

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* [2023] QPEC 44

PARTIES: **CHIDO CORPORATION OPERATIONS PTY LTD**
(ACN 619 297 997)
(Appellant)

v

DOUGLAS SHIRE COUNCIL
(Respondent)

FILE NO/S: 2827 of 2021

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 14 November 2023

DELIVERED AT: Brisbane

HEARING DATE: 5 to 8 September, 11 to 15 September, 19 September, 21 September and 12 October 2023

JUDGE: Kefford DCJ

ORDER: **The appeal is dismissed. The development application is refused.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal against the Council’s refusal of a proposed development – where the proposed development is for a new resort complex in Port Douglas – where the appellant seeks a development permit for a material change of use to facilitate a luxury, five-star, resort complex contained in a single building – whether the proposed development is inconsistent with the character of Port Douglas – whether the proposed development disregards Port Douglas’ distinctive tropical vernacular – whether the proposed development results in an unacceptable visual amenity impact – whether the proposed development includes appropriate landscape works – whether the proposed landscaping is functional and durable and provides for ease of ongoing maintenance – whether the scale of the proposed development is appropriate given its location – whether the proposed development will create a major tourist accommodation and entertainment area that will draw focus

from the Port Douglas Town Centre – whether the proposed development provides adequate car park numbers and car park management – whether there is a need for the proposed development – whether the proposed development should be approved in the exercise of discretion

- LEGISLATION: *Planning Act 2016* (Qld), ss 43, 45, 59, 60, 65
- Planning and Environment Court Act 2016* (Qld), ss 43, 45, 46, 47
- Planning Regulation 2017* (Qld) s 31, sch 24
- CASES: *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2013] 1 Qd R 1, applied
- Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257; [2021] QPELR 1003, applied
- Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2007] QPEC 112; [2008] QPELR 342, approved
- Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16; [2019] QPELR 793, approved
- Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157, applied
- Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253; [2021] QPELR 987, applied
- Buderim Private Hospital Pty Ltd v Maroochy Shire Council & Anor* [1996] QPELR 251, approved
- Caravan Parks Association of Queensland Limited v Rockhampton Regional Council* [2018] QPEC 52; [2019] QPELR 221, approved
- Cleanaway Solid Waste Pty Ltd v Ipswich City Council & Ors* [2023] QPEC 26, approved
- Garyf Pty Ltd v Maroochy Shire Council & Ors* [2008] QPEC 101; [2009] QPELR 435, approved
- Harris v Scenic Rim Regional Council* [2014] QPEC 16; [2014] QPELR 324, cited
- Heath v Brisbane City Council* [2008] QPEC 33; [2008] QPELR 566, approved
- I.B. Town Planning v Sunshine Coast Regional Council* [2021] QPEC 36; [2022] QPELR 791, approved
- Intrafield Pty Ltd v Redland Shire Council* [2001] QCA 116; (2001) 116 LGERA 350, applied
- Isgro v Gold Coast City Council & Anor* [2003] QPEC 2; [2003] QPELR 414, approved

K Page Main Beach Pty Ltd v Gold Coast City Council & Ors [2011] QPEC 1; [2011] QPELR 406, approved

Knight v FP Special Assets Ltd [1992] HCA 28; (1992) 174 CLR 178, cited

Lantrak Property Holdings (Qld) Pty Ltd v Ipswich City Council & Ors [2023] QPEC 25, approved

McBain v Clifton Shire Council & Ors (1996) 2 Qd R 493, applied

McKay v Brisbane City Council & Anor; Panozzo v Brisbane City Council & Anor; Jensen v Brisbane City Council & Anor [2021] QPEC 42; [2022] QPELR 963, approved

Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council [1996] 1 Qd R 347, applied

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

Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc [1994] HCA 54; (1994) 181 CLR 404, cited

Parmac Investments Pty Ltd v Brisbane City Council & Ors [2018] QPEC 32; [2018] QPELR 1026, approved

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28, (1998) 194 CLR 355, applied

Sanad Capital Pty Ltd v Sunshine Coast Regional Council & Anor [2023] QPEC 8, approved

SAS Trustee Corporation v Miles [2018] HCA 55; (2018) 265 CLR 137, applied

Southway Services No. 2 Pty Ltd v Brisbane City Council [2022] QPEC 8; [2023] QPELR 544, approved

SZTAL v Minister for Immigration and Border Protection & Anor [2017] HCA 34; (2017) 262 CLR 362, applied

The Purcell Family v Gold Coast City Council [2004] QPEC 9; [2004] QPELR 521, approved

Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors [2021] QCA 95; [2022] QPELR 309, applied

Weinstock v Beck [2013] HCA 14; (2013) 251 CLR 396, cited

Westfield Management Limited v Pine Rivers Shire Council & Anor [2005] QPEC 15; [2005] QPELR 534, approved

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

[2021] QPELR 1321, applied

Wingate Properties Pty Ltd v Brisbane City Council & Ors
[2001] QPELR 272, approved

Woolworths Ltd v Maryborough City Council (No. 2) [2005]
QCA 262; [2006] 1 Qd R 273, applied

Yorkeys Knob BP Pty Ltd v Cairns Regional Council [2022]
QCA 168, applied

Zappala Family Co Pty Ltd v Brisbane City Council;
Brisbane City Council v Zappala Family Co Pty Ltd [2014]
QCA 147; [2014] QPELR 686, applied

COUNSEL: E Morzone KC and D Whitehouse for the Appellant
M Batty and J Bowness for the Respondent

SOLICITORS: Mills Oakley for the Appellant
King & Company Solicitors for the Respondent

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Introduction

- [1] Approximately 65 kilometres north of Cairns is the tropical resort town of Port Douglas. It is situated between two internationally renowned, UNESCO World Heritage natural attractions being the Great Barrier Reef to the east and the Daintree Rainforest to the west. These natural attractions, coupled with the outstanding scenic setting and character of Port Douglas, contribute to Port Douglas' status as one of Australia's premier tourist destinations.
- [2] Chiodo Corporation Operations Pty Ltd wants to develop a new resort complex in this tropical resort town. It seeks to do so on a vacant parcel of land at 71 to 85 Port Douglas Road, Port Douglas ("*the subject land*"). It applied to Douglas Shire Council ("*the Council*") for a development permit for material change of use to facilitate that goal.
- [3] On 28 September 2021, the Council refused the development application. This is an appeal against that decision.

