PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Riverside Development Pty Ltd v Brisbane City Council & Ors* [2022] QPEC 53
PARTIES:	**RIVERSIDE DEVELOPMENT PTY LTD (ACN 084 611 049)** (applicant) **v** **BRISBANE CITY COUNCIL** (first respondent) AND **DEXUS FUNDS MANAGEMENT LIMITED (ACN 060 920 783)** (second respondent) AND **PERPETUAL TRUSTEE COMPANY LIMITED (ACN 000 001 007)** (third respondent)
FILE NO:	401 of 2021
DIVISION:	Planning and Environment Court
PROCEEDING:	Originating application
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	9 December 2022
DELIVERED AT:	Brisbane
HEARING DATE:	9, 10 and 21 March, 28 & 29 April 2022, with further submissions delivered 6, 12 & 13 May 2022.
JUDGE:	Williamson KC DCJ
ORDER:	**The Further Amended Originating Application filed by leave on 9 March 2022 is dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – ORIGINATING APPLICATION – DECLARATORY PROCEEDING – where the applicant seeks declaratory relief about a delegate's decision to give a development approval – whether the development application approved was impact assessable rather than code assessable – whether the decision to grant

the development approval was invalid.

PLANNING AND ENVIRONMENT – ORIGINATING APPLICATION – DECLARATORY PROCEEDING – where the applicant seeks declaratory relief about a delegate's decision to give a development approval – whether the development application required the consent of the applicant – whether the application was properly made for the purposes of the *Planning Act 2016* – whether the decision to grant the development approval was invalid.

PLANNING AND ENVIRONMENT – ORIGINATING APPLICATION – DECLARATORY PROCEEDING – where the applicant seeks declaratory relief about a delegate's decision to give a development approval – where the assessment process continued after the second respondent made a change to its development application – whether the change was made in response to an information request – whether the decision to grant the development approval was invalid.

PLANNING AND ENVIRONMENT – ORIGINATING APPLICATION – DECLARATORY PROCEEDING – where the applicant seeks declaratory relief about a delegate's decision to give a development approval – whether the delegate erred in construing and applying City Plan 2014 – whether the delegate failed to have regard to relevant considerations – whether the decision is unreasonable – whether the decision to grant the development approval is invalid.

LEGISLATION: *Acts Interpretation Act 1954*, s 7
Judicial Review Act 1991, s 32
Planning Act 2016, ss 5, 43, 44, 45, 51, 52, 59, 60, 62, 63, 68, 71 and 231
Planning & Environment Court Act 2016, ss 11 and 37
Transport Operations (Road Use Management – Road Rules) Regulation 2009, s 28

CASES: *Australia Pacific LNG Pty Limited & Ors v The Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport* [2019] QSC 124
Body Corporate for Mayfair Residences Community Titles Scheme 31233 v Brisbane City Council & Anor (2017) 222 LGERA 136
Buck v Bavone (1975-76) 135 CLR 110
East Melbourne Group Inc v Minister for Planning & Anor (2008) 23 VR 605
Eschenko v Cummins & Ors [2000] QPELR 386
Kelly v The Queen (2004) 218 CLR 216
MZAPC v Minister for Immigration and Border Protection & Anor [2021] HCA 17
Parramatta City Council v Hales (1982) 47 LGRA 319

Minister for Aboriginal Affairs v Peko-Wallsend Limited & Ors (1985-86) 162 CLR 24
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Surfers Beachfront Protection Association Inc v Gold Coast City Council (No.2) [2022] QPEC 3
Wall, Director-General of the Environmental Protection Agency v Douglas Shire Council [2007] QPELR 517
WB Rural Pty Ltd v Commissioner of State Revenue [2018] 1 Qd R 526

COUNSEL: Mr C Hughes KC, Mr M Batty and Mrs S Hedge for the applicant
Mr B Job KC, Mr J Lyons and Mr R Yuen for the first respondent
Mr D Gore KC and Mr J Ware for the second and third respondents

SOLICITORS: Herbert Smith Freehills for the applicant
City Legal for the first respondent
King and Wood Mallesons for the second and third respondents

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Introduction

[1] In December 2020, Council's delegate approved, subject to conditions, the second respondent's development application to redevelop Eagle Street Pier in the central business district of Brisbane. The decision was made after the delegate conducted a code assessment under the *Planning Act 2016* (**the Act**). The decision to approve was communicated by way of decision notice dated 17 December 2020 (**the development approval**). The development approval has taken effect[1] and authorises the carrying out of assessable development.

[2] The applicant (**Riverside**) owns the Riparian Plaza building, which is on land adjoining the Eagle Street Pier redevelopment site. By its Further Amended Originating Application, filed by leave on 9 March 2022,[2] Riverside challenges the validity of the development approval and seeks declaratory and consequential relief. The relief sought, in short form, can be stated as follows:

1. A declaration pursuant to sections 11(a) and (b) of the *Planning & Environment Court Act 2016* that:

   (a) the development application approved by the delegate was impact assessable;

   (b) the development application approved by the delegate was not a properly made development application for the purposes of the Act;

   (c) changes made to the development application prior to the delegate's decision to approve resulted in '*substantially different development* and were not a '*minor change*' for the purposes of the Act; and

   (d) the development approval is invalid and of no effect.

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1 Pursuant to s 71(1) of the Act.
2 4.016.

2. A consequential order that the development approval be set aside.

[3] The grounds relied upon by Riverside in support of the relief it seeks are limited to those identified in its written submissions, marked exhibits 6.004, 6.005 and 6.006.

[4] The Further Amended Originating application (**the application**) is opposed by Council and the second and third respondents (**the Dexus parties**).

[5] Given the nature of the proceeding, involving alleged invalidity of a decision under the Act, Riverside bears the onus.[3]

Background

[6] On 17 June 2020, a development application was made to Council as assessment manager[4] seeking a number of development permits to redevelop Eagle Street Pier in two stages (**the development application**). One of the development permits sought was for making a material change of use of premises for three defined uses in Council's planning scheme, City Plan 2014, namely Bar, Centre activities and Hotel.[5]

[7] A review of the development application reveals the land identified as the subject of the development application:

(a) was described in DA Form 1[6] and an application report[7] as Lots 40 and 50 on RP817615, Lots 11 and 12 on CP SL12763, part of Lot 7 on RP183618, Lots 700, 701 and 702 on CP SL12734, and Lot 9 on CP SL12596;

(b) has a combined '*Site Area*' of 22,307m^2, inclusive of an area of riverbed;[8]

(c) has a primary frontage to Eagle Street of 138.1 metres;[9]

(d) has a secondary frontage to Mary Street of 25.35 metres and Felix Street of 111.90 metres; [10]

(e) has a frontage to the Brisbane river in the order of 250 metres;[11]

(f) is improved with the Eagle Street Pier, Waterfront Place and part of Riverwalk, which is a publicly accessible pedestrian and cyclist path;[12]

(g) is included in the Principal centre zone of City Plan 2014;[13] and

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3 *Eschenko v Cummins & Ors* [2000] QPELR 386, [20] citing *Parramatta City Council v Hale* (1982) 47 LGRA 319, 335 and 393.
4 1.003.001, p.15, question 15.
5 1.003.001, pp.12-13, question 6.1.
6 1.003.001, p.11.
7 1.007.026, p.1237. Section 2.5 of the same report identified the lots as the 'Site' over which the development application was made (1.007.026, p.1241).
8 1.003.006, p.61 and 1.007.024, p.1206.
9 1.007.026, p.1236.
10 1.007.026, p.1236.
11 1.003.008, p.210.
12 1.007.024, p.1206 and 1.007.026, p.1236.
13 1.007.024, pp.1214.

(h) is included in the River precinct of the City centre neighbourhood plan (**CCNP**) of City Plan 2014.[14]

[8] A detailed description of the development proposed is contained in a report accompanying the development application. It was prepared by Place Design Group,[15] and identifies the key components of the development as including: (1) the demolition of existing buildings, Riverwalk, pontoons and in-river moorings; (2) the reclamation of 1,800m^2 of a riverbed lease (Lot 50 on RP817615) to facilitate the construction and expansion of an existing basement carpark; (3) two high rise premium grade office towers, each including basement carparking, a podium and public realm area; (4) the construction of a new Riverwalk, about 274 metres in length; and (5) a shared access arrangement servicing the proposed development and Riparian Plaza.

[9] The development application states it is subject to code assessment.[16]

[10] The assessment benchmarks for the development application[17] were addressed, in part, in Attachments 23 to 24 of the Place Design Group report referred to above.[18] The assessment benchmarks included: (1) the CCNP code; (2) the Waterway corridors overlay code; (3) the Transport, access, parking and servicing code; and (4) the Bicycle network overlay code.

[11] By letter dated 13 July 2020, further material was provided to Council in relation to the shared access arrangement with Riparian Plaza. The letter described the existing access arrangement in these terms:[19]

> "The subject site (Eagle Street Pier) and Riparian Plaza are accessed via the existing lanes of the Eagle Street, Creek Street and Charlotte Street signalised intersection with this access arrangement retained as part of the [proposed development].
>
> Existing easement AA on Lot 50 SP817615 (Eagle Street Pier) benefiting Riparian Plaza and burdening Eagle Street Pier and easement AB on Lot 5 on SP140665 (Riparian Plaza) benefiting Eagle Street Pier and burdening Riparian Plaza provide for reciprocal vehicular and pedestrian access rights, with easement AB limited in height to 3.627m."

[12] The same letter described the proposed access arrangements, which did not involve reliance upon the area of Easement AB:

> "To remove any doubt, amendments have been made to the access arrangement information previously provided which…now shows access and servicing wholly within Lot 50 on SP817615 and is not reliant on the use of the area of easement AB. The changes proposed are summarised as follows:

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14 1.007.024, pp.1215.
15 1.007.026, p.1254 – 1272.
16 1.007.026, p.1227; 1.007.026, pp.1288-1293; and 1.003.001, p.12, Part 3-Section 1.
17 1.007.026, pp.1294 to 1296.
18 1.007.026, p.1224 and p.1294, s 9.2.2.
19 1.009.032, p.1577.

- Additional entry lane contained wholly within Lot 50 SP817615 with a minimum 4.5m height clearance for MRV, RCV and LRV vehicles. Number of lanes increased from 4 to 5 lanes.
- Single lane ingress and single lane egress and turning lanes maintained.
- Maintained bicycle/pedestrian pathway adjacent to the left egress lane."

[13] Two Confirmation notices were issued for the development application.[20] The second notice, dated 20 July 2020, was issued to correct an error in the first notice dated 17 July 2020. Both Confirmation notices state the development application was properly made on 9 July 2020, and that Part 4 of the Development Assessment Rules (**DAR**) (public notification) do not apply. The letter accompanying each notice identifies the decision-maker for the development application as a delegate of Council, namely the Principal Urban Planner, Mr James Heading.

[14] The development application required[21] referral to the Chief executive. The final referral response issued by the Chief executive is contained in a document dated 27 November 2020. It is described as '*Changed SARA response–Waterfront Brisbane*'.[22] The response is consistent with, and reflected in, the delegate's decision to approve the development application subject to conditions.[23]

[15] By letter dated 7 August 2020,[24] a substantial information request (18 pages) was issued for the development application. The preamble to the information request is in the following terms:[25]

> "Council has carried out an initial review of the…application and has identified that further information is required to fully assess the proposal. The proposed development represents a significant opportunity to provide high quality commercial and mixed-use development with substantial improvements to accessibility along the river's edge. The overall proposal is considered to be well designed, however the development requires further refinement and resolution of key aspects of the design to ensure an appropriate outcome given the prominence of the development in the City.
>
> A number of matters have been identified during the initial assessment, requiring amendments and/or further information be provided. It is recommended that following your review of the information request, a meeting is arranged with the relevant specialists to discuss the information request items in detail."

[16] An examination of the information request reveals it raised a number of broad issues for consideration, including: (1) the width of the proposed upgrade to

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20 1.009.035 and 1.009.037.
21 Referral was triggered for four reasons. They are identified in the Changed SARA response at 1.015.137, p.3160.
22 1.015.137, pp.3159 to 3169.
23 1.015.147, p.3253, Standard Advice, item 89).
24 1.010.047.
25 1.010.047, p.1773.

Riverwalk and associated planning scheme compliance;[26] (2) proposed building height within 5 metres of the high-water mark and associated planning scheme compliance; [27] (3) the calculation of Tower site cover as defined in the CCNP Code;[28] and (4) proposed amendments to the existing shared access arrangement. [29]

[17] A full response to the information request was provided to Council under cover letter dated 16 October 2020.[30] The response included changes to the development application. The changes were said to be in direct response to the information request and not give rise to a 'minor change' issue under the Act.

[18] The changes made to the development application were identified in a report dated 16 October 2020.[31] The changes can be summarised as follows:

(a) the North Tower GFA was increased from 75,331m^2 to 76,743m^2;

(b) the South Tower GFA was increased from 59,999m^2 to 61,322m^2;

(c) the Podium GFA was increased from 9,860m2 to 12,671m2;

(d) the total GFA of the project was increased from 145,190m2 to 150,825m2;

(e) the building height of low-scaled tenancy spaces increased from RL14.05m and 2 storeys to RL20m and 3 storeys;

(f) Site cover increased from 9,919m2 (44.5%) to 10,887m2 (48.8%);

(g) Tower site cover reduced from 6,300m2 (28.2%) to 6,130m2 (27.5%);

(h) Setbacks of the podium and tower to the eastern boundary were reduced from 14.5 metres and 34 metres respectively to 13.3 metres/10.7 metres and 33.20 metres;

(i) the Tower setback to Riverwalk was increased from 13 metres to 17.9 metres;

(j) the width of Riverwalk increased from 6-18 metres (average of 10 metres) to 6-27.26 metres (average of 10m);

(k) the setback distance to the Riverwalk northern structure was increased and decreased at particular points;

(l) the setback to Eagle Street was increased from 3.15 metres to 3.3 metres;

(m) the area of landscaped open space increased from 12,608m2 (56.5%) to 15,184m2 (68.1%); and

(n) the total number of carparking, visitor, motorcycle and bicycle spaces were increased from 454 to 470 spaces.

[19] The response to the information request included, inter alia: (1) amended architectural plans, sections, details and elevations;[32] (2) a comprehensive

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26 1.010.047, pp.1774-1776.
27 1.010.047, p.1779.
28 1.010.047, p.1779.
29 1.010.047, p.1783-1784.
30 1.012.097.
31 1.012.098, p.2506.
32 1.010.072.

architectural design statement, including a range of visual aids such as photomontages;[33] and (3) a Public realm and landscaping report, also including a range of visual aids.[34]

[20] On 17 November 2020, a '*Further Advice*' letter was sent by Council to Place Design Group.[35] The preamble to the two and half page letter states:

> "An assessment has been completed of your response to the information request and outstanding items have been identified which are required to be resolved before a decision can be made."

[21] The '*outstanding items*' in the letter of 17 November 2020 included: (1) a query with respect to the calculation of Tower site cover, as defined in the CCNP code; and (2) the need for clarification in relation to the shared access arrangements with Riparian Plaza. The request for further information in relation to item (2) was in the following terms:[36]

> "**Site Access**
>
> 8. It is acknowledged changes have been made to ensure the site access does not impact the adjoining site. However, it appears that minor works such as line marking, etc. may be needed to the adjoining site.
>
> a) Provide amend (sic) plans and documentation demonstrating the site access is functional without requiring works to the adjoining site."

[22] By cover letter dated 20 November 2020, a full response was provided to the '*Further Advice*' letter of 17 November 2020.[37] The response to item 8 above was in the following terms:

> "Ingress and egress for the development will remain wholly contained within the existing Eagle Street Pier property boundary and the development is not reliant on ingress or egress via Easement AB.
>
> All line marking, directional arrows and like that may be required will be contained wholly within the Eagle Street Pier property boundary.
>
> For clarity, amended plans have been provided that remove any suggestion of directional arrows and line marking works to the adjoining site."

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33 1.010.073.
34 1.010.074.
35 1.013.109.
36 1.013.109, p.2598.
37 1.014.116, p.2795.

[23] A total of 46 adverse submissions were received by Council during the assessment process, including submissions made on behalf of Riverside. Some were received prior to the response to the information request.[38]

[24] Whilst the development application was not the subject of formal public notification, the adverse submissions were considered in the assessment by the delegate.[39] They are discussed in a document titled '*Notice about decision assessment report (s63 Development Application)*' (**the NADA report**).

[25] The NADA report provides an assessment of the development application against some of the assessment benchmarks and addresses what appear to be the key planning issues for consideration identified by the author. The author is '*Council's assessment manager*'. This is not the delegate, Mr Heading. The report also includes a recommendation about the fate of the development application. It was recommended that the development application be approved in accordance with a development approval package. Preceding that recommendation is a '*Statement of Reasons for Decision*', which is in the following terms:[40]

> "**7. STATEMENT OF REASONS FOR DECISION**
>
> 1. The development provides a built form within the City Centre that responds to its site characteristics and context, including the cityscape and streetscape. Development reinforces the distinct qualities of a close-knit city grid and well-spaced buildings along the river's edge;
>
> 2. The development is located and designed to maintain and improve views and vistas from the public realm to the Brisbane River and Story Bridge;
>
> 3. The development responds to the broad range of market demands, including diverse tenancy sizes that provide small, flexible, and innovative incubator spaces for small businesses;
>
> 4. The development is located and designed to enhance the accessibility and integration of existing and future public transport passenger facilities;
>
> 5. The river edge is enhanced as a generous and unified urban public space for pedestrians and cyclists, diners and visitors;
>
> 6. A multi-layered river edge provides for river activities at the water level, a waterfront promenade at the lower level, publicly accessible and active low-rise tenancies at the middle level, and well-spaced towers that are set back from the river at the upper level;
>
> 7. High density waterfront development optimises the amount of public space at ground level, creating a sense of openness and space for pedestrians. New and improved spaces between

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38 1.009.039, 1.010.046, 1.010.056 – 1.010.071.
39 1.015.148, pp.3331 to 3336.
40 1.015.148, p.3337.

buildings provide open visual and physical connections from the city grid to the river and beyond. Landscaping is used to create subtropical towers in a riverside garden setting;

8. The development is tailored to the location of the site considering its intensity of activity, range of uses and proximity to higher capacity public transport services, government services, community facilities and other infrastructure and presents a coordinated and integrated building, open space and innovative landscaping response to the street and adjoining public spaces;

9. The development involving new premises contributes to the economic activity and vitality of the location and is appropriate to its relative catchment and expected hours of operation; and

10. The development ensures that the design of buildings reflects an intense urban form while providing open space and landscaping appropriate to the use and scale of the development, and which positively contributes to the streetscape character and local identity."

[26] Having regard to,[41] inter alia, the NADA report, Mr Heading decided to approve the development application, subject to 200 conditions and 13 Standard Advice notes. The decision was recorded in a document titled '*Decision by delegate of Council*'.[42] The document states:

"1. Having considered the application and assessment detailed above, I am satisfied that the application accords with the requirements of the *Planning Act 2016* where applicable and as such:

(a) approve the application in accordance with the attached development approval package

(b) approve the infrastructure charges in accordance with the attached Infrastructure Charges Notice

And direct that:

2. the applicant be advised of the decision…"

[27] The development approval package included condition 18, which has application to the material change of use component, and states:[43]

"**18) Carry Out the Approved Development**

Carry out the approved development in accordance with the approved DRAWINGS AND DOCUMENTS.

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41 Affidavit of Heading, sworn 22 September 2021, para 41(j).
42 1.015.145.
43 1.015.147, p.3203.

> Note: This approval does not imply permission to enter neighbouring properties to carry out the construction (including, but not limited to, associated drainage and earthworks). Permission to enter neighbouring properties must be obtained from the relevant property owners."

