with a frontage setback to the ground to fourth storey balconies that varies from 7.9m to 3.36m. The setback of the fifth storey external front wall will range from between 13.2m to 9.5m.
- i) The varying width of the front setback area will accommodate a landscaped area that will extend along the frontage around the southwest corner of the site and along the northwest side boundary to screen a communal swimming pool and recreational terrace. ...
- j) The pedestrian entrance is centrally located along the frontage...
- k) The vehicle driveway is located on the southwest side of the frontage between two landscaped areas that assist to mitigate its visual impact...
- l) The 126m² area of deep planting (approximately 15% of the site area) that will be provided on the site. The deep planting will be located:
- Along the northwest side boundary extending to the rear boundary from the site's southwest corner frontage to Maxwell Street.
 - At the extended northwest corner of the site at its secondary frontage to Raff Lane.
 - The southern corner of the site's frontage to Maxwell Street.

The deep planting will accommodate significant landscaping to complement the existing landscaping on the adjoining heritage place to the north.”²²

[8] On 14 July 2022 I made an order that, on being satisfied that changes to the proposed development constituted a minor change, the appeal be determined on the

basis of the amended plans. The effect of these plans is summarised in the evidence of Mr Powell, a landscape architect and visual amenity expert called on behalf of the co-respondent, as largely involving changes to the front setbacks of level 5 and the roof under level 4 which are demonstrated in Figure 1 of his individual report.²³ These changes are presented in photo montages in evidence before me and considerably reduce the bulk of the proposed development from various angles.²⁴

The statutory assessment framework

[9] Pursuant to the *Planning and Environment Court Act 2016* (Qld) (“PECA”), the appeal is by way of hearing anew,²⁵ and the co-respondent must establish the appeal should be dismissed.²⁶ Section 46 of the PECA addresses the nature of an appeal and relevantly provides:

- “(2) The Planning Act, section 45 applies for the P&E Court’s decision on the appeal as if—
- (a) the P&E Court were the assessment manager for the development application; and
 - (b) the reference in subsection (8) of that section to when the assessment manager decides the application were a reference to when the P&E Court makes the decision.”

[10] As the proposed development was impact assessable, s 45 of the *Planning Act 2016* (Qld) (“PA”) provides that the assessment must be carried out against the relevant assessment benchmarks in the relevant categorising instrument which, in the circumstances before me, are the relevant provisions of the planning scheme. It must also be carried out having regard to any matters prescribed by regulation.²⁷ In this regard, s 31 of the *Planning Regulation 2017* (Qld) states that impact assessment must be carried out having regard to, *inter alia*:

- “(f) any development approval for, and any lawful use of, the premises or adjacent premises; and
- (g) the common material.”

The common material is defined in Schedule 24 to include “any properly made submissions” about the proposed development. Accordingly, I must have regard to

²³ Exhibit 11, p 4.

²⁴ Exhibit 7, pp 20, 23, 26, 29, 32 and 34.

²⁵ *Planning and Environment Court Act 2016* (Qld) s 43.

²⁶ *Ibid*, s 45(2).

²⁷ *Ibid*, s 45(5)(a)(ii).

the unimpressive, four-storey multiple dwelling, comprising nine units, located on the site and the fact there were 11 properly made submissions which all opposed the proposed development. The submissions raised issues of building height and height transition, inadequate setbacks, excessive site cover, insensitivity to the adjoining heritage place owned by the appellants, unsatisfactory refuse collection arrangements and construction impact issues.²⁸

[11] Of relevance in the determination of this appeal, the assessment undertaken by me may be carried out having regard to any other relevant matter, other than a person's personal circumstances, financial or otherwise.²⁹

[12] The Court in determining an appeal about a development application is conferred a wide discretion pursuant to s 60 of the PA which relevantly states:

“(3) To the extent the application involves development that requires impact assessment, and subject to section 62, the assessment manager, after carrying out the assessment, must decide—

- (a) to approve all or part of the application; or
- (b) to approve all or part of the application, but impose development conditions on the approval; or
- (c) to refuse the application.”

[13] In undertaking this task, the observations of Mullins JA in *Abeleda & Anor v Brisbane City Council & Anor* are instructive:

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

²⁸ Exhibit 6, para 32; Exhibit 15.

²⁹ *Planning Act 2016* (Qld) s 45(5)(b).