- [4] Since the appeal was commenced, Chiodo Corporation Operations Pty Ltd has made several changes to its development application. It now seeks a development permit for a material change of use to facilitate a luxury, five-star, resort complex contained in a single building. The building has five levels and a rooftop terrace containing roofed structures. It is approximately 165 metres long and 75 metres wide (“*the proposed development*”). The resort complex is to comprise tourist and visitor accommodation in 240 guest rooms integrated with extensive leisure facilities, including restaurants and bars, meeting and function facilities, and sporting, fitness and recreation facilities.
- [5] The Council contends that, even in its latest form, the development application should be refused. Its case is premised on non-compliance with several assessment benchmarks in version 1.0 of the Douglas Shire Planning Scheme 2018 (“*the Planning Scheme*”). At the hearing, the Council confined its case to a small number of assessment benchmarks that it says are most representative of the planning difficulties presented by the proposed development.
- [6] The Council’s primary contention is that the design of the built form and the landscape character of the proposed development is unacceptable. It says that the design, including its overall height, bulk and scale, leads to unacceptable impacts on the character and sense of place of Port Douglas and the local area. It says it will result in unacceptable visual amenity impacts. In addition, the Council contends that the proposed development is incompatible with the landscape character intended for the local area.
- [7] The Council says that Port Douglas, and the local area, is characterised by:
- (a) a relatively dispersed and modulated built form pattern;
 - (b) a prevailing low-rise built form character (up to three storeys); and
 - (c) resorts designed by reference to the distinctive architectural language of tropical Queensland, with built form dispersed amongst areas of landscaping and pools.
- [8] According to the Council, the overall presence and density of tropical vegetation surrounding development typically reduces its visibility and contributes to the character, identity and sense of place of Port Douglas.
- [9] The Council contends that the proposed development will instead present as an over-scaled, intense resort development that disregards the distinctive tropical vernacular that makes Port Douglas special and informs the sense of place for both residents and visitors. The Council also contends that the character and amenity impacts occasioned by the proposed built form are not ameliorated by the proposed landscaping. The Council says that the proposed landscaping is inconsistent with the landscape character of the area and is not functional.
- [10] Another of the Council’s key contentions is that the proposed development, by reason of its incorporation of intense dining, function and entertainment uses, is not appropriately located. The Council says that the proposed leisure facilities are of a scale that would draw focus away from the Port Douglas town centre, contrary to the Council’s deliberate forward planning strategy.

- [11] The Council also raises an issue about the adequacy of the proposed carpark arrangements.
- [12] Chiodo Corporation Operations Pty Ltd disputes the alleged non-compliances with the Planning Scheme.
- [13] Chiodo Corporation Operations Pty Ltd contends that the sense of place, character and style of Port Douglas is not fixed. Rather, it is reflective of its historical context, tourism expansion and the planning intentions for shaping the future. Chiodo Corporation Operations Pty Ltd says that the Planning Scheme intends to enhance Port Douglas' national and international reputation as a premier tourism destination, thereby creating a "buzz" and providing tourism and employment opportunities and experiences that are unique to the region.
- [14] Chiodo Corporation Operations Pty Ltd contends that the character of the immediate area is one of tourist activities and buildings that are dominated by landscaping and only partially visible by reason of the location of the activities and buildings adjacent to roads that are enclosed by avenues of native and non-native vegetation. It says that the proposed development is designed to be a five-star resort that is special and attractive to international and national visitors. Chiodo Corporation Operations Pty Ltd accepts that the built form is different to existing built form in the area, but nevertheless says that aligns with the character of the area as the built form is dominated by tropical vegetation and appropriate landscaping.
- [15] With respect to the size and location of the proposed development, Chiodo Corporation Operations Pty Ltd says that the proposed development is appropriately located. It says that the purpose of the Tourist accommodation zone is to provide for short-term accommodation for visitors. It asserts that the integrated leisure facilities, provided in conjunction with the proposed short-term accommodation, will not result in any unacceptable impact on the Port Douglas town centre.
- [16] Chiodo Corporation Operations Pty Ltd also advances an alternative case that, to the extent that the proposed development does not comply with the assessment benchmarks, having regard to the economic need for the proposed development and the other benefits it provides, the development application should be approved in the exercise of the planning discretion.
- [17] Chiodo Corporation Operations Pty Ltd bears the onus of establishing that the appeal should be allowed, and the development application approved.¹

What is the applicable framework for the decision?

- [18] The appeal proceeds, generally, by way of hearing anew.² The Court assesses the development application under s 45 of the *Planning Act 2016* (Qld) as if it were the assessment manager.³
- [19] The Court has a broad discretion in determining the appeal. It has power to confirm the decision appealed against, or change the decision appealed against, or set it

¹ *Planning and Environment Court Act 2016* s 45.

² *Planning and Environment Court Act 2016* s 43, subject to ss 46(2) and (5) of the *Planning and Environment Court Act 2016*.

³ *Planning and Environment Court Act 2016* s 46(2).

aside and either make a decision replacing it or return the matter to the Council with directions the Court considers appropriate.⁴

[20] The Court’s broad discretion should be exercised judicially⁵ and subject to the limitations in the relevant statutes.⁶ The *Planning and Environment Court Act 2016* (Qld) and the *Planning Act 2016* provide relevant guidance.