[28] The term '*drawings and documents*' (or similar expressions) is a defined term in the conditions package. It is defined by reference to a schedule of drawings or documents.[44] One of the approved drawings is the '*Basement 1 River Level Floor Plan*'.[45] This plan depicts, inter alia, the location of the shared access with Riverside. Condition 71, of the development approval is relevant to this access and states, in part (**Condition 71**):[46]

> "**71) Work for Transport Network – Road (Non-trunk) – External**
>
> Construct the following roadwork with any associated drainage, verge, site access and services including street lighting for the Transport Network (Road) shown on the APPROVED DRAWINGS in accordance with the relevant Brisbane Planning Scheme Codes, the Queensland Manual of Uniform Traffic Control Devices and the AUSTROADS design standards:
> …
> - modification of the existing shared access signalised intersection of Eagle St/Creek St/Charlotte St/shared site access generally in accordance with approved MRCagney Plans LS-1, LS-2, LS-3, LS-4 dated 13/11/2020 including the implementation of a left-turn protection delay for all left turn movements;
>
> - Provide written consent from the owners of any adjoining properties for any site works to be undertaken on that property"

[29] The MRCagney plans referred to in Condition 71 were provided to Council in November 2020.[47] They depict the layout of the shared access, along with easement plans and cross-sections. The layout plans confirm that:

(a) ingress and egress for the approved development will remain wholly within the Eagle Street Pier property boundary;

(b) the approved development is not reliant on ingress and egress via Easement AB; and

(c) all line marking that may be required will be contained within the Eagle Street Pier property boundary.

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44 1.015.147, pp.3194-3198.
45 1.015.147, p.3196.
46 1.015.147, p.3245.
47 1.014.121, pp.2961-2964.

[30] Mr Heading's decision to approve the development application was communicated by way of decision notice dated 17 December 2020.[48] The statutory requirements with respect to a decision notice are set out in ss 63(2) and (3) of the Act; it must be in the approved form and state a number of specific matters.

[31] Where, as here, the assessment manager for a development application seeking approval for a material change of use is a local government, s 63(4) of the Act requires the promulgation of '*a notice about the decision*', as distinct from the decision notice itself. The decision is to be published on the assessment manager's website. Such a notice must state the matters, where applicable, identified in s 63(5). Subsections (5)(d) and (e) state:

> "(5) The notice must state –
>
> …
>
> (d) the reasons for the assessment manager's decision; and
>
> (e) if the development was approved, or approved subject to conditions, and the development did not comply with any of the benchmarks—the reasons why the application was approved despite the development not complying with any of the benchmarks;*"*

[32] The evidence suggests the NADA report was published on Council's website as notice of the delegate's decision. This occurred on a date unknown, but no later than 19 January 2021.[49]

[33] The NADA report does not contain reasons of the kind contemplated by s 63(5)(e) of the Act. This is in circumstances where, subject to s 62, which does not apply here, s 60(2)(a) of the Act directs an assessment manager to approve a code assessable development application to the extent it complies with all of the assessment benchmarks. The provision states:

> "(2) To the extent the application involves development that requires code assessment, and subject to section 62, the assessment manager, after carrying out the assessment—
>
> (a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development;"

[34] By letter dated 23 December 2020, Riverside, through its solicitor, requested a statement of reasons for the delegate's decision under s 231(3) of the Act, and s 32 of the *Judicial Review Act 1991*.[50] In a letter dated 19 January 2021, Council through its solicitor responded to this request in the following terms:[51]

> "The Council's Notice About Decision Assessment Report for the Application, published on Council's Development.i website in

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48 1.015.146 and 1.015.147.

49 This is referred to in a letter from Council's solicitor to the Applicant's solicitor dated 19 January 2021; Affidavit of Cowan, sworn 23 February 2021, exhibit MDC-2.

50 Affidavit of Cowan, sworn 23 February 2021, exhibit MDC-1.

51 Affidavit of Cowan, sworn 23 February 2021, exhibit MDC-2.

> accordance with the requirements of section 63(4) and (5) of the Planning Act (a copy of which is **attached**), sets out the reasons for Council's decision at section 7.
>
> Council's opinion is that your client is not entitled to a statement of reasons under section 32 of the JR Act, as the decision on the Application is not one to which Part 4 of the JR Act applies (refer to section 31(a) of the JR Act)."

[35] The Applicant did not commence proceedings that, if successful, would secure an order compelling the delegate to provide the requested statement of reasons.

[36] This proceeding was commenced on 19 February 2021.

The statutory assessment and decision making framework

[37] The development application was assessed and decided by the delegate as a code assessable application under the Act. An application of this kind is to be assessed in accordance with, inter alia, ss 45(3) and (4), and decided in accordance with ss 60(2) and 62. The assessment is confined. It must be carried out only against assessment benchmarks in a categorising instrument for the development and matters prescribed by Regulation.[52]

[38] Section 5(1) of the Act does not apply to code assessment.[53] This provision requires an entity performing a function under the Act to do so in a way that advances the purpose of the Act.

[39] The power to decide the development application under s 60(2) applies to a properly made application,[54] which is defined by reference to s 51(5) of the Act.

[40] In this case, the delegate was satisfied the proposed development complied with all of the relevant assessment benchmarks.[55] This finding is not stated in the NADA report; however, it is consistent with the absence of a statement in the same document of the kind required by s 63(5)(e) of the Act. It is also consistent with the document recording his decision (paragraph [26]), which states the delegate was '*satisfied the application accords with the requirements of the Planning Act 2016*'. That the delegate was satisfied the development complied with all assessment benchmarks engaged s 60(2)(a) of the Act as distinct from subsections (2)(b) and (d). Whilst repetitious, it is useful to set out these provisions of the Act, which provide different paths to the exercise of the power to approve a code assessable development application:

> "(2) To the extent the application involves development that requires code assessment, and subject to section 62, the assessment manager, after carrying out the assessment—

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52 s 45(3)(a) and (b), The Act.
53 s 45(4), The Act.
54 s 60(1), The Act.
55 Affidavit of Heading affirmed 22 September 2021, para 44.

> (a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and
>
> (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and
>
> …
>
> (d) may, to the extent the development does not comply with some or all of the assessment benchmarks, decide to refuse the application only if compliance cannot be achieved by imposing development conditions.

The issues to be determined

[41] Riverside's written submissions contend the delegate's decision to grant the development approval, subject to conditions, is invalid and of no effect.[56] Six grounds of challenge are advanced, namely:

(a) there was no jurisdiction to make the decision because the development application could not be properly made without Riverside's consent;[57]

(b) the decision is infected by jurisdictional error – the development application was impact rather than code assessable;[58]

(c) there was no jurisdiction to make the decision on the changed development application because the changes were not in response to an information request and the delegate did not consider whether the changes resulted in substantially different development;[59]

(d) the delegate's decision was made without taking into account the following relevant considerations:[60]

  (i) overall outcomes of the relevant codes in City Plan 2014;

  (ii) non-compliance with assessment benchmarks in City Plan 2014;

  (iii) relevant facts relating to easements AA and AB;

(e) the delegate's decision was infected by jurisdictional error by making the decision under s 60(2)(a) of the Act rather than s 60(2)(b);[61] and

(f) the delegate's decision was unreasonable because of the matters raised by (d)(ii) and (d)(iii) above.[62]

[42] Riverside also contends there are no discretionary considerations that militate against granting the relief it seeks.[63]

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56 Ex.6.004, para 2.
57 Ex.6.004, para 2(d).
58 Ex.6.004, para 2(a).
59 Ex.6.004, para 2(e).
60 Ex.6.004, para 2(b)
61 Ex.6.004, para 2(c).
62 Ex.6.004, para 2(f).
63 Ex.2, p.63, para 12.

[43] Council and the Dexus parties oppose the application. They each contend the grounds of challenge to the validity of the decision have not been made out.

[44] Before considering each of the above challenges, it is necessary to deal with objections taken to affidavit material.

The objections

[45] Save for one exception, each party gave notice of objections in relation to material that was relied upon. I have dealt with the objections in **Schedule A** to these reasons for judgment.

[46] The exception to be noted is that after the material to be relied upon was read and tendered, Riverside foreshadowed an objection to the evidence of Mr James Heading. In its written submissions, Riverside submitted that Mr Heading sought to impermissibly give evidence that he had assessed the development application against all relevant benchmarks.[64] The underlying rationale for the objection was that Mr Heading's evidence was wholly different to the stated reasons for his decision. This objection was expanded in a schedule of objections to extend to 'any part' of Mr Heading's affidavits that provide reasons not contained in the decision notice or NADA report.[65]

[47] I have dealt with the objection in the body of these reasons for judgment. In summary terms, I was satisfied that Mr Heading's evidence did not seek to change the reasons for the decision. Rather, his evidence provides elucidation of the reasoning. It confirms, inter alia, that Mr Heading had regard to the relevant overall outcomes and performance outcomes of the assessment benchmarks and was satisfied compliance had been demonstrated. This evidence, in my view, is consistent with the absence of a note within the NADA report of the kind required by s 63(5)(e) of the Act and the document quoted in paragraph [26] above. As to the broader objection taken to Mr Heading's affidavits, I do not accept it should succeed. I am satisfied the evidence is admissible for the reasons stated in **Schedule A**. The affidavits assist the Court understand his reasoning in relation to a number of decisions made during the assessment process.

[48] I will now turn to deal with the disputed issues.

Was Riverside's consent required to make the development application?

[49] The DA form 1 and development application material did not identify Lot 5 on SP140665 (**Lot 5**) as land the subject of the development application. This is land owned by Riverside.

[50] Riverside contends Lot 5 should have been included as land the subject of the development application. It also contends that, as the owner of Lot 5, its consent was required for the making of the development application by operation of s 51(2) of the Act, which is in the following terms:

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64 Ex.6.004, paras 76 and 77.
65 Ex.6.004, p.50.

"(2) The application must be accompanied by the written consent of the owner of the premises to the application, to the extent—

(a) the applicant is not the owner; and

(b) the application is for—

(i) a material change of use of premises or reconfiguring a lot; or

(ii) works on premises that are below high-water mark and are outside a canal; and

(c) the premises are not excluded premises."

[51] The phrase '*excluded premises*' in subsection (2)(c) above is defined in Schedule 2 of the Act. The definition is, in part, as follows:

"***excluded premises*** means—

(a) generally—

(i) premises that are a servient tenement for an easement, if the development is consistent with the easement's terms; or…"

[52] Section 51(4) of the Act required the delegate to be satisfied that, inter alia, the application complied with s 51(2). In the context of the issue raised by Riverside, that required the delegate to ask and answer two questions: (1) whether the development application sought approval for a material change of use of Lot 5; and (2) whether Lot 5 was excluded premises (as defined in the Act). Riverside submitted the delegate was not satisfied about either question at the time the confirmation notices were issued, being 17 and 20 July 2020.[66] This submission is correct.[67] Mr Heading confirmed this to be the case in his oral evidence.

[53] What consequences flow from Mr Heading's concession?

[54] The concession has the effect that, at the time the confirmation notices were issued:

(a) Mr Heading was not satisfied the development application complied with s 51(2);

(b) the application could not be accepted by Mr Heading under ss 51(4)(c) or (d);

(c) the application was not a properly made application as defined in s 51(5), which states:

"(5) An application that complies with subsections (1) to (3), or that the assessment manager accepts under subsection (4)(c) or (d), is a ***properly made application***."

(d) s 51(4)(b) was engaged, which states:

"(4) An assessment manager—

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66 Affidavit of Mr Heading affirmed 22 September 2021, paras 66 to 71 and T3-55.

67 Ex.6.004, paras 115, 116 and 120.

…

(b) must not accept an application unless the assessment manager is satisfied the application complies with subsections (2) and (3);" (emphasis added)

[55] That an application is not a properly made application under s 51(5) is also relevant to an assessment manager's power to decide a development application under the Act. Provisions going to the decision making power are contained in Chapter 3, Part 3, Division 2 of the Act. Of particular interest is s 60(2). This provision applies to deciding an application involving code assessment. The power is enlivened where s 60(1) is met. The provision states:

"**60 Deciding development applications**

(1) This section applies to a properly made application, other than a part of a development application that is a variation request." (emphasis added)

[56] If the examination of the owner's consent issue were to cease at this point, Riverside has established the delegate did not have power to accept or decide the development application under the Act on 9 July 2020, or at the time the confirmation notices were issued. To accept the development application and commence the assessment process did not comply with the Act. This non-compliance, however, does not necessarily work invalidity. To work invalidity, the non-compliance needs to be attended with materiality.[68]

[57] Materiality of the kind necessary to work invalidity is absent here for two reasons.

[58] First, Mr Heading did consider the issue of owner's consent and was satisfied about this for the purpose of s 51(2) of the Act. He reached the satisfaction required by the Act after giving the Confirmation notices, but before taking the next step in the assessment process; the next step was the giving of the information request.[69] It was Mr Heading's view prior to giving the information request that there was no requirement for Lot 5 to form part of the land the subject of the development application. He held this view for the remainder of the assessment and decision making process.[70]

[59] Mr Heading identified the reasons for his decision about owner's consent in an affidavit affirmed 22 September 2021. His sworn evidence reveals that in determining this question he had regard to the material identified at paragraphs [11] and [12] and a report prepared by Council's project team engineers.[71] Based on the internal report, Mr Heading concluded that '*any vehicle entering the site would not be obliged by way of the physical layout of the access driveway to cross over the land covered by*' Easement AB.[72]

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68 *MZAPC v Minister for Immigration and Border Protection & Anor* [2021] HCA 17 at [29] per Kiefel CJ, Gageler, Keane and Gleeson JJ.

69 Affidavit of Mr Heading affirmed 22 September 2021, para 71.

70 Affidavit of Mr Heading affirmed 22 September 2021, paras 70 and 71.

71 Affidavit of Mr Heading affirmed 22 September 2021, paras 66, 68 and 69.

72 Affidavit of Mr Heading affirmed 22 September 2021, para 70.

[60] Second, the decision to approve the development subject to conditions does not authorise assessable development to occur on Lot 5, let alone authorise development to occur that is inconsistent with the terms of Easement AB. This is confirmed by the matters discussed in paragraphs [27] to [29] above. In particular, it is confirmed by condition 71 of the development approval read with the approved plans referred to in the condition itself.

[61] Riverside was critical of Mr Heading's approach to the issue of owner's consent. It described his assessment as a '*rolling assessment*'.[73] He was criticised for not determining the issue of owner's consent at the date the development application was said to be properly made, or at the time the Confirmation notices were issued. These criticisms are not without merit. The issue of owner's consent should have been determined prior to giving the Confirmation notices. Neither criticism, however, works invalidity, in my view, having regard to paragraphs [57] to [60].

[62] Riverside advanced two alternative cases in relation to the issue of owner's consent. The primary case, as I understood it, involved a contention that the need to provide owner's consent for Lot 5 is an issue the Court can determine for itself, as an objective fact. In the alternative, it was contended the delegate's decision about owner's consent is affected by jurisdictional error because he failed to have regard to relevant considerations. It was also contended that the decision is, in any event, legally unreasonable.

[63] Turning to deal with the jurisdictional fact allegation first, it was submitted that, despite Mr Heading's view, Riverside's consent was, and is, required to be obtained for the development application because:[74]

> "it is clear that as at…today…owner's consent was required to be obtained from Riparian Plaza for the Dexus development because the Dexus development is not consistent with the terms of Easement AB, and because, on the balance of probabilities Easement AB will be used by the Dexus development."

[64] At the outset, I can indicate that I have misgivings about approaching the issue of owner's consent in the manner contended by Riverside. As s 51(4)(a) of the Act reveals, it is a matter about which the assessment manager is to be '*satisfied*'. In reaching that satisfaction here, Mr Heading was required to make determinations about matters involving questions of degree, judgment and impression. For example, he was required to form a view about the extent of the '*site*' on which the material change of use was proposed. The evidence reveals this is a matter about which reasonable minds can, and do, differ. It is, in any event, unnecessary to express any concluded view about this because I am not satisfied Riverside has established that owner's consent was, and is, required for the development application for the following reasons.

[65] Riverside contends the Court would be satisfied that its consent was required for the development application because: (1) the application proposed a material change of use on Lot 5 where Easement AB is located;[75] (2) the applicant for approval is not

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73 Ex.6.004, para 117 and 120.
74 Ex.6.004, para 121.
75 Ex.6.004, para 114.

the owner of Lot 5; and (3) Lot 5 is not excluded premises – the material change of use proposed is on premises that are the servient tenement for an easement (Easement AB) and the development is inconsistent with the terms of that easement.[76]

[66] I accept item (2) is correct as a matter of fact.

[67] I do not accept Riverside has established items (1) and (3).

[68] Riverside's submission with respect to item (1) relies upon the Court being satisfied that the development application originally made, (principally the Traffic Impact Assessment report prepared by MRCagney)[77] establishes the development will involve a material change of use on Lot 5.[78] The difficulty with this proposition is that the development application, specifically in relation to the shared access, was changed shortly after it was made to Council. So much is clear from the background discussed at paragraphs [11], [12], [21] and [22]. The change to the application made clear that the development did not rely upon the area of Easement AB for ingress and egress.

[69] It can also be observed that the report relied upon by Riverside to establish the material change of use, namely the MRCagney Report submitted to Council on 17 June 2020,[79] falls short of the mark; it does not establish the development would give rise to a material change of use of Lot 5 in the area of Easement AB.

[70] The MRCagney report has three parts relevant to the issue of consent. First, the report contains a number of plans, one of which is a Basement 1 River Level Floor Plan. This plan indicates that the area of Easement AB was, at the time, included within the '*site boundary*'.[80] Second, the report contains swept path diagrams. The diagrams demonstrate that a 12.5 metre Heavy Rigid Vehicle could execute a turning manoeuvre into, and within, the shared access and basement carparking areas. Three swept path diagrams indicate Easement AB would be traversed (i.e. by cutting the corner of the easement area) by Heavy Rigid Vehicles utilising the shared access.[81] Third, the report contains tables of data that are outputs from a SIDRA traffic modelling programme. The tabled data suggests no vehicle movements of the kind just referred to were anticipated in the AM or PM design peaks.[82] In short, whilst the report indicates a 12.5 metre Heavy Rigid Vehicle may, when entering the shared access, cut the corner of Easement AB, there is no means of determining the number of times this movement is anticipated. Indeed, the tables containing outputs from the SIDRA model do little to assist. They give no sense of intensity.

[71] If a contrary view is taken, that is, the material is taken to establish that the development would give rise to a material change of use on Lot 5 in the area of Easement AB, it does not follow that owner's consent was necessarily required.

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76 Ex.6.004, para 121.
77 1004.010.
78 Ex.6.004, para 114.
79 1004.010.
80 1.004.010, p.52.
81 1.004.010, pp.62, 64 and 65.
82 1.004.010, compare Creek Street L1 and Eagle Street R2 on pp.89, 90, 101 and 102 with the same entries on pp.91, 92, 103 and 104.

That is because consent was only required if the '*development*' was inconsistent with the terms of Easement AB.

[72] Easement AB burdens Lot 5. It is granted in favour of Lot 50 on RP817615.[83] Diagram K, read with the volumetric levels for the easement, suggest the easement ranges in height from 3.495 metres to 3.627 metres.[84] As to its purpose, Form 9 states the purpose of the easement is for '*vehicular and pedestrian access*'.[85]

[73] Section 2.1 of the Schedule referred to in Item 8 of Easement AB states:[86]

> "**2.1 Grant of Easement**
>
> Subject to the provisions of this Easement the Grantor hereby grants to the Grantee in common with those given a like right by the Grantor full and free right and liberty as appurtenant to the Dominant Tenement for the Grantee and its tenants and its and their servants, agents, licensees and invitees at all times hereafter by day and by night with or without motor vehicles of every description (provided that the same can satisfactory obtain access to the Servient Tenement) and/or on foot for all purposes connected with the lawful use and enjoyment of the Dominant Tenement to go pass and repass to or over or from the Servient Tenement and to use the Servient Tenement for the purpose of access to and from the Dominant Tenement but not for any other purpose."

[74] The background set out at paragraphs [11], [12], [21] and [22] reveal that the development application in the form that was the subject of the information request, and subsequently decided by the delegate did not involve vehicles passing or repassing over Easement AB. In simple terms, no inconsistency arises because the development did not require Easement AB for ingress and egress.

[75] The same can also be said for the development approved by the delegate. Condition 71 of the development approval incorporates, by express reference, a layout plan[87] of the shared access along with easement plans and cross-sections. The layout plan confirms that:

(a) ingress and egress for the approved development will remain wholly contained within the Eagle Street Pier property boundary;

(b) the approved development is not reliant on ingress and egress via Easement AB; and

(c) all line marking that may be required will be contained wholly within the Eagle Street Pier property boundary.

[76] Two points were raised by Riverside to establish inconsistency between the proposed development and the terms of Easement AB.

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83 Ex. 5.006, p 19, 60, 62, 65 and 69.
84 Ex. 5.006, pp 68 and 69.
85 Ex.5.006, p.19, item 7.
86 Ex. 5.006, p 20.
87 1.014.121, pp.2961-2964.