[43] In view of the fact that s 60(3) of the Act reflects a deliberate departure on the part of the Legislature from the two part test under s 326(1)(b) of the SPA, it is no longer appropriate to refer in terms of one aspect of the public interest “overriding” another aspect of the public interest before a development application that is non-compliant with the assessment benchmarks can be approved. The decision-maker may be balancing a number of factors to which consideration is permitted under s 45(5) of the Act in making the decision under s 60(3) of the Act where the factors in favour of approval (or approval subject to development conditions) have to be balanced with the factors in favour of refusal of the application. The weight given to each of the factors is a matter for the decision-maker in the circumstances...”³⁰

[14] Mullins JA further observed in *Wilhelm v Logan City Council & Ors*:

“[77] ...The change in the decision-making regime has not affected the fundamental nature of a planning scheme as the reflection of the public interest in the appropriate development of land.”³¹

[15] The applicable principles for the construction of planning documents were considered by the Court of Appeal in *Zappala Family Co Pty Ltd v Brisbane City Council*, notably that the same principles which apply to statutory construction apply to the construction of planning documents,³² and that such documents need to be read as a whole, in a way which is practical and as intending to achieve a balance between outcomes.³³

Relevant provisions of the planning scheme

[16] In terms of the hierarchy of assessment benchmarks in the planning scheme, s 1.5 states:

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

...

(d) neighbourhood plan codes prevail over zone codes, use codes and other development codes, to the extent of the inconsistency;”³⁴

³⁰ [2020] QCA 257.

³¹ [2020] QCA 273.

³² *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* [2014] QCA 147 at [52].

³³ *Ibid* at [56].

³⁴ Exhibit 13, p 22.

[17] As the proposed development is impact assessable, it is to be assessed having regard to the whole of the planning scheme, to the extent relevant.³⁵ In undertaking the task of assessing the proposed development against the relevant assessment benchmarks, I need to assess the proposed development against various applicable codes. It is of significance that code assessable development “that complies with the purpose, overall outcomes and performance outcomes or acceptable outcomes of the code complies with the code”.³⁶

[18] The following provisions of the New Farm and Teneriffe Hill neighbourhood plan code (“NPC”) have been identified as relevant:

“7.2.14.1.2 Purpose

...

3. The overall outcomes for the neighbourhood plan area are:

...

m. Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development.

...

5. Low-medium density living precinct (New Farm and Teneriffe Hill neighbourhood plan/NPP-002) overall outcomes are:

a. Proposals retain existing houses and are of a scale and character compatible with detached housing.

...

Table 7.2.14.1.3.A—Performance outcomes and acceptable outcomes

Performance outcomes	Acceptable outcomes
General	
PO1 Development is of a height, scale and form that achieves the intended outcome for the precinct, improves the amenity of the neighbourhood plan	AO1 Development complies with the number of storeys and building height set out in Table 7.2.14.1.3.B.

³⁵ Ibid, p 66, Section 5.3.3.

³⁶ Ibid, Section 5.3.3.4.c.

<p>area, contributes to a cohesive streetscape and built form character and is:</p> <p>...</p> <p>b. aligned with community expectations about the number of storeys to be built;</p> <p>...</p>	<p>...</p>
<p>PO4 Development ensures that building size and bulk is compatible with the existing detached housing and the scale and character of the street.</p>	<p>AO4 Development has a maximum gross floor area of: ... c. 50% of the site area in all other circumstances.</p>
<p>PO5 Development ensures building size and bulk is consistent with the existing high-quality housing character of the locality.</p>	<p>AO5 Development has a maximum site cover of 50%.</p>
<p>PO6 Development ensures buildings are situated on site to protect the amenity of residents having regard to breezes, vegetation, sunlight, privacy and building separation.</p>	<p>AO6 Development has a minimum setback of 6m from the rear boundary.</p>

...

Table 7.2.14.1.3.B—Maximum building height

Development	Building height (number of storeys)	Building height (m)
...		
If in the Low-medium density living precinct (New Farm and Teneriffe Hill neighbourhood plan/NPP-002)		
Any development in this precinct	2	9.5

...³⁷

[19] The parties have also identified that the following provisions of the Low-medium density residential zone code (“LMDRZC”) are relevant:

“5. Development form overall outcomes are:

³⁷ Ibid, pp 98 – 100.

- a. Development for a residential building occurs on appropriately sized and configured lots and is of a height, bulk, scale and form which is tailored to its specific location and to the characteristics of the site within the Low-medium density residential zone and the relevant zone precinct and reinforces a distinctive subtropical character of low to low-medium rise buildings with a landscaped streetscape and recreation areas.
- b. Development provides for a building to have a building height and bulk that responds to:
 - i. the nature of adjoining dwellings;
 - ii. site characteristics, including the shape, frontage, size, orientation, slope, and nature of adjoining dwellings.

...