[21] The development application required impact assessment. For that reason, the exercise of the discretion is to be based on an assessment that:⁷

(a) must be carried out:

(i) against the assessment benchmarks in the Planning Scheme⁸ to the extent that they are relevant;⁹

(ii) having regard, to the extent they are relevant, to:

(A) any development approval for, and any lawful use of, the premises and adjacent premises, including the development permit for a material change of use with respect to the subject land, the details of which are recorded in the decision notice dated 22 August 2017 (“*the existing approval*”); and

(B) the common material;¹⁰

(b) may be carried out against, or having regard to, any other relevant matter, other than a person’s personal circumstances (financial or otherwise).

[22] The assessment and decision-making process is to be approached consistent with the Court of Appeal decisions of *Brisbane City Council v YQ Property Pty Ltd*,¹¹ *Abeleda & Anor v Brisbane City Council & Anor*,¹² *Wilhelm v Logan City Council & Ors*¹³ and *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors*.¹⁴ Collectively, those cases confirm the approach articulated in *Ashvan Investments Unit Trust v Brisbane City Council & Ors*.¹⁵ That approach is also consistent with that described in

⁴ *Planning and Environment Court Act 2016* s 47. The type of decision that may be made is also governed by s 60 of the *Planning Act 2016*.

⁵ *Knight v FP Special Assets Ltd* [1992] HCA 28; (1992) 174 CLR 178, 205; *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* [1994] HCA 54; (1994) 181 CLR 404, 421; *Weinstock v Beck* [2013] HCA 14; (2013) 251 CLR 396, 419-20.

⁶ *Planning and Environment Court Act 2016* s 47; *Planning Act 2016* s 60(3).

⁷ *Planning Act 2016* ss 45 and 59.

⁸ Douglas Shire Planning Scheme 2018 is a local categorising instrument: *Planning Act 2016* s 43. Version 1.0 of the Planning Scheme was the categorising instrument for the development in effect when the development application was properly made on 5 January 2021. There are no relevant amendments to the Planning Scheme.

⁹ In the appeal, it is only necessary to carry out an assessment against the assessment benchmarks in the Planning Scheme to the extent that they are put in dispute by the parties.

¹⁰ *Planning Regulation 2017* s 31 and sch 24.

¹¹ [2020] QCA 253; [2021] QPELR 987.

¹² [2020] QCA 257; [2021] QPELR 1003.

¹³ [2020] QCA 273; [2021] QPELR 1321.

¹⁴ [2021] QCA 95; [2022] QPELR 309.

¹⁵ [2019] QPEC 16; [2019] QPELR 793, 803-13 [35]-[86].

*Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor.*¹⁶

What are the issues that require determination?

- [23] The parties agree that the disputed issues to be determined have been identified in a document titled “*Agreed List of Issues*”.¹⁷ An attachment to the Agreed List of Issues contains extracts of the relevant assessment benchmarks, with those parts of each assessment benchmark that are not in issue shown struck through.
- [24] I am grateful to the parties for their efforts in producing this document. As compared to the 12-page document titled “*Appellant’s Amended List of Matters relied upon to Support Approval*” and the 10-page document titled “*Respondent’s Further Amended List of Matters*”, the Agreed List of Issues appropriately confines the case to the real issues in dispute. The provision of the Agreed List of Issues with the attachment at the outset of the hearing allowed me to quickly gain a sense of the factual determinations that would be called for in deciding the appeal.
- [25] That said, the structure of the document does not identify:
- (a) whether an issue is raised as a reason for refusal or approval; or
 - (b) whether an issue is relied on in combination with other issues or is said to be determinative of the appeal on its own.
- [26] The need to identify such matters when articulating issues in an appeal was identified some years ago by His Honour Judge Williamson KC in *Ashvan Investments Unit Trust v Brisbane City Council & Ors*¹⁸ and was more recently the subject of comment by His Honour in *Lantrak Property Holdings (Qld) Pty Ltd v Ipswich City Council & Ors*¹⁹ and *Cleanaway Solid Waste Pty Ltd v Ipswich City Council & Ors*.²⁰
- [27] Although it would have been helpful to have a document structured in that manner, during their openings, Counsel for each of the parties provided that assistance. I thank Mr Morzone KC and Ms Whitehouse, Counsel for Chiodo Corporation Operations Pty Ltd, and Mr Batty and Ms Bowness, Counsel for the Council, for their assistance in that regard. The clarity with which Counsel outlined the nature of their client’s respective cases at the outset of the hearing assisted me to efficiently rule on objections during the case. I was also readily able to appreciate the significance of the witnesses’ evidence while it was given thanks to the efforts of the respective Counsel in identifying, during opening addresses:
- (a) those issues that were said to have the greatest potential to influence the exercise of the discretion under s 60(3) of the *Planning Act 2016*;
 - (b) those issues that inform the exercise of the discretion but that are not, of themselves, sufficient to warrant refusal; and
 - (c) the matters raised in support of approval.

¹⁶ [2019] QPEC 46; [2020] QPELR 328, 333-7 [12]-[22].

¹⁷ Exhibit 8.09.

¹⁸ [2019] QPEC 16; [2019] QPELR 793, 809-10 [65]-[69].

¹⁹ [2023] QPEC 25, [182]-[188].

²⁰ [2023] QPEC 26, [205]-[207].

[28] With the Agreed List of Issues and the cases for approval and refusal in mind, in my view, there are nine issues to be determined, namely:

1. Will the proposed development have an unacceptable impact on the character and sense of place of Port Douglas and the local area?
2. Will the proposed development result in an unacceptable visual amenity impact?
3. Does the proposed development include appropriate landscape works?
4. Is the scale of the proposed development appropriate given its location?
5. Does the proposed development provide adequate car park numbers and car park management?
6. What are the relevant matters relied on by the parties under s 45(5)(b) of the *Planning Act 2016*?
7. Is there a need for the proposed development?
8. Are there other benefits provided by the proposed development that lend weight to its approval?
9. Should the proposed development be approved in the exercise of the planning discretion?

[29] It is common ground between the parties that the outcome of the case is likely to be informed, in large measure, by my findings about the appropriateness of the design and landscaping of the proposed development having regard to its character and amenity impacts and the appropriateness of the scale of the use proposed to be located on the subject land.