[77] First, it was submitted the material change of use would, contrary to the development application material, involve service vehicles routinely[88] passing directly through Easement AB. This, it was said, to arise because the driver of a service vehicle turning left from Creek Street into the site would have to make an election. The driver would need to elect to execute the turn in a manner that requires the vehicle to cut the corner of Easement AB to access the site, or alternatively, execute the turn in a manner which causes the vehicle to straddle two lanes before turning into the site.[89] It was contended that the second turning movement was not available to the driver as it would be contrary to Queensland Road Rules.

[78] Swept path diagrams before the delegate indicate a heavy vehicle executing a left hand turn into the site (seeking to avoid Easement AB) would traverse two lanes at the intersection of Eagle and Creek Street.[90] To determine whether this turning movement is unlawful, consideration needs to be given to the *Transport Operations (Road Use Management – Road Rules) Regulation 2009*, in particular, s 28(2).[91] This part of the Regulation anticipates that a turning movement of the kind illustrated on the swept path diagrams before the delegate may be lawful, provided certain preconditions are met. The provision relevantly states:

> "(2) A driver may approach and enter the intersection from the marked lane next to the left lane as well as, or instead of, the left lane if—
>
> (a) the driver's vehicle, together with any load or projection, is 7.5m long, or longer; and
>
> (b) the vehicle displays a do not overtake turning vehicle sign; and
>
> (c) any part of the vehicle is within 50m of the nearest point of the intersection; and
>
> (d) it is not practicable for the driver to turn left from within the left lane; and
>
> (e) the driver can safely occupy the next marked lane and can safely turn left at the intersection by occupying the next marked land, or both lanes."

[79] The swept path diagrams contained in the material before the delegate depict a turning movement for a vehicle that is 12.5 metres in length. It is a vehicle of this length that will traverse two lanes when turning left into the site from the Eagle Street/Creek Street intersection. It is a vehicle that complies with s 28(2)(a) of the Regulation.

[80] Riverside did not suggest that a vehicle of 12.5 metres, as depicted in the swept path diagrams, would fail to comply with s 28(2)(b), (c) and (e) of the Regulation. Rather, its submissions focused on subsection 2(d). This subsection requires

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88 Affidavit of Trevilyan affirmed 13 August 2021, exhibit BRT-1, p.008, para 36.
89 Ex.6.004, paras 122(b) and 123.
90 1.009.033, p.1678 (ingress manoeuvre); 1.014.121, p.2965 (ingress manoeuvre).
91 Ex.8.026, p.30.

Riverside to demonstrate that it would be practicable for a driver executing the turning movement to turn left into the site from the left lane of Creek Street.

[81] To demonstrate this, Riverside relied upon on the evidence of Mr Trevilyan, a traffic engineer. He prepared a swept path diagram to demonstrate the left turning movement was practicable.[92] An examination of the diagram reveals that a service vehicle can execute a left hand turn into the site without straddling two lanes in the intersection, provided the vehicle cuts the corner of Lot 5 in the area of Easement AB. This land does not form part of the redevelopment site. The issue is whether such a turning movement is practicable. In my view it is not: a turning movement to enter private land that, in the same movement, also traverses part of an adjoining site (which is also private land) is not a '*practicable*' solution. Here, it is a solution that engages subsection 2(d).

[82] Second, it was submitted that the proposed material change of use would be inconsistent with the terms of Easement AB because it would result in service vehicles not only passing and repassing through Easement AB, but also extending above the volumetric height of the easement, which is 3.62 metres.[93] The point was put by Riverside as highly as this: a vehicle exceeding 3.62 metres in height had no right to pass through Easement AB at all in these circumstances.[94]

[83] I do not accept this submission. In the first instance, it wrongly assumes that service vehicles accessing the site could not lawfully turn left into the site without traversing Easement AB. It also wrongly assumes that a vehicle passing or repassing over the easement area, which is greater than 3.62 metres in height, has no right to pass at all. No authority was cited for this proposition. It is not a proposition I accept in any event. That a vehicle exceeds the height of the volumetric easement amounts to trespass to the extent of the exceedance. Otherwise, the right to pass or repass over the easement remains. That right is not lost as a consequence of the trespass outside of the volumetric easement.

[84] Turning to the alternative case, Riverside submitted as follows:[95]

> "In effect, service vehicles would have the impossible task of either breaching the terms of Easement AB or breaching the terms of the Queensland Road Rules. The Dexus development requires consent and has failed to obtain it. The delegate failed to take into account these very relevant matters. That was an error in law affecting the validity of the application. Indeed, the decision of the delegate was also legally unreasonable given the utilisation of land not owned by the applicant for development approval and because the decision leads to an outcome where drivers of vehicles will be in breach of the Queensland Road Rules."

[85] The alternative case is founded on three propositions, namely: (1) that service vehicles entering the site via a left hand turn will pass through the area of Easement AB, or breach Queensland Road Rules; (2) the delegate failed to take into account

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92 Ex.2.006, exhibit BRT-1, p.8, Figure 2.
93 Ex.6.004, para 114 and 122(a).
94 Ex.6.004, para 114.
95 Ex.6.004, para 124.

item (1); and (3) item (1) is a mandatory consideration determining whether owner's consent was required for Lot 5.

[86] For reasons given above, I do not accept that the first proposition has been established.

[87] As to the second proposition, the delegate had regard to a number of documents relevant to the issue of access and owner's consent. The relevant documents include:

(a) sections 2.4, 2.7, 7.1 and Attachments 2 and 9 in the Place design Group report, dated 17 June 2020;[96]

(b) the letter of 13 July 2020, referred to in paragraph [12];[97]

(c) the updated traffic impact assessment prepared by MRCagney provided to Council on 13 July 2020;[98]

(d) the letter of 3 August 2020 from Riverside Development Pty Ltd to Dexus property Group, attaching a traffic report prepared by Mr Trevilyan – the letter describes the consequences of the proposed development for Easement AB;[99]

(e) the letter of 2 September 2020 from Riverside Developments Pty Ltd to Dexus;[100] and

(f) the letter of 15 October 2020 from MRCagney to Place Design Group, responding to items 11, 43, 44, 45 and 47 of the information request.[101]

[88] Having regard to the above documents, it is clear the delegate was able to assess and determine whether a service vehicle entering the site would pass or repass through Easement AB. The material also reveals that the delegate was able to assess the turning path of that vehicle. Based on the information before the delegate he was satisfied the vehicle could enter the site without utilising the area of Easement AB. This is what the delegate took into account. Further, to take into account that the turning movement was unlawful under the Queensland Road Rules would have been incorrect in any event.

[89] As to the third proposition, it is well established that a decision-maker will fall into error where it fails to have regard to a consideration that it was bound to take into account.[102] The matters a decision-maker is bound to take into account is determined by construing the statute conferring the decision making power.[103]

[90] Here, it can be accepted, the delegate was required to consider whether owner's consent had been provided for the land the subject of the development application. This is a requirement of ss 51(2) and 51(4) of the Act. The material reveals the point

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96 1.007.026.
97 1.009.032.
98 1.009.033.
99 1.009.042; see p.1739.
100 1.010.048.
101 1.012.089, in particular pp.2358-2362.
102 *Minister for Aboriginal Affairs v Peko-Wallsend Limited & Ors* (1985-86) 162 CLR 24, 39.
103 *Peko-Wallsend* (Supra), 39 and *Australia Pacific LNG Pty Ltd & Ors* v *The Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport* [2019] QCS 124, [191].

was considered by the delegate on a number of occasions. This consideration included an examination of whether consent was required for Lot 5.

[91] As to the Queensland Road Rules, it was not established by Riverside that the delegate was bound to have regard to these rules in examining owner's consent. Indeed, no submissions were made about this point. In any event, I am far from persuaded the Queensland Road Rules were a mandatory consideration for the delegate in the context of examining owner's consent. This is because: (1) the considerations relevant to the issue are not expressly identified in the Act; and (2) there appears to be little, if anything, about the scope, subject matter and purpose of the Act that would suggest the rules are a mandatory consideration, as distinct from a consideration that may be taken into account by the assessment manager.

[92] For completeness, I can indicate I was also satisfied that the material before the delegate demonstrates he had regard to the so-called '*relevant considerations*' identified at paragraph 11 of Riverside's amended list of issues. Here, it was asserted the delegate failed to take into account the following matters in the context of owner's consent, namely: (1) access and the use of Easement AB; (2) the requirements and restrictions of Easement AA; and (3) existing development approvals.

[93] A number of documents before the delegate, which include technical traffic reports prepared for the Dexus parties, make good that issues with respect to access and use of Easement AB were considered by the delegate. The relevant documents in this regard include those identified at paragraph [87].

[94] As to the restrictions on Easement AA and existing development approvals, Riverside did not establish that these matters were mandatory considerations for the delegate in examining owner's consent for similar reasons to those stated in paragraph [91]. I was not, in any event, persuaded that the considerations advanced Riverside's case. In short, Easement AA burdens land the subject of the development application rather than Lot 5. Further, the existing development approvals referred to do not assist in answering either of the two questions identified at paragraph [52].

[95] Riverside has failed to demonstrate the development application was not a properly made application. Rather, the true position is to the contrary. The development application was one that was properly made. It met this description on and from the time the delegate was satisfied as to the issue of owner's consent. From that point in time onwards, the delegate was obliged to accept the development application by operation of s 51(4)(a) of the Act. The delegate's power to decide the development application was also enlivened as s 60(1) of the Act was also satisfied prior to granting the development approval.

[96] Given the above, the grounds of challenge identified in paragraphs [41](a), (d)(iii) and (f) (in part) have not been established.

Was the development application code or impact assessable?

[97] As a local categorising instrument,[104] City Plan 2014 categorises development as, inter alia, assessable or accepted development. Subject to limited exceptions, assessable development is lawfully carried out where it is authorised by an extant development approval.[105] It is uncontroversial that the development application sought approval for assessable development, namely '*making a material change of use of premises*'. The material change of use proposed includes three uses defined in City Plan 2014, namely Centre activities, Bar and Hotel.

[98] The Act provides for two categories of assessment for assessable development, namely code and impact assessment.[106] The category of assessment applying to the development application is to be determined by reference to City Plan 2014. It states the category of assessment that must be carried out for assessable development.[107]

[99] Part 5 of City Plan 2014 contains the tables of assessment identifying: (1) the categories of development; (2) the category of assessment; and (3) the assessment benchmarks for assessable development.[108]

[100] In terms of the category of assessment, the starting position for all material changes of use under City Plan 2014 is that prescribed in s 5.3.2(1), which states:[109]

> "**5.3.2 Determining the categories of development and assessment**
>
> 1. A material change of use is assessable development requiring impact assessment:
>   a. unless the table of assessment states otherwise; or
>   b. if a use is not listed or defined; or
>   c. unless otherwise prescribed in the Act or the Regulation."

[101] Section 5.3.2(1) provides that all material changes of use under City Plan 2014, be they defined, undefined, listed or unlisted, are assessable development requiring impact assessment. There are two exceptions, namely: (1) where a table of assessment states otherwise; or (2) where otherwise prescribed in the Act or Regulation. No party suggests exception (2) is engaged in the circumstances of this case. The issue to be determined is whether s 5.3.2(1) of City Plan 2014 is displaced by a '*table of assessment* [that] *states otherwise*'.

[102] Section 5.5 of City Plan 2014 contains tables of assessment for making a material change of use in a zone.[110] Table 5.5.7 applies to the Principal centre zone[111] and identifies the following categories of development and assessment relevant to the development application:

Bar	**Assessable development—Code assessment**

104 s 43(3), the Act.
105 ss 43(1)(a) and 44(3), the Act.
106 s 45(1).
107 s 45(2), the Act.
108 Ex.3.001, p.121, s 5.1.
109 Ex.3.001, p.123.
110 Ex.3.001, p.131.
111 Ex.3.001, p.132.

	If no greater than the number of storeys (except where within the City Centre neighbourhood plan area), building height, gross floor area, plot ratio and site cover specified in the relevant neighbourhood plan	Centre or mixed use code Principal centre zone code Prescribed secondary code

…

Centre activities (activity group) where not caretaker's accommodation	**Assessable development—Code assessment**	
	If involving a new premises or an existing premises with an increase in gross floor area, where no greater than the number of storeys (except where within the City Centre neighbourhood plan area), building height, gross floor area, plot ratio and site cover specified in the relevant neighbourhood plan	Centre or mixed use code Principal centre zone code Prescribed secondary code

…

Hotel	**Assessable development—Code assessment**	
	If no greater than the number of storeys (except where within the City Centre neighbourhood plan area), building height, gross floor area, plot ratio and site cover specified in the relevant neighbourhood plan	Centre or mixed use code Principal centre zone code Prescribed secondary code

[103] Each of the above entries in Table 5.5.7 can be engaged[112] by the proposed development where the following is established:

(a) the development is no greater than the building height specified in the CCNP;

(b) the development is no greater than the gross floor area specified in the CCNP;

(c) the development is no greater than the plot ratio specified in the CCNP; and

(d) the development is no greater than the site cover specified in the CCNP.

[104] Riverside takes no issue with (b) and (c).

[105] Riverside contends the proposed development has a building height and site cover exceeding that specified in the CCNP.

[106] I will deal with building height first.

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[112] The Centre activities entry is to be considered because the proposed development includes uses falling within this use definition, and those uses are proposed in new premises that increase the gross floor area.

[107] The case advanced by Riverside assumes this issue is determined as if it were a jurisdictional fact. That is to say, the Court is permitted to embark upon its own examination of the development application to determine whether the development is greater than the building height specified in the CCNP. It is unnecessary to express any concluded view about the correctness or otherwise of this assumption. This is because, even assuming this basis for challenge is available, Riverside did not persuade me the building height proposed is greater than that specified in the CCNP. This is so for the following reasons.

[108] Relevantly for this case, the CCNP deals with '*building height*' in two locations, namely Table 7.2.3.7.3.C and acceptable outcome AO51.[113]

[109] Table 7.2.3.7.3.C forms part of the CCNP code. The table is described as '*Maximum building height and maximum tower site cover*' and called up in Acceptable outcomes dealing with built form in the code.[114] The first entry in the table applies to the site because it is in the CCNP area and is: (1) greater than 3,000m^2 in size; and (2) not within the Quay Street precinct or Howard Smith Wharves precinct. The table provides that no maximum building height is specified for a site meeting this criteria.

[110] The proposed development is no greater than the '*building height*' specified in Table 7.2.3.7.3.C. As a consequence, it ceases to have a role to play in determining the category of assessment by reference to Table 5.5.7.

[111] Riverside's case with respect to building height focused on Acceptable outcome AO51 of the CCNP, which states:

> "**AO51**
> Development on premises adjoining the river has a:
> a. maximum building height of 12m, measured from the finished level of Riverwalk, within 5m of the high water mark;
> b. maximum building footprint of 50% within 10m of the high water mark.
> c. Refer to Figure g for guidance."

[112] Subparagraph c refers to Figure g.[115] The figure, which is attached in **Schedule B,** is titled '*River precinct cross section*'. It depicts, inter alia, a structure ('*Low scale tenanted building*') adjacent to the River and in an area described as '*Public Plaza*'. The structure has a number of levels, one of which sits below a Public Plaza above. To the right of the structure is a vertical dotted red line identified as '*High water mark (HWM)*'. To the right of the high water mark is an area described as Riverwalk, which is cantilevered out from the edge of, and over, the River. Above the area of Riverwalk is a note that reads '*Low scale tenanted buildings and shading structures do not exceed a maximum height of 12m measured from the finished level of Riverwalk*'.

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113 Ex.3.001, pp 214 and 209 respectively.

114 Ex.3.001, p.197, AO5.2, AO6.1 and AO7; p.206, AO40 d.; p.208, AO46 and AO50; and p.210, AO57.2 and AO57.3.

115 Ex.3.001, p.230.

[113] The material before the delegate includes a series of schedules providing an assessment of the proposed development against the assessment benchmarks, including the CCNP code. In relation to AO51a of the CCNP, the assessment schedule states that the height of the structures adjoining the river exceed 12 metres.[116] That there is a non-compliance with AO51a is confirmed by architectural sections through the proposed podium. These sections were before the delegate during the assessment process.[117]

[114] The point made by Riverside is that Table 5.5.7 of City Plan 2014 is not engaged by the development because: (1) AO51a is a building height specified in the CCNP; and (2) the proposed development exceeds the building height specified in AO51a. Whilst I accept the development exceeds the height stated in AO51a, I do not accept AO51a specifies a '*building height*' against which the proposed development is to be examined for the purposes of Table 5.5.7.

[115] Table 5.5.7 is to be read with, inter alia, planning scheme definitions. This is confirmed by s 1.3.1 of City Plan 2014. This provision states that a term used in the document has the meaning assigned to it by, inter alia, the definitions in Schedule 1.[118] I was not referred to any provisions of City Plan 2014 that suggest a contrary intention is to be assumed, be it express or implied, in relation to Table 5.5.7.

[116] '*Building height*' is a defined Administrative term for City Plan 2014. It is in the following terms:[119]

> "Building height, of a building, means—
>
> a. the vertical distance, measured in metres, between the ground level of the building and the highest point on the roof of the building, other than a point that is part of an aerial, chimney, flagpole or load-bearing antenna; or
>
> b. the number of storeys in the building above ground level."

[117] This definition, read into[120] the parts of Table 5.5.7 that are relevant here, require the following questions to be asked and answered in relation to '*building height*':

(a) Does the CCNP specify a vertical distance, measured in metres, between the ground level of the building and the highest point on the roof of the building (excluding the stated exceptions)?

(b) If yes to (a), does the development exceed the specified vertical distance?

(c) Does the CCNP specify the number of storeys in the building above ground level?

(d) If yes to (c), does the development exceed the specified number of storeys?

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116 Ex.1.006.022, p 1042.
117 Ex.1.003.006, pp 132-134 and 136.
118 Ex.3.001, p.23.
119 Ex.3.001, p.469.
120 *Kelly v The Queen* (2004) 218 CLR 216, per McHugh J at [103].

[118] Questions (c) and (d) are irrelevant to this case. This is because Table 7.2.3.7.3.C and AO51 do not specify a maximum building height, in storeys, for the site. It can be observed that Riverside did not suggest to the contrary.

[119] The first question, (a), is the critical one.

[120] To answer this question, the only provision of the CCNP relied upon by Riverside is AO51, which is an Acceptable outcome. It speaks of '*Maximum building height*'. The provision, along with Figure g, state how this maximum is to be measured. The measurement is not the same as that specified by the definition of building height in Schedule 1 of City Plan 2014.

[121] The Acceptable outcome requires the height to be '*measured from the finished level of Riverwalk, within 5 metres of the high water mark*' and vertically up to a point that is 12 metres high. This measurement is not the same as the vertical distance between the ground level of the building and its highest point (excluding the stated exceptions). Ground level of the building, and its highest point, are directly relevant to the definition of building height, but have no role to play in the measurement required by AO51a, and Figure g, of the CCNP.

[122] Riverside submitted that AO51a does specify a building height as defined in City Plan.[121] It was submitted:[122]

> "19. When one returns to Figure g…for guidance…we see that… the ground level could only be the level of the building which is lower of the habitable level close to, but just above, the level of the ground which has been lawfully changed by the approval of the building.
>
> 20. Figure g shows the Riverwalk at the same height as the ground level of the building. That is true also, of the development under challenge. At the relevant locations where the height of the building is within 5m of the high water mark, the ground level of each building is at the same level as Riverwalk, as demonstrated by the Memorandum….sent to [the delegate] on 6 November 2020.
>
> 21. Therefore there is no difference between AO51 (the building height measured from the finished level of Riverwalk) and building height as defined (the building height measures (sic) from the ground level of the building)."

[123] The above submission assumes: (1) Figure g can be used for 'guidance'; (2) Figure g shows the ground level of the building adjacent to the river as being the same level as Riverwalk; and (3) that the phrase '*the finished level of Riverwalk*' has the same meaning, or is interchangeable with, the phrase '*ground level of the building*'.

[124] With respect to (1), I accept it is correct to say Figure g provides guidance. This reflects the plain words of AO51c.

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121 Supplementary Submissions, p.4 para 18.

122 Supplementary Submissions, pp.4-5 paras 19 to 21.

[125] I do not accept item (2) is correct.

[126] Figure g says nothing about what is, or what is not, the '*ground level of a building*' or its highest point. There is no reference in the figure to ground level or the ground level of a building. Nor does the figure suggest the ground level of the building adjacent to Riverwalk is to be treated as the ground level of the small scale tenanted buildings.