- 7. 2 or 3 storey mix zone precinct overall outcomes are:
 - a. Development comprises a mix of dwelling types including dwelling houses, 2 to 3 storey low rise multiple dwellings (such as apartments and row houses) and dual occupancy, to provide housing diversity and a sensitive transition both to adjoining sites that contain dwelling houses and between busier roads or centres and lower density residential areas.
 - b. Development of low-medium rise, low-medium density residential buildings:
 - i. are of predominantly 2 storeys, or of up to 3 storeys in height where located within easy walking distance of a public transport node;
 - ...
 - d. Development design, height and setbacks provide a sensitive transition at the edge of the site to an adjoining dwelling house or land in a lower density zone or zone precinct.”³⁸

[20] Finally, the following provisions of the Multiple dwelling code (“MDC”) have been identified as relevant:

“9.3.14.2 Purpose

...

- 2. The purpose of the code will be achieved through the following overall outcomes:

³⁸ Ibid, p 93.

...

- d. Development does not isolate or negatively impact on the development potential or future residential amenity of adjoining sites.
- e. Development has a bulk, scale, form and intensity that is consistent with the existing and intended neighbourhood structure for the area as expressed by zone, zone precinct and neighbourhood plan outcomes, having regard to:
 - i. the location and street context of the site;

...

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

...

- iv. 3 storeys in the Up to 3 storeys zone precinct of the Low-medium density residential zone;

...

- i. Development provides setbacks and separation of buildings that contribute to the amenity of residents within and adjoining the site and to Brisbane's high-quality subtropical streetscapes and public spaces.
- j. Development in or adjoining lower density residential areas uses side boundary setbacks and built form height transitions to manage the interface with those areas and reflect the amenity, form and character and subtropical landscape of those areas.

...

- l. Development ensures that the proportion of built and natural features, including buildings, design features, services and infrastructure, on-site open spaces and landscaping, provide:
 - i. an attractive streetscape interface and reduction in the dominance of built form at a street level that contributes to Brisbane's character and identity, high-quality subtropical streetscapes and public space network;
 - ii. a high level of amenity for occupants and adjoining residents including access to open and landscaped spaces, natural light, sunlight and breeze to support outdoor subtropical living.

...

- o. Development provides on-site landscaping that supports and contributes to Brisbane’s subtropical landscape character and contributes to the microclimate of the neighbourhood and site, supports outdoor living and subtropical planting, and assists in reducing urban heat island effects, with deep-planting areas for the protection and establishment of large, subtropical shade trees.
- ...
- q. Development manages its interface with adjoining residential uses to mitigate amenity impacts including protecting visual privacy through appropriate separation of buildings and screening.

...
Table 9.3.14.3.A—Performance outcomes and acceptable outcomes

Performance outcomes	Acceptable outcomes
...	...
<p>PO3 Development height, bulk and scale, siting and layout ensures that:</p> <ul style="list-style-type: none"> a. building height is consistent with the intended form and character of the local area including the predominant height of existing or approved buildings in the street; ... c. impacts on residential amenity and privacy from overlooking, visual dominance and overshadowing are minimised and adequate levels of natural light and breezes are maintained to habitable rooms, private and communal open space for both the development and residences on adjoining and nearby sites; ... e. the development is consistent with the setback pattern and contributes to the character of the streetscape; 	<p>AO3 Development is contained within the building envelope for the site created by applying:</p> <ul style="list-style-type: none"> a. the maximum building height in Table 9.3.14.3.B; b. front, rear and side boundary setback requirements in Table 9.3.14.3.C; ... d. building separation requirements in Table 9.3.14.3.F;

<p>PO4 Development has a building height, scale and form that improves the amenity and achieves the intended outcomes of the zone or neighbourhood plan area, contributes to a cohesive streetscape and building form character and is:</p> <p>...</p> <p>d. designed to avoid a significant and undue adverse amenity impact to adjoining development;</p> <p>...</p>	<p>AO4.1 Development has a maximum building height that complies with:</p> <p>a. a neighbourhood plan;...</p> <hr/> <p>AO4.2 Development incorporates the building height transition requirements set out in Table 9.3.14.3.I.</p>
<p>PO7 Development provides side and rear boundary setbacks that:</p> <p>...</p> <p>b. minimise the impacts of development on the amenity and privacy of future and existing neighbourhood residents;</p> <p>...</p>	<p>AO7.1 Unless greater setbacks are required to achieve adequate building separation, development provides a rear boundary and side boundary setback that complies with:</p> <p>a. a neighbourhood plan;...</p>
<p>PO8 Development ensures that the proportion of buildings to open space and landscaping on a site:</p> <p>a. is consistent with the intended form, character and intensity of the local area and immediate streetscape;</p> <p>...</p>	<p>AO8 Development has:</p> <p>a. a building footprint within the building envelope;</p> <p>b. a maximum site cover that:</p> <p>i. complies with the requirements set out in a neighbourhood plan;...</p>
<p>PO14 Development separates buildings from existing or future buildings within a site or on an adjoining site to:</p> <p>a. be consistent with the form and character intent for the local area;</p> <p>b. protect residential amenity including access to natural light,</p>	<p>AO14.1 Development provides building placement and design that:</p> <p>a. complies with Table 9.3.14.3.F; ...</p>