[30] I now turn to consider each of the issues.

Will the proposed development have an unacceptable impact on character?

[31] As identified in paragraphs [6] to [9] above, the Council contends that the design of the built form and the landscape character of the proposed development is inappropriate and will have unacceptable impacts on the character and amenity of the area. It says that the proposed development will present as an over-scaled, intense resort development which disregards the distinctive tropical vernacular that makes Port Douglas special and informs the sense of place for both residents and visitors.²¹

[32] The Council's contentions about the unacceptable character impact are informed by the requirements of the Planning Scheme, particularly:

- (a) s 3.2.2.2(5) of the Strategic framework;
- (b) the overall outcome in s 7.2.4.3(3)(d) and performance outcome PO4 of the Port Douglas / Craiglie local plan code;
- (c) the overall outcome in s 6.2.14.2(3)(b) and performance outcomes PO1, PO1 (Setbacks), PO2 and PO3 of the Tourist accommodation zone code;

²¹ Written opening on behalf of the Respondent p 4 [10].

- (d) the overall outcome in s 8.2.6.2(2)(h) and performance outcome PO3(c) of the Landscape values overlay code; and
- (e) the overall outcome in s 9.4.6.2(2)(a) and performance outcomes PO1(c) and PO2 of the Landscaping code.

[33] It is uncontentional that the provisions to which the Council refers are relevant assessment benchmarks. This is unsurprising given:

- (a) impact assessable development must be assessed against the whole of the Planning Scheme, to the extent relevant;²²
- (b) the subject land is in the Tourist accommodation zone²³ and the assessment benchmarks in the Tourist accommodation zone code apply to development in that zone;²⁴
- (c) the subject land is in the Port Douglas / Craiglie local plan area as identified on the Port Douglas / Craiglie local plan map²⁵ and the Port Douglas / Craiglie local plan code applies to that local plan area;²⁶
- (d) part of the subject land is mapped as a scenic route buffer on the Landscape values overlay map²⁷ and the Landscape values overlay code applies to impact assessable development that is in the scenic route buffer sub-category on the Landscape values overlay map;²⁸ and
- (e) the Landscape code applies for assessing a proposed material change of use that is impact assessable.²⁹

[34] Chiodo Corporation Operations Pty Ltd disputes the alleged non-compliances with the Planning Scheme.

What do the assessment benchmarks stipulate in relation to character?

[35] The first assessment benchmark relied on by the Council to found its allegation of unacceptable character impact is s 3.2.2.2(5) of the Strategic framework.

[36] Section 3.2.2.2(5) forms part of the strategic intent for “*Shaping the future*” by “*Reinforcing Douglas Shire’s sense of place and identity*”. It states:

“Port Douglas will retain it (sic) lively tropical tourism ‘buzz’ as a premier tourist destination. Development will be carefully planned to achieve sensitive incremental change, rather than instant, over-scaled development projects, that have little local context or character.”

²² Planning Scheme s 5.4(1)(d): Exhibit 9.01 pp 70 and 133.

²³ Exhibit 9.01 paragraph (g) and p 506.

²⁴ Planning Scheme s 6.2.13.1(1): Exhibit 9.01 p 176.

²⁵ Exhibit 9.01 paragraph (g) and p 506.

²⁶ Planning Scheme s 7.2.4.1(1): Exhibit 9.01 p 209.

²⁷ Exhibit 9.01 paragraph (g) and pp 506 and 513.

²⁸ Planning Scheme ss 8.2.6.1(1) and (2): Exhibit 9.01 p 263.

²⁹ Planning Scheme s 9.4.6.1(1): Exhibit 9.01 p 390.

[37] The next two assessment benchmarks relevant to the character issue are in the Port Douglas / Craiglie local plan code. They are the overall outcome in s 7.2.4.3(3)(d) and performance outcome PO4.

[38] The overall outcomes in s 7.2.4.3(3)(d) states:

“(d) All forms of development will complement the tropical image of the town through distinctive tropical vernacular, urban design and landscaping.”

[39] Performance outcome PO4 applies to development in the Port Douglas / Craiglie local plan area generally. The performance outcome, and the associated acceptable outcome, state:

Performance outcomes	Acceptable outcomes
<p>PO4</p> <p>Landscaping of development sites complements the existing tropical character of Port Douglas and Craiglie.</p>	<p>AO4</p> <p>Landscaping incorporates the requirements of Planning scheme policy SC6.7 – Landscaping, in particular landscaping should be capable of achieving a 60% screening of development within 5 years and predominantly consists of endemic vegetation.</p>

[40] The next five assessment benchmarks in issue with respect to the character impacts are in the Tourist accommodation zone code. They are the overall outcome in s 6.2.14.2(3)(b) and performance outcomes PO1, PO1(a) (Setbacks), PO2 and PO3.

[41] The overall outcome in s 6.2.14.2(3)(b) states:

“Tourist development is of an appropriate scale and achieves an attractive built form which incorporates the character and natural attributes of the site and the surrounding area as integral features of the theme and design of the development.”

[42] The performance outcomes in the Tourist accommodation zone code achieve the overall outcomes and the purpose of the code.³⁰ The associated acceptable outcomes are not mandatory. They are technical measures or standards that set a benchmark for assessment of individual applications that may be varied on the merits of an assessment of the corresponding performance outcomes and the purpose and overall outcomes.³¹

[43] The performance outcomes in issue, and their associated acceptable outcomes, state:

Performance outcomes	Acceptable outcomes
PO1	AO1

³⁰ Planning Scheme s 6.1(7): Exhibit 9.01 p 135.

³¹ Planning Scheme s 5.4(1)(c)(iii) and associated note: Exhibit 9.01 p 70.