[127] In my view, to arrive at conclusion that the lower level of the small scale tenanted buildings depicted in Figure g is the ground level of the building requires an assumption to be made about ground level contours and how those contours impact upon the hypothetical development depicted. This hypothetical development could occur anywhere along the bank of the River in the River Precinct of the CCNP where contours are likely to vary in height.[123] The hypothetical development is also depicted as set into a site, and below a public plaza/ground level immediately above. In the absence of clear words in the figure and AO51, it is not sound, in my view, to make any assumptions about the ground level of any building or structure depicted in Figure g.

[128] Rather, Figure g confirms that the measurement to be undertaken is from the finished level of Riverwalk. This level may, or may not, be the same as the ground level of a building. Either way, this point is irrelevant. The ground level of the building has no work to do for the measurement contemplated by AO51a.

[129] There is good reason for this, in my view.

[130] The reasoning emerges from an appreciation of '*Ground level*' as defined in City Plan 2014 and an examination of the architectural sections forming part of the development approval.

[131] The phrase '*Ground level*' is defined in City Plan 2014 as follows:[124]

> "Ground level means—
> a. the level of the natural ground; or
> b. if the level of the natural ground has changed, the level lawfully changed."

[132] The definition also includes an '*Editor's note*'. The note is extrinsic material.[125] It refers to s 1.7.5 of City Plan 2014. A review of this section reveals that the applicable '*level*' for subparagraph b. of the definition above is determined by Council and depicted in the 2002 BIMAP contours.[126] The approved architectural sections identify the 2002 BIMAP contour by way of a red line.[127] There is no equivalent line in Figure g. The absence of the contour line, even in indicative terms, suggests Figure g says nothing about ground level, or where it is located relative to the finished level of Riverwalk.

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123 Ex.5.007, p.34, Precinct NPP-004.
124 Ex.3.001, p.470.
125 Ex.3.001, p.24, s 1.3.2, item 4.
126 Ex.3.001, p.33.
127 Ex.1.014.125, pp.3050, 3052, 3053 and 3054.

[133] A review of the approved architectural sections reveal there is a ground level/plaza level, which sits at an elevation above the lowest level of the proposed structures adjoining the river. The drawings also reveal there is variability in terms of the 2002 BIMAP contour relative to the lowest level of the development adjacent to the river (in height terms). More particularly, the sections reveal that:

(a) the ground/plaza levels for the proposed development are at RL 6.0 metres AHD;

(b) the lowest level of the structures proposed adjacent to the river (Retail), which sit below the ground/plaza levels, are at RL 2.0 metres AHD;

(c) the lowest level of the structures adjacent to the river (Retail) sit partially above, and below, the 2002 BIMAP contour line – the extent to which it sits above and below the line is dependent on the particular point at which the section is taken; and

(d) Riverwalk sits partially above, and below, the 2002 BIMAP contour line at RL 2.0 metres AHD – again dependant on the particular point at which the section is taken.

[134] The architectural sections illustrate there is variability in terms of levels, which leave room for doubt as to what is, or is not, the ground level of a building adjacent to the River. Once this is appreciated, it is not difficult to appreciate why a practical approach has been adopted. The drafters of City Plan 2014 have identified an alternative means of measurement for building height in this instance. That measurement is taken from a specific point, namely the finished level of Riverwalk. That this point was adopted, as distinct from the ground level of a building, is to be treated as intentional.

[135] I also do not accept item (3) in paragraph [123] is correct. To suggest '*the finished level of Riverwalk*' has the same meaning, or is interchangeable with, the phrase '*ground level of the building*' needs to be grounded in an express provision of City Plan 2014 or supported by implication.

[136] There is no express provision of City Plan 2014 to which I was referred.

[137] As to matters of implication, I do not accept the phrases are to be treated as interchangeable. The phrases are different. Context suggests the difference is to be treated as deliberate. This is because the drafters of the planning scheme have adopted methods for measuring building height that include that stated in the administrative definition. They have also adopted a number of alternative measurement methods that depart from the administrative definition, where intended. The alternative measurement methods also differ when compared to each other. This is clear from Table 7.2.3.7.3.C. It can be seen from the table that:

(a) it does not include the phrase '*finished level of Riverwalk*', which is a phrase used in the CCNP and directed towards building height and tower site cover;

(b) where the CCNP specifies a control with respect to the height of buildings/structures in Table 7.2.3.7.3.C it does so in a number of ways, only two of which ((i) and (ii) below) appear to engage the definition in City Plan 2014 for building height – it seeks to control height:

(i) by stating no maximum building height;

(ii) by stating a maximum building height by reference to storeys;

(iii) by stating a maximum height by reference to a specific RL level that is not to be exceeded;

(iv) by stating a minimum distance in plan or elevation from the underside of the Story Bridge; and

(v) by stating a maximum building height by reference to a specific RL and building height in metres/storeys, whichever is the lesser.

[138] Given the above, and given that neither AO51a or Figure g of the CCNP speak of '*the ground level of the building*', there is sufficient context, in my view, to reject the third assumption underlying Riverside's submission. The assumption ignores that the drafters have identified different methods for the measurement and regulation of building height in the CCNP, some of which deliberately depart from the defined term for building height in Schedule 1 of City Plan 2014.

[139] I pause to record that the Dexus parties and Council submitted that AO51a of the CCNP had no application to Table 5.5.7, even assuming it regulates building height as defined. The point made was that AO51 does not '*specify*' a building height because it is an Acceptable outcome in the CCNP. This, in my view, is not an attractive submission. It assumes the word '*specify*' is given a meaning that is narrower than its plain and ordinary meaning. The correct approach, in my view, is to give the word its plain and ordinary meaning, which is to '*mention or name specifically*'.[128] AO51a, assuming it states a building height, does precisely this in terms of maximum building height. It specifically mentions building height.

[140] Further, Table 5.5.7 itself does not suggest, by way of implication, a provision such as AO51 of the CCNP is not intended to be captured. Rather, in my view, the contrary position is correct given: (1) the table deliberately refers to a neighbourhood plan, rather than parts of a plan; (2) the CCNP, as a whole, is an assessment benchmark for the assessable development proposed, which includes AO51;[129] and (3) to suggest AO51 is excluded from Table 5.5.7 ignores that Table 7.2.3.7.3.C, which Council and the Dexus parties accept is captured, is also implemented in the CCNP through Acceptable outcomes.

[141] Turning now to site cover.

[142] Acceptable outcome AO50a of the CCNP states:[130]

> "Development:
> a. ensures a maximum site cover of 70% (total of towers and low-scale tenanted spaces);"

[143] AO50a specifies '*site cover*', as an empirical benchmark, for the purposes of Table 5.5.7.

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128 Macquarie Dictionary, Revised Third Edition; see also *Wall, Director-General of the Environmental Protection Agency v Douglas Shire Council* [2007] QPELR 517 [12]-[15].

129 Ex.3.001, pp.124-125, s 5.3.3(4).

130 Ex.3.001, p.208.

[144] '*Site cover*' is a defined Administrative term in City Plan 2014 as follows:[131]

> "Site cover, of development, means the portion of the **site**, expressed as a percentage, that will be covered by a building or structure, measured to its outermost projection, after 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 a car parking; or
> c. the eaves of a building; or
> d. a sun shade." (emphasis added)

[145] '*Site*' is a defined administrative term in City Plan 2014 as follows:[132]

> "Site, of development, means the land that the development is to be carried out on.
>
> Examples—
>
> - If development is to be carried out on part of a lot. The site of the development is that part of the lot.
> - If development is to be carried out on part of 1 lot and part of an adjoining lot, the site of the development is both of those parts."

[146] The development application stated that the site cover for the material change of use was 44.5%.[133] To arrive at this percentage, the portion of the site covered by a building or structure is calculated. A site cover plan was provided to the delegate with the development application in its original form. The plan stated that the site cover, expressed as an area, was 9,926m^2. This area comprises two components; 6,300m^2 of site cover for towers and 3,626m^2 for Plaza Buildings.[134] To express the site cover as a percentage, the figure of 9,926m^2 is divided by the site area. When a site area of 22,307m^2 is adopted, this equates to a site cover of about 44.5%.

[147] Mr Heading said he was satisfied the site cover for the proposal did not exceed the maximum specified in AO50a of the CCNP.[135] To arrive at this conclusion, he had regard to, inter alia: (1) the definition of site cover in City Plan 2014; (2) the site cover plan referred to above; and (3) the area of the site, as defined in City Plan 2014.

[148] The response to the information request changed the development application. An updated site cover calculation was provided to Council as part of a bundle of amended plans. The amended plans reveal site cover was recalculated to be 48.8%.[136] The calculation assumed 6,283m^2 of site cover for towers and 4,604m^2 for

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131 Ex.3.001, p.472.
132 Ex.3.001, p.472.
133 Ex.1.008.028, p.1397 and 1.006.022, p.1042.
134 Ex.1.003.006, p.66.
135 Affidavit of Heading affirmed 22 September 2021, paras 61 and 62.
136 Ex.1.010.072, p.1906.

the low scale tenanted buildings.[137] The same site area as stated above was adopted for the calculation.

[149] Mr Heading was also satisfied the site cover for the amended development did not exceed that specified by AO50a of the CCNP.[138]

[150] Riverside contends the site cover for the development application as made to Council is 70.8%, which exceeds that specified in AO50a of the CCNP.[139] The assumptions underpinning this percentage are:[140] (1) the site area adopted is 8,516m^2; and (2) the development has a site cover equivalent to 6,034m^2.

[151] With respect to the site area, Riverside submits that it should be limited to the following lots, and parts of lots, namely:[141]

(a) the original Lot 50 on which the two towers are proposed;

(b) 1,800m^2, which is the area the subject of a 'facilitation agreement';

(c) Part of Lot 11 over which buildings and structures will be built, excluding Riverwalk.

[152] Riverside accepts the whole of Lot 50 should be included in the calculation. As to Lots 40, 11 and 12, it was submitted:[142]

> "(b) Development…is confined to a recognisable part of the lot [lots 11 and 12], namely the part of the lot which will contain built form in relation to which the uses applied for will be conducted. That part of the lot is recognisably different from the parts of the lot that form:
>
> (i) the Riverwalk which is to be publicly available infrastructure for pedestrians and cycling commuters – offering a high speed environment – will not be used for the centre activities, bar and hotel uses applied for; and
>
> (ii) the City Cat facility, again which is public infrastructure, is indicative only and not part of the application; and
>
> (iii) the open water of the Brisbane River itself, which is a public resource and will not be used for the centre activities, bar and hotel uses applied for.
>
> …
>
> (d) There is no substantive development on Lot 40 and 12 in the lodged plans. The low level tenanted spaces are subject to a separate application and approval…The only works related to this application on Lot 40 and 12 is the continuation of the Riverwalk (which is public infrastructure) and some landscaping, an underground connection to

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137 Ex.1.010.072, p.1911.
138 Affidavit of Heading affirmed 22 September 2021, paras 61 and 62.
139 Ex.6.004, para 47, by reference to Mr Peabody's Scenario 3 (2.004, p.23).
140 Ex.2.004, Affidavit of Peabody, SGP-22, p.25.
141 Ex.6.004, para 42.
142 Ex.6.004, para 43(b) and (d).

> existing carparking,…private charter boat mooring, and two single storey basement kiosks for ferry and private charter boat ticketing…"

[153] It is unnecessary to form a final view about Riverside's submissions with respect to the City Cat facility, and the open water. This is because I do not accept that the '*site*' for the purposes of City Plan 2014 should exclude the area of Riverwalk. Once this area is included in the site, the calculation advanced by Riverside cannot be sustained; the resulting site cover does not exceed 70%. This is so for the following reasons.

[154] As Mr Gore KC and Mr Ware correctly submitted,[143] Lots 11 and 12 are '*land*'. The plans submitted to Council with the development application indicate Riverwalk is a continuous structure that is cantilevered over that land. It has an area of about 2,641m^2.[144] The question to be examined is what development is proposed to be carried out on that land. The definition of site does not suggest the answer to this question is resolved by assessing whether the development (or part of it) will, if constructed, be dedicated to a government body and/or serve a public infrastructure function. Rather, the question requires the development (material change of use) to be examined to determine the land to which it applies.

[155] The plans submitted with the development application indicate Riverwalk is an integral part of the material change of use proposed. It is part of the Stage 1 works, and part of a redeveloped public realm.[145] The public realm will be redeveloped, in part, by the demolition and construction of the new Riverwalk and pontoon.[146]

[156] It can also be observed that Riverwalk is intended to, inter alia, facilitate pedestrian access to the lower ground level of the proposed development. The proposed plans submitted with the development application indicate this area includes food and drink outlets and retail facilities.[147] That pedestrian access to these uses is achieved via Riverwalk is evidence, in my view, that the material change of use proposed is to be carried out on that land; it is integral to the material change of use proposed. This position is not altered by reason that the new Riverwalk will, in due course, be dedicated as public infrastructure.

[157] There are two further, and related, indicators that suggest the land on which Riverwalk is proposed ought be included in the '*site*' as defined in City Plan 2014.

[158] First, it was correctly pointed out on behalf of Council that the development application was to be assessed against Performance outcome PO52 of the CCNP. This provision states, in part:

> "Development located along the riverfront, contributes to the provision of Riverwalk as a 24-hour publicly accessible and continuous link…that…integrates with riverfront tenancies…"

[159] To comply with the CCNP, the development was required to demonstrate compliance with PO52. The applicant for approval sought to do so through the

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143 Ex.8.022, para 94, read with paras 76 to 80.
144 Ex. 1.003.006, p.69.
145 Ex. 1.003.006, p 67.
146 Ex. 1.003.006, pp 106 and 107 and Ex.1.003.007, p 179.
147 Ex. 1.003.006, pp 126 and 132-134.

provision of a newly constructed Riverwalk that, inter alia, integrates with riverfront tenancies such as those proposed.

[160] Second, conditions 14, 23, 38 and 39 of the development approval contain requirements for the construction of the new Riverwalk. The conditions are supported by approved plans that are particular to Riverwalk.[148] The conditions attach to the land, which includes the area of Riverwalk.

[161] The two matters above, taken in combination, allow the point to be made that the development was required to make provision for Riverwalk to achieve compliance with the CCNP. The significance of this is reflected in the fact that its provision as part of the development is secured by way of conditions.

[162] Against this background, the assumptions underpinning Riverside's calculation of site cover for AO50 of the CCNP must be adjusted to reflect:[149] (1) the site area being 8,516m^2, plus 2,641m^2 for Riverwalk, totalling 11,157m^2; and (2) a site cover of 6,034m^2. When these inputs are adopted, the site cover expressed as a percentage is 54%. Self-evidently, this is less than the 70% prescribed by AO50 of the CCNP.

[163] Riverside sought to rely upon the evidence of Mr Ovenden, Council's town planning witness, to establish that the site cover for the development exceeded 70%.[150] The particular passage of evidence referred to describes a calculation as '*Scenario G*'. Mr Ovenden's evidence about this scenario does not establish that the site cover for the development exceeds 70%. His evidence was as follows:[151]

> "58. In the case of Scenario G that I have documented, the defined site includes an estimated land (built form) area of 9,588m^2, providing a maximum site cover of 6,712m^2 (70%) and a maximum tower site cover of 4,314m^2 (less than 45%). On the basis of my understanding of the proposed development, compliance would be achieved in both regards and thus the development application would be subject to Code Assessment should Scenario G be adopted."

[164] Scenario G, is not founded on the correct calculation. It assumes the site excludes part of the new Riverwalk.[152] For reasons given above, this is not a sound assumption.

[165] For these reasons, Riverside has not established, for the purpose of Table 5.5.7 in City Plan 2014 that the development is greater than the building height or site cover specified in the CCNP. This has the consequence that the development application was code assessable when examined against the assessment tables for the Principal centre zone.

[166] This does not mark the end of the category of assessment point.

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148 Ex.1.015.134, pp.3130-3132.
149 Ex.2.004. Affidavit of Peabody, SGP-22, p.25.
150 Ex.6.004, para 50 and 51.
151 Affidavit of Gregory John Ovenden sworn 12 October 2021 exhibit GJO-1, p.12, para 58.
152 Affidavit of Gregory John Ovenden sworn 12 October 2021 exhibit GJO-1, p.23.

[167] Section 5.3.2(8)[153] of City Plan 2014 requires consideration to be given to the CCNP to determine whether it alters the category of assessment. If it does, the level of assessment provided by the CCNP overrides that determined by reference to Table 5.5.7.

[168] Table 5.9.17.A of City Plan 2014 applies to the making of the material change of use in the CCNP. The table provides for a change to the category of assessment where particular circumstances exist. It states in part:[154]

If in the Principal centre zone		
MCU whether or not subsequently listed in this table	**Assessable development—Impact assessment**	
	If involving a new premises or an existing premises with an increase in gross floor area, where: a. greater than the maximum building height or tower site cover specified in Table 7.2.3.7.3.C of the City Centre neighbourhood plan code; or b. car parking standards specified in Table 13 of the Transport, access, parking and servicing planning scheme policy are not met	The planning scheme including: City Centre neighbourhood plan code Principal centre zone code

[169] Here, there was no dispute that: (1) the land is in the Principal centre zone; (2) the development application sought approval for a '*material change of use not subsequently listed*' in Table 5.9.17.A of the CCNP; (3) the development application sought approval for development (involving new and existing premises) leading to an increase in gross floor area; and (4) the car parking standards specified in the relevant planning scheme policy were met.

[170] Riverside contends the proposed development was impact assessable by reference to Table 5.9.17.A because it involved development leading to an increase in gross floor area greater than the tower site cover specified in Table 7.2.3.7.3.C of the CCNP Code. This table specifies a maximum tower site cover of 45% for land in the River precinct on a site over 3,000m². The table provides, in part:[155]

Table 7.2.3.7.3.C Maximum building height and maximum tower site cover

Site	**Maximum building height**	**Maximum tower site cover**
Where not within the Quay Street precinct (City Centre neighbourhood plan/NPP-002) **or Howard Smith Wharves precinct** (City Centre neighbourhood plan/NPP-005)		

153 Ex.3.001, p.124. Subsection (8) is to be read with subsections (4) and (7).
154 Ex.3.001, p 153.
155 Ex.3.001, p 214.

Where on a site of over 3000m²	-	45% for non-residential towers where utilising transferable site area, or where achieving all the sustainable development criteria in Table 7.2.3.7.3.D, TSC can be increased up to a maximum 50% of the original site area

[171] '*Tower site cover*' is defined in a '*Note*' to the CCNP as follows:[156]

> "Note—Tower site cover (TSC) is:
> - the combined average area of the 10 largest storeys of each building (being the full area of any storey located wholly or partially above 20m above ground level) as a portion of the original site area;
> - calculated as the area bounded by the outside of the external wall, including balconies but excluding projections.
>
> Note—Where a tower includes both non-residential and residential uses, the maximum TSC for non-residential uses is applicable."

[172] The development application material asserted that the Tower site cover for the proposal did not exceed 45%. The material stated:[157]

> "The site cover for the proposed development is 28.2% of the site area and represents both the proposed commercial towers and the existing tower at Waterfront Place. The tower site cover for the development is less than the maximum tower site cover of 45% which is prescribed under Table 7.2.3.7.3.C of the CCNP.
>
> Please refer to Architectural Plans within **Attachment 6** for reference."

[173] Reference to the architectural plans provided with the development application confirms that the inputs adopted to calculate the maximum Tower site cover were as follows:[158]

(a) a total site area of 22,307m²; and

(b) a tower site cover of 6,300m² comprising:

(i) 2,054m², north tower;

(ii) 199m², podium;

(iii) 1,894m², south tower; and

(iv) 2,153m² of Waterfront Place.

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156 Ex.3.001, p 216.
157 Ex.1.006.022, p.1023.
158 Ex.1.003.006, p. 65.

[174] The evidence establishes that Mr Heading was satisfied the proposed development, in its original, and amended, form did not exceed the maximum Tower site cover specified in Table 7.2.3.7.3.C.[159]

[175] Riverside contends the maximum Tower site cover for the development is 46.7%, calculated on the basis that:

(a) a total site area of 8,516m² is adopted;[160] and

(b) a tower site cover of 3,980m² is adopted, which does not equate to the aggregate of the three tower site cover values stated in paragraph [173](b)(i), (ii) and (iii).

[176] For Riverside to succeed, it must establish that the two assumptions (namely the figures adopted for site area and tower site cover) underpinning the calculation of 46.7% are correct. I was not satisfied the first of the two assumptions is correct. As I have already said, the site for the proposed development is greater than 8,516m2. The site area is, at least, 11,157m2. If this is substituted for the site area assumed by Riverside, the maximum Tower site cover does not exceed 45%. It falls well short of this mark, being 35.7%.