<p>sunlight and breeze;</p> <p>c. provide visual privacy to reduce the need for fixed screening.</p> <p>...</p>	
<p>PO32 Development provides refuse and recycling collection and storage facilities that:</p> <p>a. are located conveniently in an unobtrusive dedicated storage room or separate screened structure;</p> <p>b. are located and managed so that adverse impacts on building occupants, neighbouring properties and the public realm are minimised;</p> <p>c. provide for refuse and recycling including source separation;</p> <p>d. are of a design that allows low-frequency service collection;</p> <p>e. minimise ongoing building management cost for occupation.</p> <p>...”³⁹</p>	<p>AO32 Development provides refuse and recycling collection and storage facilities, including source separation, in accordance with the Refuse planning scheme policy.</p>

The disputed issues

[21] The parties agree that the issues for determination in the appeal are:

1. whether the height, scale and form of the proposed development is acceptable having regard to provisions of the planning scheme identified above;
2. whether the proposed servicing arrangement for waste collection is acceptable having regard to PO32(b) and AO32 of the MDC of the planning scheme quoted above;

³⁹ Ibid, pp 132 – 144.

3. whether there are relevant matters justifying approval of the proposed development, including;
 - (a) whether it can be conditioned to comply with the assessment benchmarks quoted above;
 - (b) whether the planning scheme has been overtaken by events having regard to the history of development approvals and existing development in Maxwell Street;
 - (c) the community and economic need for the proposed development;
 - (d) whether the proposed development will result in improved amenity compared to the existing multiple dwelling on the site;
 - (e) an absence of unacceptable impacts arising from the proposed development;
4. whether there are relevant matters justifying refusal of the proposed development, such as whether it would result in unacceptable adverse amenity impacts, including on the appellants' property.

[22] Other relevant matters which are identified by the parties are essentially just re-statements of issues for determination in terms of the extent to which the proposed development complies with the identified provisions of the planning scheme.

Height, scale and form

[23] The approach taken by the appellants is to focus on the designation of the site as being within both the LMDR2Z and the LMD living precinct in the NP. These designations are juxtaposed with the land at the end of the Maxwell Street cul-de-sac and that on the northern side of Raff Lane which are both contained within the MDRZ and the Medium density living precinct ("MD living precinct").⁴⁰ The latter designations unambiguously contemplate higher and more intense development and this is reflected in the built form within these areas. The appellants submit that community expectations in terms of the number of storeys, building size, setbacks and separation are informed, in part, by quantitative metrics in the various

⁴⁰ Exhibit 6, pp 59 and 60, Figures 4.2 and 4.3; Exhibit 1B.

acceptable outcomes referred to above.⁴¹ In this regard, Mr Buckley, the town planner who gave evidence on behalf of the appellants, provided a table in his individual report which showed the proposed development was non-compliant in terms of applicable acceptable outcomes, regardless of which precinct or zone it was in.⁴² I accept his analysis and for this reason I have not quoted the relevant tables referred to in the AOs to the LMDRZC above. The appellants also rely upon various overall outcomes and performance outcomes of various codes set out above. They argue the proposed development is inconsistent with the character and amenity of Maxwell Street and the local context.⁴³

[24] Conversely, the co-respondent emphasises the flexibility afforded by the relevant provisions of the planning scheme. At trial, the co-respondent sought to demonstrate compliance with the relevant planning scheme requirements through overall outcomes and performance outcomes which require qualitative rather than quantitative assessments to be undertaken.⁴⁴ To the extent that there are provisions in various codes which impose quantitative assessments, it is submitted that the NPC applies to the extent of any inconsistency, and in any event expressly contemplates buildings of a greater height where there is both a community need and an economic need for the development.⁴⁵

[25] The respondent essentially supports the position of the co-respondent in terms of height, scale and form issues, but disputes the assertion of the co-respondent that the planning scheme has been overtaken by events.

[26] Before considering the respective positions of the parties, it is appropriate to consider the evidence relevant to these issues in a little more detail. Firstly, while the site already contains a four-storey brick apartment building which sits prominently in Maxwell Street, the proposed development will be significantly larger in terms of its built form. This is the case in respect of all of its dimensions and it will be 4.7 metres higher than the existing building.⁴⁶ However, as Mr Butcher, the landscape architect who gave visual amenity evidence on behalf of the appellants conceded, the proposed development will still not be the tallest building

⁴¹ Exhibit 1B, para 4.

⁴² Exhibit 20, p 5.

⁴³ Exhibit 1B, para 4.

⁴⁴ Exhibit 1A.

⁴⁵ Ibid; Exhibit 13, p 98, s 7.2.14.1.2, 3.m.