<p>The height of all buildings and structures must be in keeping with the residential character of the area.</p>	<p>Buildings and structures are not more than 13.5 metres and 3 storeys in height.</p> <p>Note – Height is inclusive of roof height.</p>
<p>Setbacks (other than for a dwelling house)</p>	
<p>PO1</p> <p>Buildings are setback to:</p> <p>(a) maintain the character and amenity of the area;</p> <p>(b) achieve separation from neighbouring buildings and from road frontages.</p>	<p>AO1</p> <p>Buildings are setback:</p> <p>(a) a minimum of 6 metres from the main street frontage;</p> <p>(b) a minimum of 4 metres from any secondary street frontage;</p> <p>(c) 4.5 metres from a rear boundary;</p> <p>(d) 2 metres from a side or an average of half of the height of the building at the side setback, whichever is the greater.</p>
<p>Site coverage (other than for a dwelling house)</p>	
<p>PO2</p> <p>The site coverage of all buildings does not result in a built form that is bulky or visually obtrusive.</p>	<p>AO2</p> <p>The site coverage of any building is limited to 50%</p>
<p>Building proportions and scale (other than for a dwelling house)</p>	
<p>PO3</p> <p>The proportions and scale of any development are in character with the area and local streetscape.</p>	<p>AO3.1</p> <p>The overall length of a building does not exceed 30 metres and the overall length of any continuous wall does not exceed 15 metres.</p> <p>AO3.2</p> <p>Balconies, patios and similar spaces are not enclosed or capable of being enclosed and used as a habitable room.</p> <p>AO3.3</p> <p>Balconies, patios and similar spaces are designed to be open and light weight in appearance with a maximum of 20% of the façade being fully enclosed.</p>

	<p>AO3.4</p> <p>Roof forms, materials and colours of buildings enhance the amenity of the street and locality, including:</p> <p>(a) the roofs of buildings are light coloured and non-reflecting;</p> <p>(b) white and shining metallic finishes are avoided on external surfaces in prominent view.</p> <p>Note – The building incorporates building design features and architectural elements detailed in Planning scheme policy SC 6.2 – Building design and architectural elements.</p>
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(emphasis added to reflect the allegations made by the Council)

[44] The assessment benchmarks in the Landscape values overlay code that are put in issue with respect to character are the overall outcome in s 8.2.6.2(2)(h) and performance outcome PO3(c).

[45] The overall outcome in s 8.2.6.2(2)(h) states:

“development is consistent with the prevailing landscape character of its setting, and is neither visually dominant nor visually intrusive.”

(emphasis added to reflect the allegations made by the Council about character)

[46] Performance outcome PO3 and the associated acceptable outcome state:

Performance outcomes	Acceptable outcomes
Development within a Scenic route buffer / view corridor area	
<p>PO3</p> <p>Development within a Scenic route buffer / view corridor area as identified on the Landscape values overlay maps contained in Schedule 2:</p> <p>(a) retains visual access to views of the surrounding landscape, the sea and other water bodies;</p> <p>(b) retains existing vegetation and</p>	<p>AO3.1</p> <p>Where within a Scenic route buffer / view corridor area, the height of buildings and structures is not more than identified within the acceptable outcomes of the applicable zone code.</p> <p>AO3.2</p> <p>No clearing of native vegetation is undertaken within a Scenic route buffer area.</p>

<p>incorporates landscaping to visually screen and soften built form elements whilst not impeding distant views or view corridors;</p> <p>(c) incorporates building materials and external finishes that are compatible with the visual amenity and the landscape character;</p> <p>(d) minimises visual impacts on the setting and views in terms of:</p> <p>(i) the scale, height and setback of buildings;</p> <p>(ii) the extent of earthworks and impacts on the landform including the location and configuration of access roads and driveways;</p> <p>(iii) the scale, extent and visual prominence of advertising devices.</p> <p>Note - A visual impact assessment is undertaken in accordance with Planning scheme policy SC6.6 – Landscape values in order to satisfy performance outcomes.</p>	<p>A03.3</p> <p>Where within a Scenic route buffer / view corridor area development is set back and screened from view from a scenic route by existing native vegetation with a width of at least 10 metres and landscaped in accordance with the requirements of the landscaping code.</p> <p>A03.4</p> <p>Development does not result in the replacement of, or creation of new, additional, or enlarged advertising devices.</p>
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(emphasis added to reflect the allegations made by the Council about character)

[47] The final three assessment benchmarks relating to character impacts are in the Landscaping code. They are the overall outcome in s 9.4.6.2(2)(a) and performance outcomes PO1(c) and PO2.

[48] The overall outcome in s 9.4.6.2(2)(a) states:

“(a) The tropical, lush landscape character of the region is retained, promoted and enhanced through high quality landscape works”

[49] Performance outcomes PO1 and PO2, and their associated acceptable outcomes, state:

Performance outcomes	Acceptable outcomes
Landscape design	
PO1	AO1
Development provides	Development provides landscaping:

<p>landscaping that contributes to and creates a high quality landscape character for the site, street and local areas of the Shire by:</p> <ul style="list-style-type: none"> (a) promoting the Shire's character as a tropical environment; (b) softening the built form of development; (c) enhancing the appearance of the development from within and outside the development and makes a positive contribution to the streetscape; (d) screening the view of buildings, structures, open storage areas, service equipment, machinery plant and the like from public places, residences and other sensitive development; (e) where necessary, ensuring the privacy of habitable rooms and private outdoor recreation areas; (f) contributing to a comfortable living environment and improved energy efficiency, by providing shade to reduce glare and heat absorption and re-radiation from buildings, parking areas and other hard surfaces; (g) ensuring private outdoor recreation space is useable; (h) providing long term soil erosion protection; (i) providing a safe environment; (j) integrating existing vegetation and other natural features of the premises into the development; 	<ul style="list-style-type: none"> (a) in accordance with the minimum area, dimensions and other requirements of applicable development codes; (b) that is designed and planned in a way that meets the guidelines for landscaping outlined in Planning Scheme Policy SC6.7 – Landscaping; (c) that is carried out and maintained in accordance with a landscaping plan that meets the guidelines for landscaping outlined in Planning Scheme Policy SC6.7 – Landscaping. <p>Note - Planning scheme policy SC6.7 – Landscaping provides guidance on meeting the outcomes of this code. A landscape plan submitted for approval in accordance with the Planning policy is one way to achieve this outcome.</p>
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(k) not adversely affecting vehicular and pedestrian sightlines and road safety.	
<p>PO2</p> <p>Landscaping contributes to a sense of place, is functional to the surroundings and enhances the streetscape and visual appearance of the development.</p>	<p>AO2.1</p> <p>No acceptable outcomes are specified.</p> <p>Note - Landscaping is in accordance with the requirements specified in Planning scheme policy SC6.7 – Landscaping.</p> <p>AO2.2</p> <p>Tropical urbanism is incorporated into building design.</p> <p>Note – ‘Tropical urbanism’ includes many things such as green walls, green roofs, podium planting and vegetation incorporated into the design of a building.</p>