[177] As a consequence, I am not satisfied the maximum Tower site cover for the proposed development exceeds that stated in Table 7.2.3.7.3.C of the CCNP.

[178] The above leads me to conclude that Riverside has not established that the category of assessment for the development application was impact assessment.

[179] The delegate was correct, in my view, to proceed on the footing that the development application was code assessable.

[180] The ground of challenge identified in paragraph [41](b) has not been established.

Were changes made in response to the information request?

[181] By letter dated 16 October 2020, the second respondent through its consultant, responded to an information request for the development application.[161] A review of the correspondence reveals it was intended to be a complete response to the request. That response included '*updated*' architectural plans. The changes made to the proposed plans were identified at s 3.3 and 4 of a report dated 16 October 2020, prepared by Place Design Group.[162] I have set out the changes tabulated in that report at paragraph [18].

[182] Riverside's case in relation to this issue focused on some of the changes made to the proposed plans. Paragraph 102 of Riverside's written submissions drew attention to the following changes made in the response to the information request:[163]

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159 Affidavit of Heading affirmed 22 September 2021, paras 59 to 60.
160 Affidavit of Peabody, sworn 18 August 2021, p 23.
161 Ex.1.012.097, p.2496.
162 Ex.1.012.098, pp. 2506-2507 and 2509-2554.
163 Ex.6.004, para 102.

> "…the relevant changes made during the application process included as described in the material:
>
> (a) increase in gross floor area of the proposed towers – from 75,331m^2 to 76,743m^2 for the north tower and from 59,999m^2 to 61,332m^2 for the south tower;
>
> (b) height of low scale tenant spaces near Riverwalk increasing from 14 metres to 20 metres;
>
> (c) 30% increase in site cover of the low scale tenant spaces near Riverwalk;
>
> (d) increase in amount of development or works in the Brisbane River;
>
> (e) addition of 2 dining and bar spaces on the river side of the river walk; and
>
> (f) widening of access entrance, removal of part of the exit from Easement AA."

[183] That the development application before the delegate was changed during the assessment process does not mean the process was required to stop. The assessment could continue provided the delegate was satisfied the change to the development application was a minor change as defined in the Act.[164] The process could also continue where rule 26.1 of the DAR was satisfied. This rule states:

> "For a change that is not a ***minor change***, the development assessment process does not stop if the assessment manager is satisfied the change—
>
> (a) only deals with a matter raised in a properly made submission for the application; or
>
> (b) is in response to an information request for the application; or
>
> (c) is in response to further advice provided by an assessing authority about the application."

[184] Here, the assessment process did not stop. Mr Heading was satisfied[165] the changes made to the development application met rule 26.1(b) of the DAR; the changes were in response to an information request. Mr Heading did not decide whether the changes were minor changes as defined in the Act.[166] He was not required to do so given his decision about rule 26.1(b) of the DAR.

[185] The proceeding before the Court is not a merits appeal. The Court has no power to review the correctness or otherwise of the delegate's decision and replace it with its own decision. The nature of the proceeding is one impugning the validity of the decision. Riverside must establish a basis to judicially review this particular decision of the delegate.

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164 s 52(3), The Act.

165 Affidavit of Heading affirmed 22 September 2021, para 48 and T3-44, L15 to 20 and T3-47, L27 to 30.

166 T3-44, L35 to 45.

[186] The nature of the decision made by the delegate under rule 26.1 of the DAR, as I have said, required him to be '*satisfied*' about a stated matter. The bases for reviewing a decision of this kind are well established; they are constrained. As Gibbs J said in *Buck v Bavone* (1975-76) 135 CLR 110 at 118 to 119:

> "It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts."

[187] With reference to the above passage, Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 654 observed:

> "This passage is consistent with the proposition that, where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question."

[188] Riverside asserts that Mr Heading's decision under rule 26.1(b) of the DAR is one that no reasonable decision-maker could have reached when comparing the information request and the changes made to the development application.[167] Riverside does not assert the delegate: (1) misdirected himself in law; (2) failed to consider matters he was required to consider; or (3) has taken irrelevant matters into account.

[189] Riverside's case is that the assessment process should have stopped and returned to the confirmation stage.[168] This assumes rule 26.6 of the DAR was engaged. This rule provides that the assessment manager cannot decide an application until parts 2 (Referral) and 4 (Information request), as relevant to the changed application, have ended.[169]

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167 Supplementary Submissions, p,12, para 51.
168 Rule 27.1 of the DAR.
169 Ex.5.002, p 6, see footnotes 3 and 4.

[190] Relevant principles with respect to legal unreasonableness were comprehensively identified by Bond J (as he then was) in *WB Rural Pty Ltd v Commissioner of State Revenue* [2018] 1 Qd R 526, [64] and [65]. Those principles were again cited by his Honour in *Australia Pacific LNG Pty Limited & Ors v The Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport* [2019] QSC 124, [155]. The principles to which I have had regard are as follows:

> "[64] In *Francis v Crime and Corruption Commission* [2015] QCA 218 Fraser JA observed (at [33], Morrison JA and Mullins J agreeing) in relation to the unreasonableness ground of judicial review that:
>
> (a) it involved a stringent test, and was rarely established;
>
> (b) it did not sanction a review on the merits;
>
> (c) it was not made out merely if the court disagrees with an evaluative decision or with the weight attributed to a factor taken into account in the decision;
>
> (d) in *Flegg v Crime and Misconduct Commission* [2014] QCA 42 at [3] and [16]:
>
> (i) the President had expressed the test, with reference to *Minister for Immigration and Citizenship v Li*, as being "whether the ... decision was so unreasonable that it lacked an evident and intelligible justification when all relevant matters were considered"; and
>
> (ii) Gotterson JA (Margaret Wilson J agreeing) noted that the *Wednesbury* principles did not allow a challenge to a decision "on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which the [appellate tribunal] disagrees".
>
> (e) the court's task was to examine the reasoning of the impugned decision to determine whether it was a decision that could be justified even though "... reasonable minds could reasonably differ" or whether the decision was so unreasonable that it lacked an evident and intelligible justification.
>
> [65] And, in *Minister for Immigration and Border Protection v SZVFW* [2017] FCAFC 33, Griffiths, Kerr and Farrell JJ observed at [38]:
>
> The following general principles may be extracted from the three leading authorities [of *Li, Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1 and *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11] (further general guidance is provided by the Full Court's

decision in *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28):

- there is a legal presumption that a statutory discretionary power must be exercised reasonably in the legal sense of that word (*Li* at [63] per Hayne, Kiefel and Bell JJ; *Singh* at [43] per Allsop CJ, Robertson and Mortimer JJ; *Stretton* at [4] per Allsop CJ and at [53] per Griffiths J);
- nevertheless, there is an area within which a decision-maker has a genuinely free discretion, which area is bounded by the standard of legal reasonableness (*Li* at [66]; *Stretton* at [56] per Griffiths J);
- the standard of legal reasonableness does not involve a court substituting its view as to how a discretion should be exercised for that of a decision-maker (*Li* at [66]; *Stretton* at [8] per Allsop CJ) and [76] per Griffiths J);
- the legal standard of reasonableness is not limited to what is in effect an irrational, if not bizarre, decision and an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified (*Li* at [68]);
- in determining whether in a particular case a statutory discretion has been exercised unreasonably in the legal sense, close attention must be given to the scope and purpose of the statutory provision which confers the discretion and other related provisions (*Li* at [74]; *Stretton* at [62] and [70] per Griffiths J);
- legal unreasonableness "is invariably fact dependent" and requires a careful evaluation of the evidence. The outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles to the relevant circumstances, rather than by way of an analysis of factual similarities or differences between individual cases (*Singh* at [48]; *Stretton* at [10] per Allsop CJ and at [61] per Griffiths J);
- the concept of legal unreasonableness can be "outcome focused", such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the characterisation of an underlying jurisdictional error (*Singh* at [44]; *Stretton* at [12]-[13] per Allsop CJ);
- where reasons are provided, they will be the focal point for an assessment as to whether the decision is unreasonable in the legal sense and it would be a rare case to find that the exercise of a discretionary power is legally unreasonable where the reasons demonstrated a justification (*Singh* at [45]-[47]).” [170]

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[170] These principles have been applied by this Court in the context of declaratory proceedings under s 11 of the *Planning & Environment Court Act 2016*; *Surfers Beachfront Protection Association Inc v Gold Coast City Council (No.2)* [2022] QPEC 3, [13].

[191] Paragraph 108 of Riverside's written submissions[171] includes a table with four columns. The columns set out the following information: (1) the category of change made to the application; (2) possible references in the information request to the category of change; (3) possible references in response to the information request material to the category of change; and (4) Riverside's submission in relation to the category of change and the response.

[192] The '*changes*' made to the development application were categorised in Riverside's written submissions as follows:

(a) increase in gross floor area of the proposed towers;

(b) increase in height of low scale tenanted spaces near Riverwalk;

(c) increase in amount of development or works in the river;

(d) addition of 2 dining and bar spaces on the river side of Riverwalk;

(e) widening of access entrance, removal of part of the exit from Easement AA.

[193] Riverside concedes that the change identified in subparagraph [192](e) was made in response to the information request.[172] The remainder of the changes are said not to be responsive to the information request and required the development application to return to the confirmation stage of the assessment process.

[194] Before dealing with Riverside's submissions in this regard, it is necessary to bear the following matters in mind.

[195] First, rule 26.1(b) of the DAR requires an assessment manager to be satisfied that the change to the development application '*is in response to an information request*'. This gives rise to a question of fact and degree for the assessment manager to consider. The question is to be considered broadly and fairly.

[196] The submissions made on behalf of Riverside on this issue invited the Court to adopt a different approach. The submissions, in my view, invited a pedantic and narrow approach to be taken to rule 26.1(b) of the DAR and the changes made to the development application. The Court was, essentially, invited to conclude that a change to an application was responsive to an information request where the request either: (1) called for that change; or (2) discussed the change, or something akin to it. Such an approach is too narrow and not called for, in my view, given:

(a) neither the Act, nor DAR, require information requests to take any particular form;

(b) neither the Act, nor DAR, require responses to an information request to take any particular form;

(c) an information request is not akin to an interrogatory or request for particulars;

(d) a response to an information request is not a response to an interrogatory or request for particulars – the manner in which an applicant chooses to respond to an issue raised in an information request is entirely a matter for it; and

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171 Ex.6.004, p.39.

172 Ex.6.004, p.39, para 108 and p.42.

(e) one needs little exposure to design professionals to appreciate that changes made to a development may result in, or require, consequential changes, which may be unforeseen at the time an information request was issued.

[197] Second, the development before the delegate for assessment is fairly described as large and complex. It has a number of components, all of which were to be examined against a significant number of planning requirements specified in City Plan 2014, particularly the CCNP. A review of the CCNP reveals the development was to be assessed against provisions that express value laden qualitative objectives. The very nature of those qualitative objectives admit of the prospect that there is more than one design solution open to demonstrate compliance. For example, it could not be said there is only one design solution to comply with overall outcome 7.d. of the CCNP, which states:[173]

> "A multi-layered river edge provides for river activities at the water level, a waterfront promenade at the lower level, publicly accessible and active low-rise tenancies at the middle level, and well-spaced towers that are set back from the river at the upper level."

[198] This needs to be borne in mind when considering whether a design change is responsive to an information request that calls for, in part, a re-design to demonstrate compliance with City Plan 2014.

[199] Third, there can be little doubt the information request had in mind that the design of the proposed development would need to be changed to demonstrate compliance with City Plan 2014. So much is clear from the preamble to the request, which is set out at paragraph [15] and bears repeating, in part:

> "Council has carried out an initial review of the…application and has identified that further information is required to fully assess the proposal. The proposed development represents a significant opportunity to provide high quality commercial and mixed-use development with substantial improvements to accessibility along the river's edge. The overall proposal is considered to be well designed, **however the development requires further refinement and resolution of key aspects of the design to ensure an appropriate outcome given the prominence of the development in the City**.
>
> A number of matters have been identified during the initial assessment, requiring amendments and/or further information be provided. It is recommended that following your review of the information request, a meeting is arranged with the relevant specialists to discuss the information request items in detail." (emphasis added)

[200] The statement that there was a need for '*further refinement and resolution*' of the design was directed towards '*key aspects of the design*'. As to the matters requiring refinement and resolution, this is informed by the substance of the information request itself. The information request comprises some 18 pages and 59 numbered paragraphs. The issues raised for consideration in the document included the

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173 Ex.3.001, p.195.

calculation of the gross floor area of the towers (item 59); the height of buildings adjacent to Riverwalk and the high water mark (items 24 and 25); the width and use of Riverwalk (items 6 to 9); potential conflicts between pedestrians/cyclists and proposed uses on Riverwalk (item 11); and site access (item 44).

[201] Each of the changes emphasised by Riverside are now considered.

[202] With respect to the increase in gross floor area (subparagraph [192](a)), it was submitted there is no item in the information request that suggests or relates to the floor area of the towers. This submission cannot be accepted.

[203] In my view, it was open to the delegate to conclude that an increase in the gross floor area of the proposed development was in response to, inter alia, item 59 of the information request, which states, in part:[174]

> "Item 59 The plans provided lack key information to enable accurate calculation of GFA for the development. It is recommended the revised plans include a development summary demonstrating the GFA associated with the different uses on each level. Furthermore, GFA is to include corridors, lobbies (except ground floor hotel, office, etc), storage areas and permanently roofed outdoor dining areas. For further clarification refer to the definition of GFA as outlined in the Brisbane Infrastructure Charges Resolution (No. 9) to assist in correctly identifying the areas considered GFA.
>
> Provide amended plans and confirm the following details:
>
> (a) Revised plans to clearly differentiate Stage 1 and Stage 2;
>
> (b) Provide the existing GFA and impervious area for Stage 1 and Stage 2;
>
> (c) Provide the proposed GFA and impervious area for Stage 1 and Stage 2 on the revised plans that clearly demonstrate the proposed GFA associated with all of the uses for each stage and note that planter boxes are counted as impervious area;
>
> (d) Confirm and demonstrate if the basement levels are above natural ground level. If yes, include and show the GFA for EOT facilities and lobby (except for office lobby) and confirm what the lobby is used for on basement level;
>
> (e) Provide revised plans to include the GFA associated with permanently roofed outdoor dining areas;

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174 Ex. 1.012.098, p. 2552.

> (f) Provide revised plans showing the GFA and that differentiate indoor sport and recreation, as the court and facility areas as they, are two different rates;
>
> (g) Confirm the outdoor wellness area on Level 3;
>
> (h) Provide revised plans to include the GFA for corridors and amenities associated with office areas;
>
> (i) Clarify what 'LMR' and 'BMU' areas are; and
>
> (j) Confirm if Level 44 balcony area is open or closed."

[204] This part of the information request directly called for new plans to assist in calculating (accurately) the gross floor area in accordance with the definition of City Plan 2014. Amended plans and revised calculations were provided to Council in response to this request. Whilst the amendments resulted in the gross floor area increasing, this was always a prospect given the above request, which was directed towards errors in the plans and the need for re-calculation of the gross floor area.

[205] With respect to the increase in height of the low scale tenancies referred to in subparagraph [192](b), it was open to the delegate to conclude that the change made to this aspect of the development was in response to item 24 of the information request.[175] Item 24 is in the following terms:

> "The development proposes a building height of 16m within 5m of the high water mark which seeks a performance outcome for PO51 of the CCNP. The proposed plans depict buildings which may in fact exceed 20m above the finished level of the Riverwalk.
>
> (a) Provide further information clarifying this matter with accompanying justification for the proposed outcome."

[206] The information request was seeking justification for the proposed design solution in the context of PO51 of the CCNP. Subsection a. of this Performance outcome calls for development that provides '*low-level and well-spaced ground storey tenancies that activate the Riverwalk and create wide and active public spaces and connections to the river*'. With PO51 and item 24 of the information request in mind, a change was made to the application. The change, and underlying design reason for it, was discussed in the information request response report dated 16 October 2020 as follows:[176]

> "Due to the overall building height of the low-scale tenanted spaces adjacent to Riverwalk exceeding 12m in height, a Performance outcome is sought.
>
> The development has been altered to provide a layered building form, that includes low-scale tenanted buildings that project forward of the commercial towers, toward the river's edge. The architectural

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175 Ex.1.010.047, p.1179.
176 Ex.1.012.098, p.2529.

> expression of these podium and pavilion elements has been changed from that of vertical surfaces with operability, to that of expressed horizontal edges with integrated greenery. This glass line has been set back such that these elements now read as occupied terraces rather than glazed pavilions.
>
> The proposed design and uses, adjoining the river achieve Performance outcome PO51 and provide an integrated public realm, ensuring a stepped and terraced building outcome is achieved…"

[207] In short, the change to the development responded to a request to demonstrate, or justify, compliance with PO51 of the CCNP.

[208] The changes identified in subparagraphs [192](c) and (d) are interrelated. They involve changes to Riverwalk and the area described in the development application as the Public realm.

[209] It was open to the delegate to conclude that the changes made to Riverwalk and the public realm were in response to, at least, items 6, 7 and 14 of the information request.[177] Those items of the request called for, inter alia: (1) design amendments to the width of Riverwalk;[178] (2) consideration to be given in the design to conflict points between, inter alia, the City Cat terminal and Riverwalk;[179] and (3) design refinement to demonstrate compliance with Performance outcomes PO2, PO4, PO51, PO52 and PO53 of the CCNP.[180]

[210] The report dated 16 October 2020, which provides the response to the information request, identifies the changes made to the development application and explains how they respond to particular items in the request. With respect to items 6, 7 and 14 of the request, the report explains how the changes to Riverwalk and the works in the River respond to the issues raised. It is unnecessary to set out the response in detail. It is lengthy. In my view, it is sufficient to say that this material comfortably establishes it was open to the delegate to conclude that the changes of interest (paragraph [192] (c) and (d)) were responsive to the information request. The material explains that the design philosophy for the changes was to, inter alia, activate public spaces along principle movement corridors and provide a generous and engaging Riverwalk.[181] This is responsive to the information request.

[211] I pause to observe that Mr Heading was cross-examined about the changes to the development application and his finding that they were made in response to the information request.[182] I have carefully reviewed his evidence in light of the changes made.

[212] Mr Gore KC and Mr Ware submitted Mr Heading gave a logical, considered and coherent explanation as to why he thought the changes responded to the information request.[183] I accept this submission. The evidence was persuasive, particularly once

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177 Ex.1.010.047, pp.1774-1775 and 1777.
178 Ex.1.010.047, p.1775, item 6 a).
179 Ex.1.010.047, p.1775, item 7.
180 Ex.1.010.047, p.1777, item 14.
181 Ex.1.011.074, p.2136 and Ex.1.011.073, pp.2069, 2070 and 2095.
182 T3-44, L5 to T3-47, L30.
183 Ex.8.022, p.70, para 247.

it is appreciated that Mr Heading: (1) accepted without qualification that some of the changes made to the development application were not specifically requested; and (2) recognised, correctly, that the general request for a design review, coupled with specific aspects of the information request, called for a practical rather than pedantic, approach to rule 26.1(b) of the DAR. In the circumstances, Mr Heading's evidence confirms that the impugned decision is not infected by legal error as contended by Riverside.

[213] If, contrary to my view, it is concluded that Mr Heading's decision in relation to rule 26.1 of the DAR is infected with legal error, it does not follow that the development approval is invalid. It is necessary to examine whether there is a realistic possibility that a different decision could have been made had there been compliance with the DAR.[184]

[214] In my view there is no realistic possibility that a different decision could have been made having regard to the following considerations:

(a) the development application was code assessable, which does not require public notification;

(b) submissions were made (by third parties) to Council after the changes were made to the development application;[185]

(c) as discussed in paragraphs [18] to [20], Council made a further request for information in relation to the changed development application and was provided with a response;[186] and

(d) the State Assessment Referral Agency was given an opportunity to, and did, change its referral response taking into the account the changed development application.[187]

[215] In my view, the non-compliance with the DAR, if there in fact be one, represents a matter of form rather than substance. This is established by the matters identified in paragraph [214]. Those matters, taken collectively, do not suggest non-compliance has sounded in an adverse impact for the assessment process. Rather, the entities charged with the responsibility of assessing and deciding the amended application could do so effectively. In such circumstances, there would be no practical utility in requiring the development application to return to the confirmation stage to repeat the development assessment process.