⁴⁶ Exhibit 2, pp 39 – 40.

in the LMDR2Z in Maxwell Street,⁴⁷ nor will it be the widest.⁴⁸ For the sake of completeness, I should observe that the tallest building in this regard, situated at 40 Maxwell Street, is located immediately adjacent to the edge of the MDRZ and the MD living precinct and that the development within these designations is generally more intense in terms of height, scale and form to that elsewhere in Maxwell Street.⁴⁹ Mr Butcher also conceded that there was a significant variance in the size of the detached housing,⁵⁰ no discernible pattern of development in Maxwell Street and no discernible setback pattern,⁵¹ and I find that this is the case.⁵²

[27] As noted above, the NPC prevails over the LMDRZC and the MDC to the extent of any inconsistency between the relevant provisions.⁵³ In circumstances where there is acknowledged significant non-compliance with relevant acceptable outcomes, the co-respondent relies upon compliance with the purpose, overall outcomes and performance outcomes of the relevant provisions of the applicable codes.⁵⁴ In this regard, I note that there are no parts of the purpose of the codes, other than overall outcomes quoted above, relevant to the exercise of my discretion. To the extent that overall outcome 2.h. of the MDC proscribes a height of two or three storeys for the site,⁵⁵ and overall outcome 7 of the LMDRZC proscribes dwelling houses and two to three storey low-rise multiple dwellings,⁵⁶ it is submitted that this is inconsistent with the NPC.

[28] The NPC does not proscribe any height limits, relying entirely on qualitative measures for satisfaction of overall outcomes and performance outcomes. Significantly, overall outcome 3.m. permits development of a height, scale and form greater than that which is consistent with the “amenity and character, character expectations and infrastructure assumptions intended for the... site” where there is “both a community need and an economic need for the development”.⁵⁷

⁴⁷ T4-104, ll 25 – 30 and Exhibit 34.

⁴⁸ T4-104, ll 30 – 40.

⁴⁹ Exhibit 2.

⁵⁰ T4-104, ll 40 – 45.

⁵¹ T4-108, ll 40 – 48 – T4-109, ll 1 – 10.

⁵² Ibid.

⁵³ Exhibit 13, p 22, s 1.5.

⁵⁴ Ibid, p 66, 5.3.3.

⁵⁵ Ibid, p 132, s 9.3.14.2.

⁵⁶ Ibid, p 93, s 6.2.1.2.7.

⁵⁷ Ibid, p 98, s 7.2.14.1.2.

[29] To better understand the operation of this provision, it is necessary to reflect on the meaning of the terms “community need” and “economic need”. In *Fabcot Pty Ltd v Cairns Regional Council & Ors*, the Court noted that the term community need “refers to an assessment as to the extent to which the physical wellbeing of the community is improved”, and that a range of qualitative factors are involved, including choice.⁵⁸ The Court further noted that economic need “refers to an assessment as to whether the extent of demand for the proposal is sufficient to support it at a sustainable level” and is typically “more quantitative in nature”.⁵⁹

[30] The appellant called evidence from Mr Stephens, an economic analyst. He noted the strong housing demand, particularly for units and apartments in New Farm.⁶⁰ This has occurred in the context of population and housing growth and an extended period of gentrification associated with higher dwelling values.⁶¹ He concluded that the proposed development “is consistent with both the economic need for housing in New Farm more generally, particularly as it relates to higher density dwelling formats”.⁶² He also observed that the size of the proposed apartments, being significantly larger than typical, provides additional choice which would improve the physical well-being of the community.⁶³ I accept the evidence of Mr Stephens and find that there is both a community need and an economic need for the proposed development.

[31] There are a number of considerations which are relevant to the qualitative assessment benchmarks, but before I turn to them, I wish to make some observations about the extent to which the variances from the acceptable outcomes should assume significance in the exercise of my discretion in determining the appeal. In *McKay v Brisbane City Council & Anor*, Kefford DCJ observed, in the context of a proposal for a multiple dwelling in New Farm in the MDRZ:

“However, when read in the context of City Plan as a whole, the failure to deliver a development compliant with that quantitative

⁵⁸ [2021] QPELR 40 at 54, [29].

⁵⁹ Ibid. These observations were confirmed by the Court of Appeal in *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexis Funds Management Limited v Fabcot Pty Ltd & Ors* [2022] QPELR 309 at 356, [157].

⁶⁰ Exhibit 9, para 3.46.

⁶¹ Ibid, para 5.1.

⁶² Ibid, para 5.2.