(emphasis added to reflect the allegations made by the Council)

[50] When these provisions are read in their broader statutory context,³² it is evident that:

- (a) the Strategic framework sets the policy direction for the Planning Scheme and forms the basis for ensuring that appropriate development occurs within the Planning Scheme area for the life of the Planning Scheme;³³
- (b) local plan codes addresses matters at the local level,³⁴ including by:
 - (i) identifying the qualities that make the local plan area special, including environmental and built form characteristics;
 - (ii) promoting gateway treatments, nodes of activity, viewing corridors and landmark sites; and
 - (iii) defining an interface boundary between urban and rural areas to reinforce the sense of town and country;³⁵

³² Consistent with the principles and canons of statutory construction that apply to the construction of planning documents and noting that the Planning Scheme is to be read as a whole and as intending to achieve balance between outcomes: *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2013] 1 Qd R 1 and *Zappala Family Co Pty Ltd v Brisbane City Council; Brisbane City Council v Zappala Family Co Pty Ltd* [2014] QCA 147; [2014] QPELR 686, 698-700 [52]-[58]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355, 381-2 [69]-[71]; *SZTAL v Minister for Immigration and Border Protection & Anor* [2017] HCA 34; (2017) 262 CLR 362, 368 [14]; *SAS Trustee Corporation v Miles* [2018] HCA 55; (2018) 265 CLR 137, 149 [20].

³³ Planning Scheme s 3.1(1): Exhibit 9.01 p 23.

³⁴ Planning Scheme s 7.1(1): Exhibit 9.01 p 181.

³⁵ Planning Scheme s 3.2.2.2(3): Exhibit 9.01 p 38.

- (c) the Port Douglas / Craiglie local plan code:
- (i) facilitates development outcomes consistent with community values, the local tropical built-form and protection of the natural environment within the Port Douglas / Craiglie local plan area;³⁶
 - (ii) does not include the subject land as part of an identified precinct, but intends that it will form part of the Craiglie area that is to be developed as an integrated residential community with some low scale tourism;³⁷
 - (iii) is largely silent as to specific built form parameters for the subject site, but seeks to ensure that all forms of development in the local plan area will complement the tropical image of Port Douglas and Craiglie, through distinctive tropical vernacular, urban design and landscaping;³⁸
- (d) the assessment benchmarks in the Tourist accommodation zone code are directed at providing short-term tourist accommodation at an appropriate scale that is supported by community uses and small-scale services and facilities in locations that are close to commercial and recreational services and facilities to:³⁹
- (i) support the economic growth of the Shire;⁴⁰ and, simultaneously
 - (ii) maintain and enhance the distinctive character and identity of the Shire's towns, including by site specific tropical design which adapts franchise corporate designs to integrate with the established urban qualities of the Shire's local communities and that make those communities distinct from other places;⁴¹
- (e) to the extent that it is relevant to this case, the Landscape values overlay code is directed at the protection of scenic amenity, sense of place and landscape character;⁴² and
- (f) the Landscaping code is primarily directed at ensuring the landscaping aspects of a particular proposal are functional and of a high quality, and enhance the visual quality, amenity and identity of the area.⁴³

[51] When the provisions on which the Council relies are read in the context of the whole Planning Scheme, one readily discerns a strong planning policy to maintain the distinctive sense of place and character of Port Douglas and the various communities within Port Douglas. Various assessment benchmarks align with, and support achievement of, this policy.

³⁶ Planning Scheme s 7.2.4.3(1): Exhibit 9.01 p 210.

³⁷ Planning Scheme s 7.2.4.3(3)(c): Exhibit 9.01 p 210.

³⁸ Planning Scheme ss 7.2.4.3(3)(d) and (g) and performance outcomes PO2, PO3 and PO4: Exhibit 9.01 pp 210 and 215.

³⁹ Planning Scheme ss 6.2.14.2(1), (2), (3)(a), (c), (d), (e) and performance outcomes PO1, PO1 (setbacks), PO2, PO3, PO4, PO6, PO7, and PO9: Exhibit 9.01 pp 176-8.

⁴⁰ Planning Scheme ss 3.8.2.1(1), 3.8.3(1) and (2), 3.8.3.1(1), (4) and (5), 6.2.14.2(2)(a)(ii): Exhibit 9.01 pp 59 and 176.

⁴¹ Planning Scheme ss 3.7.4(1), (2) and (3), and 3.7.4.1(1) and (3), and 6.2.14.2(2)(a)(i): Exhibit 9.01 pp 55-6 and 176.

⁴² Planning Scheme ss 3.5.5(1), 3.5.5.1(1) and (2), and 8.2.6.2(1)(a)(i): Exhibit 9.01 pp 50 and 263.

⁴³ Planning Scheme ss 9.4.6.2(1), (2)(a), (c), (e), (f), and (g) and performance outcomes PO1, PO2, PO3, PO4, PO6, PO7 and PO10: Exhibit 9.01 pp 390-2.