[216] To avoid doubt, I can indicate that, if required, I was comfortably satisfied any non-compliance with the DAR arising out of the delegate's decision under r 26.1(b) was an appropriate one for excusal. The power to excuse is to be found in s 37 of the *Planning & Environment Court Act 2016*.[188] The underlying reasons for excusing the non-compliance are those given in paragraphs [214] and [215].

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184 *MZAPC v Minister for Immigration and Border Protection & Anor* (Supra), [39].

185 1.013.099, 1.013.102, 1.013.103, 1.013.104, 1.013.106, 1.015.126, 1.015.128, 1.015.129 and 1.015.133.

186 1.013.109 and 1.014.116.

187 1.015.130 and 1.015.137.

188 The DAR is to be treated, in my view, as an enabling Act. This is because: (1) the DAR are created under the Act, namely s 68; and (2) as Mr Gore KC and Mr Ware pointed out in their written submissions, s 7 of the *Acts Interpretation Act 1954* provides that a reference to a provision of the

[217] The error alleged in paragraph [41](c) has not been established.

Did the delegate fail to take into account compliance with overall outcomes in City Plan 2014?

[218] The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is an abuse of discretion.[189] As I have already said, when this is relied upon as a ground of review, it will only be made out where it is established the decision-maker failed to take into account a consideration that it was bound to take into account.[190] Whether a decision-maker is bound to take a matter into account is determined by construing the statute conferring the power exercised.[191] Here, the allegation is informed by s 45(3) of the Act.

[219] Section 45(3)(a) of the Act provides that a code assessment must be carried out against the assessment benchmarks in a categorising instrument for the development. City Plan 2014 is the categorising instrument here and prescribes a significant number of codes, namely 22, against which the development application must be assessed. The codes against which the assessment was to be conducted in this case were identified in the NADA report.[192]

[220] Riverside submits the delegate '*did not take into account compliance with the overall outcomes of each code*', which are prescribed as assessment benchmarks.[193] It is further submitted that this is a matter of consequence having regard to s 5.3.3(4) of City Plan 2014. This provision prescribes the '*rules*'[194] applying to code assessment carried out against the planning scheme. Section 5.3.3(4)(c) states how compliance is demonstrated with each assessment benchmark for code assessment:

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

[221] There is an initial difficulty with Riverside's case in relation to the ground of challenge presently under consideration.

[222] Riverside makes a general point; it contends the delegate failed to take into account compliance with the overall outcomes of <u>each</u> code.

Act is to be read as including a reference to a provision of a statutory instrument made under the Act, such as the DAR.

189 *Peko-Wallsend* (Supra), 39.
190 *Peko-Wallsend* (Supra), 39.
191 *Australia Pacific LNG* (Supra), [191].
192 1.015.148, pp.3323-3324.
193 Ex.6.004, p.22, para 69.
194 s.5.3.3(3).

[223] Against the background of ss 45(3)(a) and 60(2) of the Act and s 5.3.3(4)(c) of City Plan 2014, it can be accepted, as a general proposition, that the delegate was bound to take into account compliance with overall outcomes of the assessment benchmarks prescribed by City Plan 2014 for the development application. However, it does not follow the delegate was bound to consider every overall outcome in every code prescribed for assessment of the development application.

[224] Whether the delegate was obliged to consider an overall outcome in a code must be considered, in my view, by reference to each provision. The reason for this is clear once reference is made to a code such as the CCNP. The CCNP includes overall outcomes that apply to the neighbourhood plan area as a whole.[195] The code also includes overall outcomes that are specific to particular precincts.[196] A failure to assess the development application against an overall outcome for the former may be material. A failure to assess the development application against provisions applying to an unrelated precinct is unlikely to be material. Once this is appreciated, it can be said that broad assertions, such as that made by Riverside, are unhelpful.

[225] In any event, Riverside's case in relation to this point does not commence on sound footing. The following evidence, which I accept, establishes the facts from which an inference can be drawn contrary to Riverside's case, namely that the delegate did have regard to compliance with the relevant overall outcomes of the applicable codes in City Plan 2014:

(a) the delegate is an experienced urban planner with 16 years of experience;[197]

(b) the delegate has held various roles in Council's development services branch as an urban planner since April 2009; [198]

(c) as an urban planner employed by Council, the delegate acquired experience, skills and knowledge in the application of City Plan 2014, particularly in assessing and deciding development applications in the CCNP area; [199]

(d) when deciding a code assessable development application, the delegate was aware from his experience that it is necessary to ask, and answer, whether compliance is demonstrated having regard to the assessment rules in s 5.3.3(4) of City Plan 214; [200]

(e) the material before the delegate included:

    (i) an assessment of the development against the performance outcomes of the applicable codes;[201]

    (ii) an assessment of the development against overall outcomes of the CCNP, Principal centre zone code[202] and a number of overlay codes,

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195 Ex.3.001, p.194, s 7.2.3.7.2(3).
196 Ex.3.001, pp.195-196.
197 Affidavit of Heading affirmed 22 September 2021, para 2.
198 Affidavit of Heading affirmed 22 September 2021, para 3.
199 Affidavit of Heading affirmed 22 September 2021, para 4.
200 Affidavit of Heading affirmed 22 September 2021, para 31(a).
201 1.006.022.
202 1.007.026, pp.1296-1308.

including the Bicycle network overlay code and Waterway corridors overlay code; [203]

(f) eight of the ten reasons for the decision stated in the NADA report pick up the language of an overall outcome in the CCNP, namely overall outcomes 3(c),[204] (d),[205] (j) [206] and (o) [207] and 7(b),[208] (c) [209] and (d),[210] and the Centre or Mixed use Code, namely overall outcomes 2(b),[211] (c) [212] and (j) ;[213]

(g) text within the body of the NADA report picks up the language of overall outcomes 3(h) of the CCNP,[214] 2(d) of the Waterway corridors overlay code,[215] 2(f) of the Coast hazard overlay code, 2(a) of the Flood overlay code,[216] and 2(c) of the Transport, Access, Parking and Servicing Code.[217]

[226] In my view, these facts taken in combination are more than sufficient to establish that the delegate did have regard to overall outcomes in City Plan 2014 and assessed the development application against them.

[227] Riverside's case requires a contrary inference to be drawn from the evidence.

[228] What evidence does Riverside rely upon to suggest a contrary inference is open, and should be drawn?

[229] Riverside points to the following facts from which an inference can be drawn:

(a) the NADA report does not mention by name any overall outcomes, which is said to justify an inference that they were not taken into account;[218]

(b) there is no written record of the delegate's assessment against each assessment benchmark;[219] and

(c) the delegate relied upon internal memoranda written by project teams within Council, which do not include an assessment against every benchmark.[220]

[230] Each of the above matters can be accepted as established on the evidence. However, they do not individually, or collectively, suggest (on the balance of probabilities) that the inference Riverside invites the Court to draw should, in fact, be drawn in the face of the matters set out at paragraph [225].

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203 The references in the material are helpfully identified at Table 2 of Council's Supplementary Submissions, para 65.
204 1.015.148, p.3337, para 1.
205 1.015.148, p.3337, para 2.
206 1.015.148, p.3337, para 3.
207 1.015.148, p.3337, para 4.
208 1.015.148, p.3337, para 5.
209 1.015.148, p.3337, para 7.
210 1.015.148, p.3337, para 6.
211 1.015.148, p.3337, para 8.
212 1.015.148, p.3337, para 9.
213 1.015.148, p.3337, para 10.
214 1.015.148, pp.3325, 3326 and 3335.
215 1.015.148, p.3329.
216 1.015.148, p.3336.
217 1.015.148, p.3332.
218 Ex.6.004, paras 71 and 77(a) and (e).
219 Ex.6.004, para 73, citing T3-33, L4 to 17 and para 77(b).
220 Ex.6.004, para 77(d).

[231] This does not mark the end of the evidence dealing with this issue.

[232] To assist the Court, Council led evidence from the delegate, comprising two affidavits sworn for these proceedings. The affidavits seek to confirm that the delegate:

(a) assessed the development application against the relevant overall outcomes and performance outcomes of each code;

(b) was satisfied compliance was demonstrated with each overall outcome and performance outcome in the assessment benchmarks, consistent with s 5.3.3(4) of City Plan 2014; and

(c) approved the application under s 60(2)(a) of the Act.

[233] Riverside objected to Mr Heading's evidence on the footing that a decision-maker should ordinarily be treated as bound by, and confined to, the reasons given for the decision in question.[221] Assuming this objection is upheld, it is difficult to see how Riverside's case is improved. In short, the inference referred to in paragraph [225] above is not displaced because Mr Heading's evidence as to the process he adopted for particular parts of his assessment is put to one side.

[234] In any event, whilst a decision-maker is ordinarily bound by and confined to the reasons given for a decision, there are exceptions to this principle. Further evidence is admissible where its purpose is to elaborate on matters before the decision-maker and provide elucidation, rather than fundamental alteration or contradiction of the decision. In my view, Mr Heading's evidence, related to this alleged error, does precisely that. His evidence makes clear what would otherwise be the subject of an inference, namely: (1) that he was aware of the requirements of s.5.3.3(4) of City Plan 2014; and (2) that he was satisfied compliance had been demonstrated with all assessment benchmarks. This does not represent a contradiction or reformulation of the decision. It is consistent with, and corroborated by, an absence of reasons in the NADA report of the kind otherwise required by s 63(5)(e) of the Act.

[235] Mr Heading was also cross-examined about these matters. He was pressed firmly by Mr Hughes KC a number of times about findings with respect to compliance with City Plan 2014, and whether an assessment had, in fact, been conducted against each and every part of the applicable assessment benchmarks. I did not observe Mr Heading to be shaken by this cross-examination. Mr Heading carefully explained what he had done, and how long his assessment had taken. Contrary to Riverside's submission, I accept his evidence. It was credible and consistent with other evidence I accept, namely that identified in paragraph [225]. I reject Riverside's submission that Mr Heading's '*claimed process of assessing*' was '*entirely incredible*'.

[236] In the context of this alleged error, Riverside was critical of the process adopted by Mr Heading to assess the development application against City Plan 2014. The criticism starts from the premise that an assessment of the application against the assessment benchmarks, as required by s 5.3.3(4)(a) of City Plan 2014, required a full assessment against each benchmark at the '*time of the decision*'. It was

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221 *East Melbourne Group Inc v Minister for Planning & Anor* (2008) 23 VR 605, 675.

submitted Mr Heading did not do this; his assessment was described as a '*moving feast*'.[222]

[237] Mr Heading's assessment did move with new material as it was presented, but I reject this was in any way improper or in some way legally flawed. This is clear when the process he adopted is properly understood.

[238] The assessment approach adopted by Mr Heading started with a complete assessment of the application against the relevant parts of City Plan 2014. This assessment did two things. First, it allowed provisions of City Plan 2014 with which compliance was demonstrated to be identified, thereby excluding them as reasons for refusal. Second, it allowed provisions of City Plan 2014 to be identified that were the potential sources of non-compliance. It was these non-compliances that can readily be seen to inform the substance of the information request; the best evidence of this is the preamble to the information request, which is set out at paragraph [15]. After this point, unsurprisingly, the focus of the delegate's assessment turns to those matters raised in the information request. They were the subject of a response. The intention of the response to the information request was to address, or narrow, the planning issues raised by the delegate's assessment. This was achieved in part. So much is clear from the further advice letter referred to in paragraph [20]. A full response was provided to the further advice letter. All of this information was before the delegate for his consideration at the time of his decision. This type of assessment, as I said above, moved with the presentation of new material and changes to the development application.

[239] Against this background, this question can be asked: What provision of the Act required Mr Heading to undertake a complete re-assessment of all of the development application, including those parts that had not changed, against City Plan 2014 at the time of his decision? The answer, in my view, is that there is no such provision. The assessment caried out was entirely orthodox and practical.

[240] At the time of the delegate's decision, the assessment process had been carried out. He had, by exclusion, reduced the potential non-compliances with City Plan 2014 to a limited number. It was the potential non-compliances that became the subject of particular focus and were examined with the benefit of, inter alia, proposed plans of development, a development approval package (conditions), and the contents of the NADA report. It was against this background that the delegate decided to approve the application subject to conditions. Importantly, Riverside did not suggest that ss 45, 59 and 60 of the Act required the delegate to do otherwise. Nor did it suggest that these provisions of the Act required Mr Heading to undertake a completely fresh assessment of the development application at the time of the decision. There is good reason for this; these provisions contain no such requirement. Section 59(3) of the Act does however provide:

> "(3) Subject to section 62, the assessment manager's decision must be based on the assessment of the development carried out by the assessment manager."

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222 Ex.6.004, para 77(f).

[241] This is what Mr Heading did. He decided the development application on the basis of the assessment he carried out. The outcome of that assessment engaged s 60(2)(a) of the Act, which mandated approval of the development application.

[242] For these reasons, the ground of challenge identified in paragraph [41](d)(i) fails. It has not been established that Mr Heading was required to make his decision under s 60(2)(b) of the Act.

Is the delegate's decision legally unreasonable?

[243] Riverside contends it was unreasonable for the delegate to find the proposed development complied with all assessment benchmarks in City Plan 2014. To establish this contention, Riverside submits the delegate's findings in relation to compliance with particular provisions of City Plan 2014 fall outside the range of outcomes defensible in respect of the facts and the law.[223] The provisions of the planning scheme that are relied upon in this regard are as follows:

(a) in the CCNP, overall outcomes 3(h), 7(d) and Performance outcomes PO5/AO5.2, PO8/AO8.1 & AO8.2, PO51/AO51;

(b) in the Waterway corridors overlay code (**WCO**) Performance outcome PO16/AO16;

(c) in the Transport, access, parking and servicing code (**TAPS**) Overall outcomes 2(c) and 2(e) and Performance outcomes PO1/AO1 & PO9/AO9; and

(d) in the Bicycle network overlay code (**BNO**) Performance outcome PO2/AO2.

[244] The principles relevant to the determination of these allegations are set out in paragraphs [186] to [190].

[245] Before dealing with the assessment benchmarks referred to above, I pause to make a number of observations that provide important background to an examination of this part of Riverside's case.

[246] The benchmarks relied upon by Riverside in the CCNP call for an assessment of the acceptability or otherwise of built form having regard to its height, bulk, scale, setback/s and relationship to adjoining spaces and buildings (separation). Assessing compliance with these benchmarks call for the making of an evaluative judgment[224] where reasonable minds may differ. A similar point can be made in relation to the provisions relied upon in the WCO, TAPS and BNO codes. All of the provisions relied upon in these codes call for an evaluative judgment about which reasonable minds may differ. That reasonable minds may differ about compliance with City Plan 2014 is unsurprising having regard to the language of the provisions relied upon; they are performance based provisions that may be satisfied by more than one development solution. Put another way, the provisions provide a degree of elasticity, or flexibility, for the decision-maker to arrive at a finding of compliance.

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223 Ex.6.004, para 81.

224 *Body Corporate for Mayfair Residences Community Titles Scheme 31233 v Brisbane City Council & Anor* (2017) 222 LGERA 136, [68].

[247] Riverside relies upon departures from acceptable solutions to establish legal unreasonableness. This needs to be approached with caution. Section 5.3.3(4)(c) of City Plan 2014 confirms that, for the purposes of a code assessment, compliance is demonstrated where development complies with, inter alia '*performance outcomes or acceptable outcomes*' of the code.[225] Put another way, a departure from an Acceptable outcome does not, in and of itself, establish non-compliance with City Plan 2014. As a consequence, it is my view that Acceptable outcomes, whilst relevant, are unlikely to be determinative one way or another of legal unreasonableness in this case. They certainly do not displace the high degree of flexibility, or elasticity, inherent in the Performance outcomes the delegate was required to consider. I have therefore focused, principally, on the Performance outcomes and Overall outcomes of each code raised by Riverside.

[248] The observation in paragraph [246] is of significance for an examination of legal unreasonableness as a ground of review. As the authorities set out in paragraph [190] confirm, legal unreasonableness involves a stringent test, which is rarely established. It does not permit a review on the merits. It is not established where the Court disagrees with the evaluative decisions of a decision-maker. The question to be considered is whether the decision is one that can be justified or lacks evident or intelligible justification. Subject to limited exceptions, this is to be asked and answered by reference to the material before the decision-maker.

[249] To assess the development application, the delegate had the benefit of a very large body of material.[226] The material included architectural plans, elevations and photomontages. The visual aids, along with supporting reports, were considerable in number and, in my view, provided a strong foundation for the delegate to be satisfied that compliance had been demonstrated with the assessment benchmarks raised by Riverside in this proceeding. The visual aids, and matters of impression and judgment that can be drawn from them, provide an intelligible justification for a substantial part of the delegate's decision. In particular, his assessment against the CCNP, WCO and BNO code provisions relied upon by Riverside. Once this is appreciated, it is apparent the task facing Riverside is a difficult one.

CCNP: Overall outcome 3(h)

[250] Overall outcome 3(h) of the CCNP code is in the following terms:[227]

> "3. The overall outcomes for the City Centre neighbourhood plan area are:
>
> …
>
> h. Modern towers each contribute to the city's distinctive skyline and provide elevated outdoor spaces. Towers are sited to maintain the openness of street vistas with adequate spacing between buildings to allow for light penetration, air circulation, views and vistas, and privacy, particularly for residential towers."

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225 Ex.3.001, p.125.
226 In excess of 3000 pages distributed between ten (10) A4 lever arch folders.
227 Ex. 3.001, p.194.

[251] Riverside submits compliance with this overall outcome was not within the range of '*possible outcomes'* that are *'defensible*' having regard to the '*separation of the towers and tower design*'. Particular emphasis was placed upon the following phrases in the body of the overall outcome, namely '*to maintain the openness of street vistas*' and '*with adequate spacing between buildings*'.[228]

[252] Riverside pointed to three matters to make good its submission, namely:[229]

(a) the separation distance to Riparian Plaza, which is 14.75 metres;

(b) the separation distance between the north and south towers of 10 metres, which is the minimum distance identified in Acceptable outcome AO9 of the CCNP; and

(c) the visual effect of these separation distances, which was said to result in overcrowding of the site and a lack of openness at the river.

[253] Having regard to the approved plans of development, I accept the separation distances identified in (a) and (b) above are correct.[230] I also accept that the 10 metre separation distance between the north and south towers complies with AO9 of the CCNP.[231] These findings do not establish legal unreasonableness.

[254] Riverside contends that it is the '*effect*' of these separation distances that gives rise to non-compliance with overall outcome 3(h). In this regard, reliance was placed upon the evidence of Mr Perkins.[232] It is his opinion that compliance was not demonstrated with the overall outcome.

[255] Mr Perkins' evidence does not assist Riverside for two reasons. First, the evidence: (1) was not before the decision-maker; (2) is argumentative and seeks to impermissibly agitate the merits the delegate was empowered to consider; and (3) save for that part providing assistance as to the planning rationale for '*site cover*', is inadmissible. Second, if it is assumed the evidence is admissible in its entirety, Mr Perkins' opinions represent one of a number that may be formed using the visual aids before the delegate to assess compliance.[233] Such an outcome does not establish legal unreasonableness.

[256] Putting Mr Perkins' evidence to one side, the submissions advanced by Riverside in relation to overall outcome 3(h) of the CCNP do not, in any event, explain why the delegate's finding of compliance was legally unreasonable. This was required, in my view, in order to succeed, particularly once it is appreciated that:

(a) the material before the delegate included an architectural design statement that, in combination with the visual aids, examined the issue of Tower separation – the statement demonstrated that '*the proposed tower separation and boundary setbacks exceed those of*' an adjacent cluster of buildings to the north, which includes Riparian Plaza;[234]

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228 Ex.6.004, para 82.
229 Ex.6.004, para 83.
230 Confirmed by 1.014.125, p.2985.
231 Ex.3.001, p.198.
232 Ex.2.003, pp.25 to 26.
233 Book of Plans, pp.2 to 5.
234 1.011.073, p.2056.