⁶³ T3-38, ll 10 – 45 and T3-39, ll 1 – 10.

standard does not demonstrate that the proposed development is non-compliant with the assessment benchmarks.”⁶⁴

Her Honour subsequently observed:

“The relevant assessment benchmarks with which non-compliances are alleged do not contain quantitative standards to which development must adhere. Rather, the assessment benchmarks call for an evaluative judgment about the qualitative contribution the proposed development would make to the streetscape and the character of the locality.”⁶⁵

[32] Those observations are apposite to the determination of the appeal before me. I say this cognisant of the observations of Brown J in *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors* that:

“While acceptable outcomes in a planning scheme may be relevant in ascertaining the legislative intention of the planning scheme in a particular area, it depends on the terms of the provision itself.”⁶⁶

[33] The combination of the failure of the NPC to incorporate any metrics into the purpose, overall outcomes and performance outcomes, combined with the opportunity to provide development of a height, scale and form greater than that otherwise consistent with these qualitative assessments, pursuant to overall outcome 3.m., is important. I am of the view that the identified acceptable outcomes of the codes in question are not of any consequence when making an evaluative judgment about the qualitative matters relevant to the determination of this appeal set out in the overall outcomes and performance outcomes of the relevant parts of the planning scheme. Moreover, to the extent quantitative restrictions are imposed in the overall outcomes and performance outcomes of the LMDRZC and the MDC, they are inconsistent with these qualitative provisions in the NPC and the overall outcomes and performance outcomes of the NPC prevail to the extent of any inconsistency.

[34] There remain numerous criteria to be satisfied in the different, sometimes overlapping provisions of the planning scheme identified above. The first of these is that development is to be consistent with the amenity, character and community expectations intended for the LMD living precinct in the NP and compatible with

⁶⁴ *McKay v Brisbane City Council & Anor; Panozzo v Brisbane City Council & Anor; Jensen v Brisbane City Council & Anor* [2021] QPEC 42 at [43].

⁶⁵ *Ibid* at [95].

⁶⁶ *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexis Funds Management Limited v Fabcot Pty Ltd & Ors* [2022] QPELR 309 at 345, [110].

detached housing.⁶⁷ Subsequently in the NPC, PO1 expresses considerations of this nature slightly differently in the context of a development contributing to a cohesive streetscape and built form character that is, *inter alia*, aligned with community expectations about the number of storeys to be built.⁶⁸ Thereafter in PO4, PO5 and PO6, there are specific performance outcomes requiring the proposed development to be compatible with existing detached housing and the scale and character “of the street”, compatible with the housing character “of the locality” and finally requirements to provide several amenity outcomes for residents, including from the perspective of privacy.⁶⁹

- [35] The overall outcomes in the LMDRZC again focus on development being of a height, bulk, scale and form which is tailored to the relevant zone precinct, reinforcing subtropical character and being responsive to the nature of adjoining buildings, including by providing appropriate setbacks to create a sensitive transition to an adjoining dwelling house.⁷⁰ Unsurprisingly, the MDC provides a plethora of design outcomes identified as being relevant to the proposed development. Therein, overall outcomes focus upon amenity, consistency with the existing neighbourhood structure and community expectations, transitions to adjoining development and appropriate setbacks, landscaping, and respecting the amenity and privacy of adjoining owners.⁷¹ Thereafter, PO3 seeks that building height be consistent with the intended form, that impacts on amenity be minimised, and a consistent setback pattern is achieved.⁷² PO4 thereafter focuses again on building height, scale and form. It also focuses on improving the amenity, and the intended outcomes of the zone or neighbourhood plan area from a perspective of a cohesive streetscape and built form character and with a view to avoiding significant undue adverse amenity impact on adjoining development.⁷³ Thereafter, PO7 and PO8 focus on amenity and privacy impacts being reduced through setbacks and landscaping which is consistent with the form, character and intensity of the local area and immediate streetscape.⁷⁴ Finally, PO14 again seeks appropriate amenity outcomes from, *inter alia*, both a character and privacy perspective.

⁶⁷ Exhibit 13, p 98, s 7.2.14.1.2, 3.m.

⁶⁸ Ibid, p 99.

⁶⁹ Ibid, p 100.

⁷⁰ Ibid, p 93, s 6.2.1.2, 5 and 7.

⁷¹ Ibid, p 132 – 133, s 9.3.14.2.

⁷² Ibid, p 134.

⁷³ Ibid.

⁷⁴ Ibid, p 135.

[36] As noted above, the amenity and character of Maxwell Street, while being residential, is mixed in terms of the built form. I note the observations of Mr Curtis that the properties in Maxwell Street located within the LMDR2Z and corresponding LMD living precinct comprise “a mix of multiple dwellings and houses with heights of between 2 and 5-storeys”,⁷⁵ and that the streetscape is otherwise characterised by significant vegetation.⁷⁶ I note the differing focus for considering the interaction between the built form of the proposed development and the existing character in various assessment benchmarks. In the NPC, PO1 refers to the precinct, whereas in PO4 it is the street and in PO5 it is the locality. Similarly in the MDC, PO3 refers to the local area, as does PO8 and PO14, whereas PO4 refers to the zone or the neighbourhood plan area. Whether I consider the amenity of the part of Maxwell Street in the LMDR2Z or the LMD living precinct, or Maxwell Street as a whole or the wider locality, the conclusion is the same. I find the proposed development consistent with the amenity and character which presents because of the design features noted in paragraph [7] above, and the setting for the proposed development, amongst a variety of residential buildings of various shapes, sizes and designs.