- [52] The character and sense of place that is sought to be achieved is not one that is “*distinctive*” in terms of being different to the design and character of built form present in the local area. Rather, the built form is to integrate with established urban qualities that distinguishes the local area from other parts of Queensland. The distinctive sense of place is informed by the Shire’s natural and rural settings; its unmistakable built form, being Queensland tropical vernacular; and its landscape setting. Combined, these attributes make a vital contribution to the Shire’s identity which, in turn, contributes to the everyday experiences of residents and visitors alike.
- [53] The protection of Port Douglas’ character is not the only planning policy sought to be achieved in the Planning Scheme. The Planning Scheme also has an economic growth policy. That policy seeks the provision of tourist accommodation of an appropriate scale to support economic growth. That said, the character and sense of place of Port Douglas underpins achievement of both the policy with respect to character and the economic policy. This is evident from the acknowledgment in the Planning Scheme that the character and sense of place of Port Douglas is critical to the tourism industry, which is one of two principal determinants of economic activity and employment in Douglas Shire.
- [54] Collectively, the assessment benchmarks are directed at achieving the provision of tourist accommodation while ensuring that such accommodation is:
- (a) designed for the tropical climate; and
 - (b) maintains and enhances the distinctive character and identity of Port Douglas generally and the relevant local area.⁴⁴
- [55] Given the importance that the Planning Scheme places on its planning policy with respect to character, it is unsurprising that both parties submit that the outcome of this appeal will largely turn on my determinations with respect to character.
- [56] With those matters in mind, I return to an assessment of the proposed development against the assessment benchmarks that the Council has put in issue about the design of the built form and the landscaping, and the character and amenity impact of it. Those assessment benchmarks raise the following four key factual questions for determination.
1. What is the character of Port Douglas?
 2. What is the character of the local area surrounding the subject land?
 3. What are the design attributes of the proposed development?
 4. Will the proposed development have an unacceptable impact on the character and sense of place of Port Douglas and the local area?

⁴⁴ Planning Scheme ss 3.2.1.1(3) and (4), 3.2.1.2(9) and (10), 3.2.1.3(1), 3.2.1.4(3)(e)(i), 3.2.1.6(1), (2) and (3), 3.2.1.7(1) and (3), 3.2.2.1(1), 3.2.2.2(1), (2), (3) and (5), 3.5.5(1), 3.5.5.1(1) and (2), 3.7.1(2), (3) and (4), 3.7.4(1), (2) and (3), 3.7.4.1(1) and (3), 3.8.2.1(1), 3.8.3(1) and (2), 3.8.3.1(2), (4) and (5), 6.2.14.2(1), (2), and (3)(a), (c), (d), and (e) and 6.2.14.3 performance outcomes PO1, PO1 (setbacks), PO2, PO3, PO4, PO6, PO7, and PO9, 7.2.4.3(1) and (3)(c), (d) and (g) and 7.2.4.4 performance outcomes PO2, PO3 and PO4, 8.2.6.2(1)(a)(i), 9.4.6.2(1), (2)(a), (c), (e), (f), and (g), and 9.4.6.3 performance outcomes PO1, PO2, PO3, PO4, PO6, PO7 and PO10: Exhibit 9.01 pp 29-30, 32-4, 37-8, 50, 53-6, 59-60, 176-8, 210, 215, 263, and 390-2.

[57] Before answering those questions, it is useful to make four general observations.

[58] First, to assist me with the assessment of the proposed development against the applicable assessment benchmarks, including the determination of the issues to which I refer in paragraph [56], I had the benefit of:

- (a) a statement of agreed facts;⁴⁵
- (b) the plans of the proposed development,⁴⁶ which depict, amongst other things, design details of the proposed building, including the height, setback and extent of site cover of the floorplates for the various levels of the building, and building elevations and sections;
- (c) a landscape design;⁴⁷
- (d) many photographs of the area, including photographs of other buildings in the area and of the streetscape;⁴⁸
- (e) documents providing details about other development sites and other development in Port Douglas;⁴⁹
- (f) expert evidence with respect to digital photomontages given by Mr Zac Petersen, an expert retained by Chiodo Corporation Operations Pty Ltd;⁵⁰
- (g) expert evidence with respect to visual amenity and landscape architecture given by Mr Dean Butcher and Dr Nicholas McGowan, the visual amenity experts retained by Chiodo Corporation Operations Pty Ltd and the Council respectively;⁵¹
- (h) expert evidence with respect to architecture given by Mr Leslie Curtis and Mr Scott Peabody, the retained by Chiodo Corporation Operations Pty Ltd and the Council respectively;⁵²
- (i) expert evidence with respect to town planning given by Ms Jennifer Morrissy and Mr Greg Ovenden, the town planners retained by Chiodo Corporation Operations Pty Ltd and the Council respectively;⁵³
- (j) evidence of lay witnesses about their perceptions of the local area and Port Douglas;⁵⁴ and
- (k) the Planning Scheme,⁵⁵ which informs the reasonable expectations people may hold about the place.⁵⁶

⁴⁵ Exhibit 8.11.

⁴⁶ Exhibits 7.02, 7.06 and 8.20. The plans are understood in conjunction with the evidence in Exhibits 1.78, 1.79, 1.81, 1.82, 1.83 and 1.84.

⁴⁷ Exhibit 7.03.

⁴⁸ Exhibits 5.08, 5.09, 5.11, 6.11, 6.12, 8.15, 8.38, 8.41, and 9.21.

⁴⁹ Exhibits 6.09, 8.01, 8.02, 8.03, 8.13, 8.15, 8.38, 8.41, 9.07, 9.13, 9.14, 9.16, 9.17, and 9.23.

⁵⁰ Exhibits 6.11, 6.12, 6.22, 8.21, 8.27, 8.28, and 9.06, and oral testimony by the expert.

⁵¹ Exhibits 5.04, 5.08, 6.04, and 8.24, and oral testimony by the experts.

⁵² Exhibits 5.09, 6.05, and 6.06, and oral testimony by the experts.