(b) the delegate had regard to the NADA report, which contained the following expressions of opinion reflecting impressions drawn from the material before him, namely:

> "…The proposal represents a built form outcome that responds to the characteristics of the site, city context and setting through a considered, balanced and layered tower and podium design, reinforcing the connection with the Brisbane River and city grid."[235]
>
> And
>
> "The development is not considered to cause significant and undue adverse amenity impacts to adjoining properties or prejudice their development…Furthermore, the towers are situated to allow a satisfactory building separation, internally and externally. Due to the unique site location, the buildings have frontage to the Brisbane River and the proposed towers will allow for light penetration, air circulation, views, vistas and privacy for neighbouring buildings."[236]

(c) the statement of reasons for the decision include the following conclusions:[237]

> "The development provides a built form within the City Centre that responds to its site characteristics and context, including the cityscape and streetscape. Development reinforces the distinct qualities of a close-knit city grid and well-spaced buildings along the river's edge;"
>
> And
>
> "The development is located and designed to maintain and improve views and vistas from the public realm to the Brisbane River and Story Bridge;"
>
> And
>
> "The development is tailored to the location of the site…"
>
> And
>
> "The development ensures that the design of buildings reflects an intense urban form while providing open space and landscaping appropriate to the use and scale of the development, and which positively contributes to the streetscape character and local identity."

(d) the delegate had regard to a wide range of documents, which provided a rational basis to be satisfied that compliance was demonstrated with overall outcome 3(h) – the documents included an Urban context report, an Architectural design statement (October 2020), a Public Realm & Landscape Concept Plan (October 2020) and approved plans and photomontages.[238]

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235 1.015.148, p.3324.

236 1.015.148, pp.3325-3326.

237 1.015.148, p.3337.

238 The relevant parts of the documents are correctly identified in a table at page 43 of the submissions prepared by Mr Gore KC and Mr Ware (Ex.8.022). To avoid repetition, I adopt the contents of that table for these reasons.

[257] In the circumstances, I accept Council's submission. It contends Riverside's challenge with respect to, inter alia, overall outcome 3(h) of the CCNP is an attempt to impermissibly challenge the merits of the delegate's decision.[239] I agree. It has not been demonstrated the delegate's decision in relation to overall outcome 3(h) of the CCNP is legally unreasonable.

CCNP: Overall outcome 7(d)

[258] Overall outcome 7(d) of the CCNP code is in the following terms:[240]

> "7. River precinct (City Centre neighbourhood plan/NPP-004) overall outcomes are:
> …
>
> d. A multi-layered river edge provides for river activities at the water level, a waterfront promenade at the lower level, publicly accessible and active low-rise tenancies at the middle level, and well-spaced towers that are set back from the river at the upper level."

[259] Riverside's written submissions emphasised the phrase '*well-spaced towers*' in overall outcome 7(d).[241] With this phrase in mind, Riverside submitted the delegate's finding of compliance with overall outcome 7(d) is indefensible.[242] The reasons advanced to make good on this submission are the same advanced in relation to overall outcome 3(h).[243]

[260] For the reasons given in paragraphs [253] to [257], I do not accept the delegate's decision with respect to overall outcome 7(d) is unjustifiable or lacking an evident or intelligible basis.

[261] The material reveals that overall outcome 7(d) was considered by the delegate. It is repeated verbatim at paragraph 6 in section 7 of the NADA report.[244] There was a wide range of material available to the delegate to assess compliance with this provision and arrive at the finding in paragraph 6. As Mr Gore KC and Mr Ware submitted,[245] the relevant material included the NADA report. That report considered the very themes present in overall outcome 7(d). The material also included the approved plans, which permit an assessment of the scale of different components of the development (proposed towers, low-scale tenanted buildings) and illustrate the multi-layered design approach where built form is contiguous with the river.[246]

[262] I am not satisfied it has been demonstrated the delegate's decision with respect to overall outcome 7(d) of the CCNP is legally unreasonable.

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239 Ex.7.004, para 94.
240 Ex. 3.001, p.195.
241 Ex.6.004, para 82.
242 Ex.6.004, para 83.
243 Ex.6.004, para 83.
244 1.015.148, p.3337.
245 Ex.8.022, para 169.
246 Ex.8.022, p.46.

CCNP: Performance outcome PO5/AO5.2

[263] Performance outcome PO5 of the CCNP, and the accompanying acceptable outcomes, are in the following terms:

<table>
<tr><td rowspan="2">PO5

Development is of a scale and design that:
a. contributes to a cohesive streetscape and built form character;
b. does not cause significant and undue adverse amenity impacts to adjoining properties or prejudice their development;
c. is sited and designed to enable existing and future buildings to be well separated from each other to allow for light penetration, air circulation, views, vistas and privacy.</td><td>AO5.1

No acceptable outcome is prescribed in relation to building height and gross floor area.</td></tr>
<tr><td>AO5.2

Development ensures the maximum tower site cover is in accordance with Table 7.2.3.7.3.C.</td></tr>
</table>

[264] Riverside submits that the delegate's finding of compliance with PO5 (and AO5.2) was not within the range of possible outcomes, which are defensible. It was said to be indefensible for the reasons identified in paragraph [252].[247] This submission focuses on tower design and tower separation. It is with this in mind that Riverside emphasised the phrase '*enable existing and future buildings to be well separated from each other*' in PO5c.

[265] For the reasons given in paragraphs [253] to [257], I do not accept Riverside's submission that a finding of compliance with PO5, by reason of tower separation and design, is indefensible.

[266] I also do not accept that a finding of compliance with AO5.2 was not open or lacking justification. For reasons already given, the maximum Tower site cover for the development was in accordance with Table 7.2.3.7.3.C. The delegate's conclusion in this respect was supported by, inter alia, the NADA report.[248]

[267] It can be observed that the NADA report directly addressed PO5.[249] The report stated:

> "…The development is not considered to cause significant and undue adverse amenity impacts to adjoining properties or prejudice their development…the proposal is of a height and scale which is appropriate in this location and provides a significant public realm benefit with the proposed plaza areas adjoining the new Riverwalk.

247 Ex.6.004, paras 82 and 83.
248 1.015.148, p.3333.
249 1.015.148, p.3325-3326.

> Furthermore, the towers are situated to allow satisfactory building separation, internally and externally. Due to the unique site location, the buildings have frontages to the Brisbane River and the proposed towers will allow for light penetration, air circulation, views, vistas and privacy for neighbouring buildings."

[268] The opinion stated in the NADA report was considered by the delegate. The opinion is supported by the development application material. This material included photomontages, plans, an Urban context report and an Architectural design statement.[250] I am satisfied this material, taken collectively, provides ample support for concluding that the development complies with PO5 and AO5.2 of the CCNP. It has therefore not been demonstrated that the delegate's decision in this regard is legally unreasonable.

CCNP: Performance outcome PO8/AO8.1 & AO8.2

[269] Performance outcome PO8 of the CCNP, and the accompanying acceptable outcomes, are in the following terms:

<table>
<tr><td rowspan="2">PO8
Tower levels are set back from boundaries to provide spacing between buildings to protect privacy, views and vistas.

Minimum side and rear setbacks ensure that existing and future buildings are well separated to optimise light penetration and air circulation through the cityscape so that each building contributes positively to the overall amenity of the city.

Tower shape and setbacks reduce the visual width and scale of the building and provide variation, contributing positively to the streetscape and city skyline.</td><td>AO8.1
Development ensures tower levels (being all levels from which a set back tower commences where involving a street building, or all levels where a tower in plaza) have minimum setbacks in accordance with Table 7.2.3.7.3.E.</td></tr>
<tr><td>AO8.2
Development truncates and curves tower corners and creates an alternative shape to a typical square or rectangle parallel to the site boundaries.</td></tr>
</table>

[270] Riverside submits that a finding of compliance with PO8 and AO8.2 is indefensible. This is advanced on two bases: (1) by reference to the matters set out in paragraph [252], which go to tower design and separation considerations;[251] and (2) for reasons associated with tower shape and orientation.[252]

[271] Riverside pointed out that PO8 and AO8 were not mentioned in the NADA report.[253]

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250 The particular parts of the reports of assistance are identified in Ex.8.022, p.48-49.
251 Ex.6.004, paras 82 and 83.
252 Ex.6.004, para 84.
253 Ex.6.004, para 85.

[272] It was submitted by Riverside that the delegate could not have reasonably concluded the development complied with AO8 or PO8 because:

(a) the towers are to be built effectively to the site boundaries;

(b) there is some curvature to two of the four corners of the building, but not to any extent which would take away from the squareness of the towers;

(c) the shape of the towers do not reduce their visual width – they would appear as a block to the street and the river and the design does not vary the shape and setbacks from different view-points/levels; and

(d) no reasonable attempt was made in the design to have buildings well separated, to preserve views and vistas between buildings, or to address PO8/AO8.2 in terms of visual shape.[254]

[273] Having regard to the approved plans of development and photomontages, I accept it is open to form a view that is consistent with (a) to (d) above.

[274] To establish each of (a) to (d), Riverside relied upon the evidence of Mr Perkins.[255] This evidence does not assist Riverside's case for the same reasons given in paragraph [255]. The evidence, even if acted upon, does not establish legal unreasonableness.

[275] In my view, the factual matters raised by Riverside are not, in any event, sufficient to demonstrate the delegate's decision with respect to PO8/AO8 is legally unreasonable. This is so for the following reasons.

[276] In the first instance, as Mr Gore KC and Mr Ware pointed out, the approved plans and the response to the information request made clear that the tower setbacks were compliant with AO8.1.[256] The only reasonable conclusion open to the delegate was that the development complied with this Acceptable outcome. This was not confronted by Riverside.

[277] With respect to AO8.2, compliance or otherwise was informed by an examination of, inter alia, the approved plans and photomontages before the delegate. The visual aids support a finding of compliance with the Acceptable outcome. These same visual aids, along with the same findings made to examine compliance with overall outcome 3(h) of the CCNP, support a finding of compliance with PO8, in my view.

CCNP: Performance outcome PO51/AO51

[278] Performance outcome PO51 of the CCNP, and the accompanying acceptable outcome, are in the following terms:

PO51	**AO51**
Development provides: a. low-level and well-spaced ground storey tenancies that activate the Riverwalk and create wide and	Development on premises adjoining the river has a: a. maximum building height of 12m, measured from the finished level of

254 Ex.6.004, para 85.
255 Ex.2.003, pp.33-34.
256 1.012.098, p.2507.

active public spaces and connections to the river; b. towers set back a sufficient distance from the Riverwalk to not dominate the public realm, allow sunlight penetration and a sense of space, and to ensure a broad publicly accessible frontage to the river.	Riverwalk, within 5m of the high water mark; b. maximum building footprint of 50% within 10m of the high water mark. c. Refer to figure g for guidance.

[279] Riverside submits that a finding of compliance with PO51 (and AO51) is indefensible. This submission is advanced on the footing that the performance outcome is directed towards the '*attractiveness and openness of the river*'.[257] The proposed plans and elevations[258] are said to demonstrate non-compliance because:[259]

(a) there is significant building bulk within proximity to the Riverwalk, which will dominate the public realm;

(b) the design makes no attempt to respect the desired wide active public spaces along the full frontage of the river;

(c) the design makes no attempt to ensure public accessibility to the river frontage;

(d) the design does not maintain or enhance the attractiveness of the river's banks – it covers them with infrastructure; and

(e) from the river, the visual impressions provided in the material reveal the development comprises two tall, bulky, closely spaced towers dominating the river and Riverwalk.

[280] To establish each of (a) to (e), Riverside relied upon the evidence of Mr Perkins.[260] This evidence does not assist Riverside for the reasons given in paragraph [255]. This evidence, even if accepted, is insufficient in my view to establish the ground of challenge in any event.

[281] There was, in truth, only one finding open to the delegate in relation to AO51. For reasons given above, the development did not comply with AO51a. This had the consequence that the delegate's assessment was required to focus on the terms of PO51 itself. This was precisely how PO51 was approached and considered in the NADA report. The report stated:[261]

> "The design of the development is a layered form which descends from the towers, to the podium, public realm areas, low-scaled tenanted buildings and to the Riverwalk along the river's edge. The proposed low-scale tenanted buildings exceed the maximum building height of 12m within 5m of the high water mark and therefore does not comply with AO51(a).

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257 Ex.6.004, para 86.
258 Referring to 1.010.72, plans dated 14, 15 and 16 October 2020.
259 Ex.6.004, para 87.
260 Ex.2.003, pp.40-42.
261 1.015.148, p.3327.

> The proposed building height is 16m–20m to the highest point within 5m of the high water mark. Despite the non-compliance, the development is considered to achieve compliance with PO51.
>
> The low-scale tenanted buildings along the riverwalk provide a range of active uses which allow for direct connections to the river. A number of food and drink tenancies are provided directly adjoining the riverwalk which promote active uses. The northern retail tenancy is 2 storeys and allows for casual surveillance over the riverwalk itself and views to the Brisbane River and Story Bridge.
>
> The north tower setback to the Riverwalk is 17.9m and the south tower setback to the Riverwalk is 11.4m. These setbacks ensure the towers do not dominate the public realm areas and allows for a broad publicly accessible frontage to the river."

[282] I am satisfied the above reasoning, which was before the delegate, is open and rational having regard to the architectural plans and photomontages in the development application material. This reasoning, along with the approved plans and photomontages, was material before the delegate. It provided a rational basis for concluding the development complied with PO51 of the CCNP. I am therefore not satisfied it has been demonstrated the delegate's decision in this regard is legally unreasonable.

WCO: Performance outcome PO16/AO16

[283] Performance outcome PO16 of the WCO, and the accompanying Acceptable outcome, are in the following terms:

PO16	**AO16**
Development of a site in the Brisbane River corridor sub-category abutting the Brisbane River: a. maintains and enhances the attractive appearance of the Brisbane River and its banks, when viewed from the Brisbane River, from development near the Brisbane River, or from other public viewing points; b. uses materials for buildings, structures and landscaping which complement surrounding buildings, the visual character of the area and the character, functions and values of the corridor section. Refer to Figure c.	Development involving buildings (excluding ancillary buildings or structures), parking and servicing areas, and areas for the storage of materials, goods or solid waste: a. for the Brisbane River corridor sub-category – section 1 is set back a minimum 30m horizontal distance from the high water mark; b. for the Brisbane River corridor sub-category – sections 2, 3, 4 and 5 is set back a minimum of 20m from the high water mark; or c. if the existing development on an adjoining lot is located within 20m of the high water mark, the setback does not extend closer to the high water mark than the existing adjoining development.

[284] Riverside submits the delegate's finding of compliance with PO16 and AO16 is indefensible, the former being a provision that calls for an examination of the '*attractiveness and openness of the river*'.[262] This submission is advanced on the same footing as PO51 of the CCNP, namely, that the proposed plans and elevations[263] demonstrate non-compliance for the reasons identified in paragraph [279].

[285] To establish non-compliance, Riverside also relied on the evidence of Mr Perkins.[264] This evidence does not assist for the reasons given in paragraph [255]. It is insufficient to establish the ground of challenge.

[286] As to the submissions made on behalf of Riverside, they failed to explain why it was not open to the delegate to find compliance with PO16 having regard to, inter alia, the architectural plans and the NADA report. The latter addressed PO16 directly. It states:[265]

> "The subject site is located within Brisbane River corridor Section 3. The development is proposed partly within the corridor and within the 20m setback provision with access ramps and steps proposed along various sections of Riverwalk to enable equitable access between the varying levels within the 20m setback provision. Materials for buildings, structures and landscaping are used to enhance the visual character of the area and maintain the attractive appearance of the Brisbane River."

[287] The extensive material before the delegate provides a sound and rational basis for the above reasoning. The delegate had regard to the NADA report. He also had regard to the approved plans, the Urban context report (October 2020), the Public Realm and Landscape Concept Plan (October 2020) and the Architectural design statement (October 2020). I am satisfied all of this material, taken in combination, provided a sound and rational basis for the delegate to be satisfied compliance was demonstrated with PO16 of the WOC. That finding was also supported by the same findings made in relation to PO51 of the CCNP, which were also sound and supported by the material before the delegate. I am therefore not satisfied it has been demonstrated the delegate's decision in this regard is legally unreasonable.

TAPS: Overall outcome 2(c)

[288] Overall outcome 2(c) of TAPS is in the following terms:

> "c. Development provides safe access for all transport modes that does not impact adversely on the efficiency and safety of the transport network or diminish the amenity of nearby land uses."

[289] Riverside submits the delegate '*fell into error*' in finding the development complies with overall outcome 2(c).[266] Two reasons are advanced in support of the submission, namely, the delegate fell into error because:

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262 Ex.6.004, para 86.
263 Referring to 1.010.72, plans dated 14, 15 and 16 October 2020.
264 Ex.2.003, pp.40-42.
265 1.015.148, p.3329.
266 Ex.6.004, para 94(a).

(a) the development application and development approval require use of land that is not the subject of the application (Dexus land, Easement AB), thereby diminishing the amenity of nearby land uses;[267] and

(b) it will be necessary for a truck turning left from Creek Street into the shared access to utilise 2 lanes, which is not permitted under the Queensland Road Rules and will adversely impact on the efficiency and safety of the transport network.[268]

[290] I do not accept it has been established that the implementation of the development approval will require the use of land that is not the subject of the development application. Nor do I accept the truck turning movement described above is unlawful.

[291] As to the proposition that the use of the shared access will adversely impact on the efficiency and safety of the transport network, specific consideration was given to these impacts in the NADA report. The report states:[269]

> "The applicant's analysis of the existing signalised intersection and traffic impacts to the network have been adequately demonstrated to not create adverse operational impacts from the anticipated demand.
>
> SIDRA is widely accepted as an industry standard for the assessment of intersection operation and is considered appropriate by Council in this location."

[292] Relevant background information to this statement, including the '*analysis*' referred to, is to be found in: (1) Council's information request; (2) the MRCagney response to the information request dated 15 October 2020; and (3) the MRCagney response dated 20 November 2020. These documents, in my view, provided a sound basis for the delegate to reach a conclusion consistent with that set out above in the NADA report.

[293] It can be observed that the delegate had before him adverse submissions from Riverside attaching reports from a traffic engineer, Mr Trevilyan. The points Mr Trevilyan traverses in these reports were raised for the delegate's consideration. It was open to the delegate to reject Mr Trevilyan's opinions in the face of the other traffic related material provided with the development application. That is precisely what occurred. It was not legally unreasonable for the delegate to take such a course.

[294] Riverside also relies upon Mr Trevilyan's affidavit evidence to establish non-compliance with overall outcome 2(c). His evidence was not before the decision-maker. It is inadmissible. It represents an attempt to agitate the merits of the delegate's decision. This is impermissible in a proceeding such as this. In any event, Mr Trevilyan's evidence, in my view, establishes no more than that an alternative view to the one formed by the delegate was open. I am not satisfied this demonstrates that the delegate's decision with respect to overall outcome 2(c) is legally unreasonable.

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267 Ex.6.004, para 94(a)(i).
268 Ex.6.004, para 94(a)(ii).
269 1.015.148, p.3332.

TAPS: Overall outcome 2(e)

[295] Overall outcome 2(e) of TAPS is in the following terms:

> "e. Development provides site access arrangements to ensure that any adverse impacts on other development, the transport network and those who use it, are minimised to maintain amenity of the area and the safety and efficiency of the transport system."

[296] Riverside relies upon the reasoning advanced in relation to overall outcome 2(c) to establish legal error with overall outcome 2(e).

[297] This ground of challenge fails for the reasons identified in paragraphs [289] to [294].

TAPS: Performance outcome PO1/AO1

[298] Performance outcome PO1 of TAPS, and the accompanying acceptable outcomes, are in the following terms:

PO1	**AO1**
Development is designed: a. to include a technically competent and accurate response to the transport and traffic elements of the development; b. in accordance with the standards in the Transport, access, parking and servicing planning scheme policy; c. to ensure the efficient operation and safety of the development and its surrounds. Note—The acceptable outcome and performance outcome can be demonstrated through a development application that: • is accompanied by sufficient information, including computer modelling input and output data, to allow the proposed development to be properly assessed against the requirements of this code and the standards and guidelines of the Transport, access, parking and servicing planning scheme policy; • is certified by a Registered Professional Engineer Queensland that all plans, documents and dimensioned drawings comply with the requirements of this code and the standards and guidelines of the Transport, access, parking and servicing planning scheme policy; • ensures that any computer modelling	Development complies with the standards in the Transport, access, parking and servicing planning scheme policy.

	input and output data are accurate, reasonable and carried out in accordance with sound traffic engineering practices.	

[299] Riverside submits the proposed development does not comply with PO1.[270] It contends this is so for five reasons, which were explained by Mr Trevilyan.[271] The reasons are:

(a) the proposed development has not been adequately modelled – two egress lanes were not modelled as part of the proposed access arrangements;[272]

(b) there is a decrease in pedestrian safety due to additional crossing length resulting from the approval of the development application;[273]

(c) the modelling material provided to support the traffic analysis is flawed;[274]

(d) the configuration of the internal intersection is unacceptable;[275]

(e) pedestrians and cyclists utilising the access driveway will intermix with heavy vehicles.[276]

[300] The above points do not establish legal unreasonableness. They represent an attempt to agitate the merits of the delegate's decision. This is impermissible.