[37] So far as the proposed development aligning with community expectations is concerned, I note that all of the submissions in respect of the proposed development were opposed to it.⁷⁷ A number of residents provided statements which were accepted into evidence at trial. There was a consistent theme that the proposed development was overbearing,⁷⁸ incompatible with the character of the street,⁷⁹ and did not align with community expectations given its zoning and designation in the NP.⁸⁰

[38] The concept of community expectations was recently considered by the Court of Appeal in *Development Watch Inc v Sunshine Coast Regional Council & Anor* in the following terms:

“[43] ...the primary judge was of course obliged to consider whether the height of building [sic] and structures in the proposed

⁷⁵ Exhibit 5, para 66.

⁷⁶ Ibid, para 67.

⁷⁷ Exhibit 15.

⁷⁸ Exhibit 21, para 56, Exhibit 25, paras 19 – 20.

⁷⁹ Exhibit 31, para 10.

⁸⁰ Exhibit 29, paras 8 – 10.

development was consistent with the reasonable expectations of the local community. To do so, her Honour was required to first determine what the expectations of the local community were about the height of buildings and structures and once that was done, as her Honour recognised, the reasonableness of those expectations needed to be assessed in light of the planning provisions applying to the subject land. Then, after the reasonable expectations were identified, the extent to which those expectations were consistent with what was proposed for the development had to be determined.”⁸¹

[39] Turning to these considerations, I appreciate that the expectations of the local community, as demonstrated through the submissions and the statements of the various residents, were essentially that the proposed development was of a height, scale and form which was greater than the expectations of the local community. However, given that there are no quantitative limits when consideration is given to the purpose, overall outcomes and performance outcomes of the NPC and that this code applies to the extent of any inconsistency in terms of any quantitative measure giving rise to such expectations, these expectations are not reasonable. As noted above in paragraph [14], the planning scheme is “the reflection of the public interest in the appropriate development of land” and where reasonable expectations are to be found.⁸² The proposed development is also consistent with the residential character of the street, both as a whole and in the part including the site, despite the assertions of various residents to the contrary. As noted above, it will replace a dated and unremarkable four storey apartment building with a larger, well designed five storey apartment building, in a residential street containing many large apartment buildings and other residential buildings.

[40] The other considerations in the relevant provisions of the assessment benchmarks relate to considerations of scale and character being compatible with detached housing and the importance of addressing amenity impacts on adjoining residents. I find that the proposed development will be of a scale and character compatible with detached housing. This finding firstly takes into account the three-storey house with a large basement and roof terrace being constructed on the other side of the appellants’ house at 36 Maxwell Street.⁸³ I also accept that the deep planting between the proposed development and the appellants’ house will be capable of

⁸¹ [2022] QCA 6.

⁸² *Wilhelm v Logan City Council & Ors* [2020] QCA 273 at [77].

⁸³ Exhibit 23, pp 30-31.

supporting screening trees that supplement the existing screening trees on the appellants' property. This buffer makes for compatibility with the appellants' house from an amenity perspective. I accept that the term does not require a mimicking of detached housing and that as Mr Perkins, the planner who gave evidence of behalf of the co-respondent observed, although the proposed development is closer to the appellants' property than the existing building, removal of the existing driveway and the provision of deep planting in this area results in a superior amenity outcome.⁸⁴

[41] The attributes of the proposed development identified by Mr Curtis above, in my view, result in a high-quality design outcome. As to whether it is consistent with the existing high-quality housing character of the locality, it is important to bear in mind that again, it does not have to mimic it. The word "consistent" is defined in the Macquarie Dictionary as "agreeing or accordant; compatible".⁸⁵ I am of the view that the attributes of the proposed development outlined by Mr Curtis at paragraph [7] make it consistent with the existing high-quality housing character of the locality.

[42] To the extent that the design criteria identified above also require a reinforcement of a distinctive subtropical character, I accept the evidence of Mr Curtis that this is achieved by the verandas of the proposed development "complementing the functionality of adjoining internal spaces" and that the balconies will provide "a legible subtropical design response" which will be complemented by the integrated landscaping which is proposed.⁸⁶

[43] The landscaping of the setbacks, in my view, makes them adequate to not only protect the amenity of adjoining properties but they also provide a suitable interface with both Maxwell Street and Raff Lane.⁸⁷ This is an appropriate design response in the context of Maxwell Street presenting no discernible setback pattern, as was conceded by Mr Butcher in cross-examination.⁸⁸

[44] The only evidence of any direct impact from the perspective of amenity which may arise for the appellants as a consequence of the proposed development is a minor

⁸⁴ T5-49, ll 5 – 25.

⁸⁵ *Macquarie Dictionary* (online at 1 December 2022) 'consistent'.

⁸⁶ Exhibit 5, paras 82 – 83.

⁸⁷ Exhibit 2, p 67.

⁸⁸ T4-109, ll 1 – 8.

overlooking of their courtyard at the rear of their property. I accept the evidence of Mr Powell that this would only extend to .8 of a metre being visible.⁸⁹ I also accept his evidence that an appropriate condition can be imposed to screen the relevant section of glass and provide a one metre high baffle.⁹⁰ As noted above, the appellants' property is overlooked by other tall buildings in the vicinity. This does not give rise to a legitimate ground for refusing the proposed development.

Waste bin collection

[45] The appellants submit that the proposed kerbside refuse collection results in unacceptable impacts. The particular provisions of the planning scheme identified in this regard are PO32 and AO32 in the MDC. It is essentially submitted that the placing of the bins on the street will give rise to adverse impacts on building occupants, the public and neighbouring properties, and that there is non-compliance with the Refuse planning scheme policy called up by at AO32.

[46] Two traffic engineers gave evidence at the hearing of the appeal. Mr Pekol, who was engaged by the co-respondents and Mr Holland who is engaged by the appellants. Ultimately, the alleged non-compliance came down to the space for two bins at either end of the Maxwell Street frontage of the site not being able to be contoured to the precise standard set out in the policy such that the four bins were at some risk of falling over upon being emptied.⁹¹ This minor non-compliance with the policy does not in my view justify refusal of the proposed development. In any event, Mr Holland conceded in cross-examination that waste collection was not a reason for refusal; the issue was how it was conditioned.⁹² In the circumstances, it is clear that this is not a proper basis for refusal of the proposed development.

Relevant matters

[47] The only relevant matter not already addressed in the context of the identified assessment benchmarks, which is of sufficient significance to warrant express

⁸⁹ T4-70, ll 30 – 46.

⁹⁰ T4-71, ll 5 – 10.

⁹¹ T2-120, ll 1 – 15.

⁹² T2-121, ll 1 – 5.

consideration, is whether the planning strategy which applies to Maxwell Street has been overtaken by events as a consequence of the history of approvals there.⁹³

[48] The concept was explained by White J in *Grosser v Gold Coast City Council* in the following terms:

“It is well recognised that a town planning appeal court may depart from the planning intent of the local government if the local government has itself departed from the intent or the subject land has been given a designation that was and remained invalid.”⁹⁴

I accept the evidence of Mr Buchanan, the town planner who gave evidence on behalf of the respondent, that development in Maxwell Street can be explained by its own particular circumstances and that provisions in the planning scheme allow for a “performance-based approach looking at the site and its context”.⁹⁵ In all of the circumstances, I am not satisfied that, given the performance based qualitative assessment benchmarks discussed above, it can be said that the planning controls for Maxwell Street have been overtaken by events.

Conclusion

[49] The proposed development is consistent with the qualitative provisions of the planning scheme relating to height, scale and form identified above. Relevantly, the co-respondent has been able to demonstrate compliance with each of the relevant criteria in the identified overall outcomes and performance outcomes remaining in issue in the appeal. The appeal is not about the suitability of the site for a multiple dwelling, it is about the suitability of the site for this multiple dwelling. I am satisfied that the design elements of the proposed development, including the landscaping and setbacks, warrant approval of the proposed development. In the event that there is some non-compliance in terms of the proposed height, scale and form then I am satisfied that the attributes of the proposed development warrant its approval having regard to s 7.2.14.1.2, 3.m. of the NPC. It has been demonstrated that there is both a community need and an economic need for the development. Waste bin collection issues certainly do not justify a refusal of the proposed development which is architecturally meritorious and responsive to the pattern of development in Maxwell Street. There are no relevant matters raised by the

⁹³ Exhibit 1A, para 7.

⁹⁴ [2001] QCA 423 at [44].

⁹⁵ T5-75, ll 34 – 35.

appellants to justify refusal of the proposed development when it has adequately addressed all of the relevant assessment benchmarks in the planning scheme, including those dealing with amenity impacts.

[50] Given the design modifications which occurred during the course of the appeal, it is appropriate to allow the appeal to the limited extent to enable the imposition of new conditions reflective of the minor design changes.

[51] I therefore order that the appeal be allowed to the limited extent of imposing conditions to give effect to the minor changes to the approved plans.