[301] In any event, for reasons given in relation to overall outcome 2(c) of the TAPS code, it is clear the delegate had material before him to properly, and justifiably, conclude compliance had been demonstrated with PO1. That Riverside, relying upon Mr Trevilyan's inadmissible evidence, contend otherwise is insufficient to establish legal unreasonableness.

[302] As I have already observed, the material before the delegate included submissions made on behalf of Riverside. Some of those submissions were directed towards traffic issues and attached reports prepared by Mr Trevilyan. The submissions made in this respect are dated 8 July 2020, 3 August 2020 and 2 September 2020. A report prepared by Mr Trevilyan accompanied the August and September submissions. Each of these documents were considered by the delegate. They were the subject of a response in the NADA report. The response is quoted at paragraph [291]. This response, read in conjunction with the various traffic reports provided to Council, provided a rational and intelligible basis for the delegate to be satisfied that compliance had been demonstrated with, inter alia, PO1 of the TAPS code.

[303] Accordingly, I am not satisfied it has been established the delegate's finding in relation to PO1 of the TAPS code is legally unreasonable.

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270 Ex.6.004, para 94(c)
271 Citing 2.001, para 56c; and 2.006, paras 6-15 & paras 29-30.
272 Ex.6.004, para 94(c)(i).
273 Ex.6.004, para 94(c)(ii).
274 Ex.6.004, para 94(c)(iii).
275 Ex.6.004, para 94(c)(iv).
276 Ex.6.004, para 94(c)(v).

TAPS: Performance outcome PO9/AO9

[304] Performance outcome PO9 of TAPS, and the accompanying Acceptable outcomes, are in the following terms:

PO9 Development provides access driveways in the road area that are located, designed and controlled to: a. minimise adverse impacts on the safety and operation of the transport network, including the movement of pedestrians and cyclists; b. ensure the amenity of adjacent premises, from impacts such as noise and light.	**AO9.1** No acceptable outcome for access is prescribed, for a major development (as described in the Transport, access, parking and servicing planning scheme policy)
	AO9.2 Development which is not a major development (as described in the Transport, access, parking and servicing planning scheme policy) provides a single site access driveway in the road area to the lowest order road to which the site has frontage.
	AO9.3 Development ensures that sight distances to and from all proposed access driveways in the road area and intersections are in compliance with the standards in the Transport, access, parking and servicing planning scheme policy.
	AO9.4 Development provides access driveways in the road area which: a. are located, designed and controlled in compliance with the standards in the Transport, access, parking and servicing planning scheme policy; b. are not provided through a bus stop, taxi rank or pedestrian crossing or refuge.
	AO9.5 Development makes provision for shared access arrangements particularly where it is necessary to limit access points to a major road.

[305] Riverside submitted that the delegate fell into error in finding the development complies with PO9 for two reasons.[277] The reasons are the same as those identified for overall outcomes 2(c) and 2(e) of the TAPS code.

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277 Ex.6.004, para 94(d).

[306] For reasons given above, I do not accept Riverside has established that the delegate's finding in relation to overall outcomes 2(c) and 2(e) is affected by legal error. For the same reasons, I am not satisfied a different conclusion ought be reached in relation to PO9 of the TAPS code.

BNO: Performance outcome PO2/A02

[307] Performance outcome PO2 of BNO, and the accompanying acceptable outcomes, are in the following terms:

PO2	**AO2**
Development contributes to the creation of publicly accessible riverfront by providing a shared, continuous riverside pathway.	Development fronting the river provides a publicly accessible riverfront pathway via a linear land dedication of 10m width as measured from the riverfront ambulatory boundary.

[308] Riverside submit the delegate's finding with respect to PO2 (and AO2) is unreasonable.[278] It is said the development application does not comply with AO2 because: (1) Riverwalk is 6 metres wide in places; (2) the land is not dedicated to Council; and (3) Riverwalk is not at the riverfront ambulatory boundary.[279] It is also said that the development application does not comply with PO2 because:[280]

(a) it is not 10 metres in width;

(b) the 4 metre difference (measured between what is proposed and AO2) is significant in cost terms;

(c) this section of Riverwalk is intended to be a primary cycle route, not an access way for private bars and restaurants;

(d) the Riverwalk as designed does not accommodate high speed commuting cyclists - provision should be made to separate cyclists and pedestrians;

(e) Riverwalk has, on both sides, dining, ferry terminals and other areas to which pedestrians will travel via the Riverwalk; and

(f) the planning scheme policy standards cannot be delivered on a 6 metre wide path as proposed.

[309] Riverside relies upon the evidence of Mr Trevilyan to establish (a) to (f).[281]

[310] Riverside's case in relation to PO2 of the BNO is, in my view, problematic. First, it relies upon material (Mr Trevilyan's affidavit), which was not before the delegate and is inadmissible. Second, the submissions advanced place great weight upon non-compliance with AO2. Non-compliance of this kind does not establish non-compliance with PO2. The terms of PO2 must be given particular consideration.

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278 Ex.6.004, para 90.
279 Ex.6.004, para 90.
280 Ex.6.004, para 91.
281 Ex.2.001, p.13, paras 51-52.

[311] The requirements of PO2 are clear. The provision required the delegate to be satisfied the development contribute to the creation of a continuous publicly accessible shared riverside pathway. To consider compliance, the delegate had the benefit of, inter alia, plans of development, including plans that illustrate the pathway proposed. These plans were approved by the delegate. They demonstrate a continuous publicly accessible shared pathway was proposed.

[312] This was not lost on the author of the NADA report. The author dealt with the importance of Riverwalk and the proposed development in the context of adverse submissions. The report states:[282]

> "Council acknowledges the importance of the Riverwalk to the active transport, with the route shown as a primary bicycle route on Council's Bicycle network overlay….
>
> …
>
> Since the original lodgement of the development application, the applicant has revised the Riverwalk pathway to address Council's requirements. The development now provides a compliant 1047 bicycle parking spaces in accordance with City Plan 2014. Furthermore, consideration of the AustRoads requirements has also been addressed in the design and layout of Riverwalk. It is noted that along this section Riverwalk, not only are there strong longitudinal movements but there are strong latitudinal movements, with people entering the Riverwalk from the development site at different points and at regular intervals. This movement and interaction from pedestrian and place-making uses at the edge of the path, makes providing separated pathways difficult. Therefore, a shared arrangement with a clearly defined minimum 6m wide pathway has been identified on the approved plans and documents to provide adequate and safe movement for all users, including cyclists and pedestrians and this outcome is considered to take into account the objectives sought within the City Reach Waterfront Masterplan…"

[313] This opinion is, in my view, amply supported by the approved plans, particularly the Riverwalk sections and the site plan. It is also supported by the response provided to Council's information request, items 6(a) and 11.

[314] All of this material was before the delegate. It provides a sound basis to conclude that compliance had been demonstrated with PO2 of the BNO. The requirement to provide Riverwalk as part of the development is enshrined in conditions of the development approval.

[315] This ground of challenge has not been established.

Conclusion: alleged non-compliance with City Plan 2014

[316] Riverside has not established the delegate's findings with respect to compliance with the above provisions of City Plan 2014 are legally unreasonable.

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[282] 1.015.148, p.3331-3332.

[317] The grounds of challenge identified in paragraph [41](d)(ii) and (f) have not, as a consequence, been established.

Did the delegate err in making a decision under s 60(2)(a) rather than 60(2)(b) of the Act?

[318] Section 60(2) of the Act states what an assessment manager must, or may, do after carrying out a code assessment. Subsection (2)(a) mandates that an approval follows where compliance is demonstrated with all of the assessment benchmarks for the development. Subsection (2)(b) applies where partial compliance is established with the assessment benchmarks for the development and states:

> "(2) To the extent the application involves development that requires code assessment, and subject to section 62, the assessment manager, after carrying out the assessment—
> …
>
> (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and
>
> *Examples—*
>
> 1 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks.
>
> 2 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks and a referral agency's response."

[319] Mr Heading determined that the development application complied with the assessment benchmarks in City Plan 2014.[283] An approval was required to follow as a consequence under s 60(2)(a) of the Act. The discretion conferred by subsection (2)(b) of the same provision did not arise.

[320] Riverside contends that Mr Heading's decision in relation to compliance with the assessment benchmarks is legally unreasonable. If that was accepted, Riverside submits that:[284] (1) s 60(2)(a) was not the correct power to be exercised by the delegate; (2) the delegate was required to exercise the discretion conferred by s 60(2)(b); and (3) the exercise of that discretion would have significantly affected the delegate's decision.

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283 Affidavit of Heading affirmed 22 September 2021, paras [44] to [45].

284 Ex.6.004, p.36, para 97.

[321] The critical assumption underlying this ground of challenge has not been made out for the reasons given above. It has not been established that the delegate's decision in relation to compliance with City Plan 2014 is legally unreasonable.

[322] This ground of challenge fails.

[323] The ground of challenge identified at paragraph [41](e) has not been established.

Discretionary factors militating against granting the relief sought

[324] For the reasons given above, the Applicant has not demonstrated it is entitled to the relief it seeks in the Further Amended Originating Application. It is, as consequence, unnecessary to consider whether there are discretionary factors that militate for, or against, granting that relief.

Answers to the lists of disputed issues

[325] Answers to each list of disputed issues are set out in **Schedules C** and **D** to these reasons for judgment.

Disposition of the application

[326] The Further Amended Originating Application filed 9 March 2022 is dismissed.

SCHEDULE A

OBJECTIONS TO EVIDENCE

Objections to Applicant's material

Affidavit of S G Peabody, Doc # 2.004

Paragraphs 3 to 4 (and corresponding exhibits)

Paragraph 3(c), 4 and the corresponding exhibits are relevant to the extent they assist the Court, by way of expert evidence, to understand the calculations underpinning the Applicant's Scenario C or 3 case (Ex.6.004, paragraph 42). The calculations are based on material before the decision-maker.

Affidavit of S G Peabody, Doc # 2.007

Paragraphs 7 to 11

This evidence assists the Court, by way of expert architectural evidence, with respect to the interpretation of architectural plans before the decision-maker. It is admissible on this basis.

Affidavit of B R Trevilyan, Doc # 2.001

Exhibit BRT-1, Paragraphs 16 to 47

This evidence is inadmissible. It is irrelevant. It is material that was not before the decision-maker. In substance it is argumentative and impermissibly seeks to agitate the merits.

To the extent it is relied upon to assist the Court '*understand*' the material before the decision-maker, namely traffic reporting before the decision-maker, this assistance is not required. The reports speak for themselves. Further, this is a specialist Court that routinely deals with traffic evidence of the kind before the decision-maker.

Exhibit BRT-1 Paragraphs 51 to 57

This evidence is inadmissible. It is irrelevant. It is material that was not before the decision-maker. In substance it is argumentative and impermissibly seeks to agitate the merits.

To the extent the evidence is relied upon to assist the Court '*understand*' the material before the decision-maker, namely the traffic reporting before the decision-maker, this assistance is not required. The reports speak for themselves. Further, this is a specialist Court that routinely deals with traffic evidence of the kind before the decision-maker.

Affidavit of B R Trevilyan, Doc # 2.006

Exhibit BRT-1 Paragraphs 7 to 73

This evidence is inadmissible for the same reasons given for Doc # 2.001.

Affidavit of D W Perkins, Doc # 2.003

Exhibit DWP-3 Paragraphs 1, 7 to 14

Paragraph 1 is admissible, but only to the extent it references provisions of the planning scheme that are in issue.

The Applicant does not rely upon paragraphs 7 to 14. These paragraphs will be struck out.

Exhibit DWP-3 Paragraphs 15 to 18, 19(e)

The applicant does not rely upon these paragraphs. These paragraphs will be struck out.

Exhibit DWP-3 Paragraphs 26 to 29

This part of the report is inadmissible. It: (1) impermissibly engages in an exercise of construction of City Plan 2014; and (2) foreshadows an assessment against the planning scheme that was not before the decision-maker; is argumentative; and impermissibly agitates the merits.

Exhibit DWP-3 Paragraphs 37 to 51

The Applicant does not rely upon paragraph 49. It will be struck out.

As to the balance, this part of the report is admissible to a limited extent. It provides assistance in understanding, as a matter of planning practice and planning purpose, '*site cover*' controls. It directly supports the submission made at paragraph 44 of Ex.6.004.

Exhibit DWP-3 Paragraphs 54, 62 to 64

Paragraph 54 is irrelevant.

Paragraphs 62 and 63 are irrelevant. They relate to Scenarios E and F, which were, in any event, not pressed by the Applicant.

Paragraph 64 is not relied upon by the Applicant and will be struck out.

Exhibit DWP-3 Paragraph 65

The Applicant does not rely upon paragraph 65. It will be struck out.

Exhibit DWP-3 Attachment 1

Attachment 1 is inadmissible. It represents an assessment of planning scheme compliance that was not before the decision-maker. The schedule is argumentative and impermissibly seeks to re-agitate the merits.

Exhibit DWP-3 Attachment 3

Attachment 3 is irrelevant.

Affidavit of D W Perkins, Doc # 2.005

Exhibit DWP-1 Paragraphs 3 to 49

The Applicant does not rely upon paragraphs 4 to 6, 20 to 22 and 48. These paragraphs are struck from the report.

Paragraphs 3, 7 to 19, 23 to 47 and 49 are inadmissible. It is material that was not before the decision-maker. Further, these parts of the report impermissibly seek to express opinions about the construction of City Plan 2014; are argumentative; and seek to agitate the merits.

Objections to Dexus parties' material

Affidavit of J P Morrissy, Doc # 2.009

Exhibit JPM-1 Section 2.0

This evidence is inadmissible. It is irrelevant; contains expressions of opinion that were not before the decision-maker and, in any event, are not matters for expert opinion.

Exhibit JPM-1 Section 2.1

This evidence is inadmissible. It is irrelevant and not a matter for expert opinion.

Objections to Council's material

Affidavit of G J Ovenden, Doc # 2.008

Exhibit GJO-1 Section 2.1

This evidence is inadmissible. It is irrelevant and contains expressions of opinion that are not matters for expert opinion.

Exhibit GJO-1 Section 3.0, paragraphs 31, 35 and 36

Paragraph 31 is inadmissible. It is irrelevant; is not a matter for expert opinion and in any event swears the issue.

Paragraphs 35 and 36 are inadmissible. They swear the issue on a matter of mixed fact and law.

Affidavits of J A Heading

Any part of Affidavits 1.001 and 1.002 relied upon to provide reasons for the decision not provided as reasons by Council with the decision notice or in response to the request for reasons.

Mr Heading's evidence is admissible.

The evidence provides elucidation of his reasoning. The evidence does not impermissibly change, or augment, his reasoning. The evidence is consistent with the NADA report.

SCHEDULE B

FIGURE G

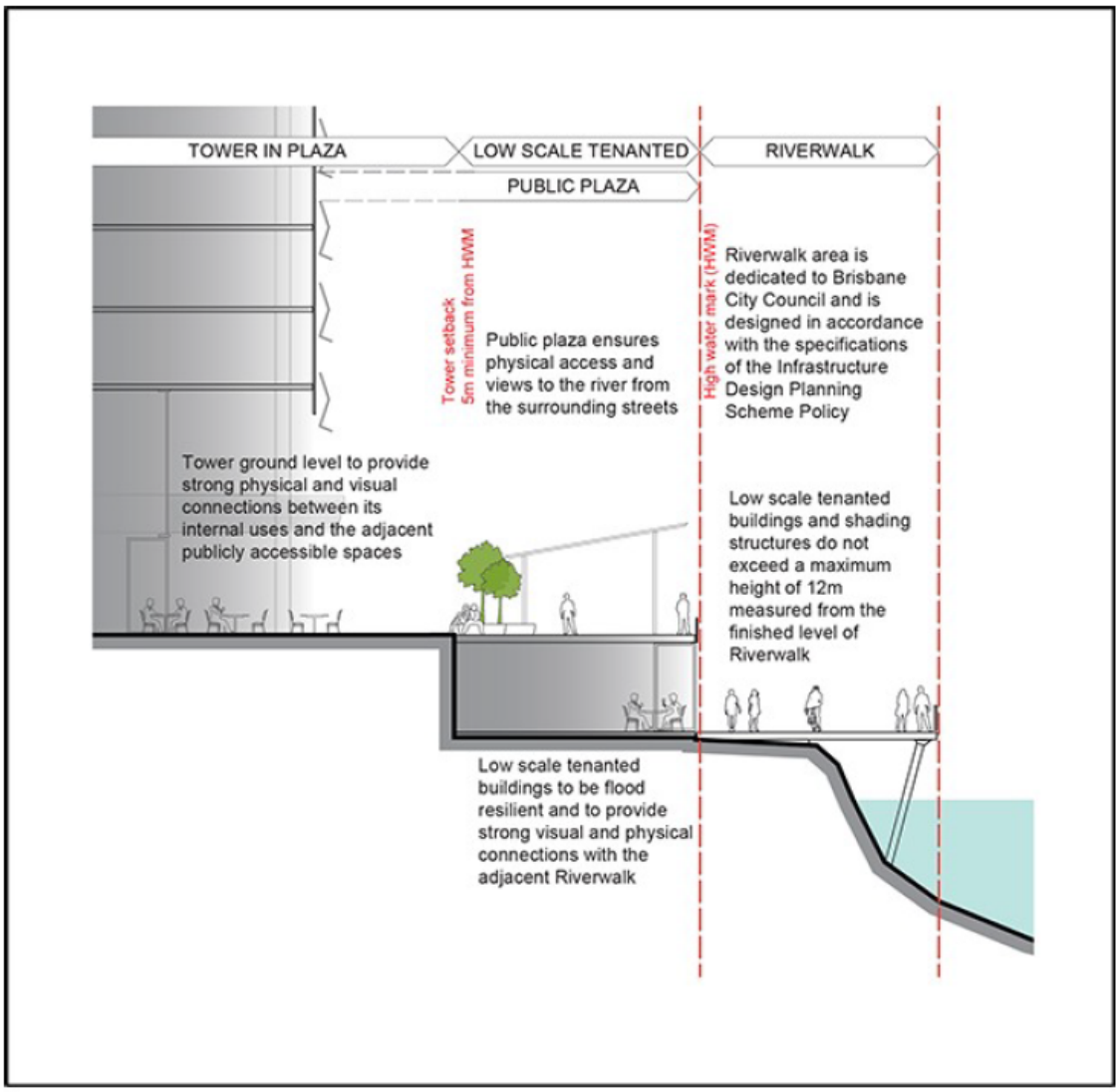

Figure g - River precinct cross section

SCHEDULE C

ANSWERS TO RIVERSIDE'S AMENDED LIST OF DISPUTED ISSUES (6.006)

Question 1: No.

Question 2: No.

Question 3: Unnecessary to answer.

Question 4(a): No.

Question 4(b): No.

Question 4(c): No.

Question 4(d): No.

Question 5: No.

Question 6: No. The delegate decided the application under s 60(2)(a) of the Act. There was no error that vitiated the decision.

Question 7: Unnecessary to answer.

Question 8: No. I would in any event have excused any non-compliance under s 37 of the *Planning & Environment Court Act 2016*.

Question 9(a): No.

Question 9(b): No.

Question 9(c): No.

Question 10: No.

Question 11(a): No.

Question 11(b): No.

Question 11(c): No.

Question 12: Unnecessary to answer.

SCHEDULE D

ANSWERS TO DEXUS PARTIES LIST OF DISPUTED ISSUES

Ex.8.022, Schedule 1

Question 1(a): No.

Question 1(b): Unnecessary to answer.

Question 2(a): At least 11,157m^2.

Question 2(b): Yes.

Question 3(a): Unnecessary to answer.

Question 3(b): Unnecessary to answer.

Question 4A: No.

Question 4B: Unnecessary to answer.

Question 4C: Refer to Schedule A.

Question 4D: No.

Question 5: No.

Question 6: No.

Question 7: No. I would in any event have excused any non-compliance under s 37 of the *Planning & Environment Court Act 2016*.

Question 8: Yes.

Question 9: Unnecessary to answer.

Question 10: Unnecessary to answer.

Question 11(a): No.

Question 11(b): Unnecessary to answer.

Question 12: Unnecessary to answer.