⁵³ Exhibits 5.11, 6.01, 6.02, 6.31, and 9.24 and oral testimony by the experts.

⁵⁴ Exhibits 6.17, 6.18, 6.19, 6.20 and 6.21.

⁵⁵ Exhibits 7.01, 8.07 and 9.01.

⁵⁶ *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2007] QPEC 112; [2008] QPELR 342, 348-9 [40].

[59] There was a strongly contested issue about the accuracy and reliability of the digital photomontages prepared by Mr Petersen and the weight to be afforded to them. The Council submits that the photomontages cannot be relied on and that, given their heavy reliance on the photomontages, nor can the opinions of the other experts who were called by Chiodo Corporation Operations Pty Ltd. This is because:

- (a) Mr Butcher prepared the tree removal and retention plan, but was unable to explain how the tree removal plan fit together with the additional trees depicted on the photomontages;
- (b) Mr Petersen was unable to explain how the tree retention plan and the new vegetation in the photomontages fit together;
- (c) the photomontages have been prepared using a methodology that is based on hearsay evidence, being a model prepared by architects, which Mr Petersen accepted at face value and inserted into the montages;
- (d) the accuracy of the model cannot be tested in circumstances where there is an admitted discrepancy between the photomontages and plans in the form of an absence of deep planting area in the plans about the roof;
- (e) the photomontages depict landscaping in the planter boxes which Dr McGowan is concerned cannot, or will not, materialise as proposed due to insufficient soil volume and the impacts of a maintenance regime;
- (f) the addendum to the photomontage report imports a “*building height line*” purportedly at 13.5 metres from natural ground level, which has been measured six metres in from the front boundary. The building height line is premised on a depiction of natural ground level that relies upon the model prepared by Dr Johnson that has arbitrarily “*filled in*” the large, excavated lake on the subject land;
- (g) for viewpoints 13 to 15, which depict views from Flagstaff Hill and the Captain Cook Highway, Mr Petersen used a process whereby he decided himself what vegetation should be removed or included in the photomontages. His process of reasoning was not fully outlined in his report in a manner that permitted it to be replicated; and
- (h) Dr Johnson has noted the potential need for cut and fill processes to create a development pad for any future residential development on the “*golf course land*” with the area of vegetation relied upon to the immediate north of the subject land being included within the “*Residential*” precinct under the *Integrated Resort Development Act 1987* (Qld), unbeknownst to Mr Petersen, such that the off-site vegetation relied upon to shield the proposed development may not exist in the future.

[60] The Council’s criticisms of the photomontages are borne out by the evidence.

[61] The lack of clarity from the experts called by Chiodo Corporation Operations Pty Ltd is hardly surprising in circumstances where the collection of plans before the Court reflect various iterations of the design of the proposed development. Some plans that are sought to be approved reflect the current design of the proposed development, while others do not. This is a symptom of the appeal process being used as a vehicle to design the proposed development and several minor changes being made to a proposal without proper consideration being given to a cohesive set of plans that reflect the present design of the proposed development that Chiodo

Corporation Operations Pty Ltd seeks to have approved. My experiences with resulting difficulties in other cases informed my reluctance to accept the tender of expert reports to the extent that they addressed a form of development that was different to the development that I am to assess. Although developers may proceed to trial on a changed development application where the change is no more than a minor change, careful consideration needs to be given to the admissibility of expert reports that do not address the changed development application.

- [62] Here, the Council concedes that its criticisms are not such that the evidence is inadmissible, rather it submits they should be afforded little, if any, weight. Having regard to the matters referred to by the Council, I accept that the photomontages should be treated with a degree of caution. I do not accept them to be a photo real depiction of the proposed development. Nevertheless, I am prepared to afford them weight for the reasons that follow.
- [63] It is reasonable to expect that the final details of the landscaping will be the subject of detailed design at a later stage. This is borne in mind when considering the weight to be attributed to the photomontages. Here, Chiodo Corporation Operations Pty Ltd has sought to limit the uncertainty that arises in that respect by, at the last minute, changing its development application to define its development as a luxury five star resort complex up to five levels and a roof top terrace that is generally in accordance with the architectural plans and landscaping plans and that achieves the outcome shown in the photomontages.
- [64] Even though Mr Petersen did not detail his process for identifying the vegetation to be removed from the photomontage for viewpoints 13 to 15 in his report, he provided a detailed and sound explanation of the process during cross-examination.
- [65] Mr Petersen also explained his familiarity with the process of building models as compared to the results obtained by adopting a Revit model prepared by the architects. His experience with both satisfies me that he has sufficient experience with converting information in architectural plans to a photomontage as to ensure that if there was a significant discrepancy in the product, such discrepancy would have been noticed by him.
- [66] Considering all the evidence of Mr Petersen about the preparation of the photomontages, and my comparison of the depiction of the proposed development in the photomontages with the architectural and landscape plans, I am satisfied that the photomontages provide a useful guide when assessing the character and visual amenity impacts of the proposed development.
- [67] My second general observation is that issues about the character and amenity of the local area loom large in this appeal. To assist me in appreciating the photographic, photomontage and other expert evidence about such matters, the parties arranged an extensive site inspection of Port Douglas and its surrounds. Although my observations on the site inspection do not form part of the evidence, my appreciation of the photographic evidence, and the opinions conveyed by the experts, was greatly enhanced by that site inspection.
- [68] Third, the determination of the matters to which I refer in paragraph [56] above calls for value laden judgments about which reasonable minds may differ. The opinions expressed by the experts retained by Chiodo Corporation Operations Pty

Ltd and the Council respectively were generally consistent about issues such as the features that inform the character of Port Douglas and the area surrounding the subject land and, to an extent, the design and visual impact of the proposed development. The experts differed in their views about the acceptability of the visual and character impacts. Although I respect the views of Mr Butcher, Mr Curtis and Ms Morrissy, with respect to most of the matters in dispute, I do not accept their evidence to the extent that it differs from that of the other experts. I generally prefer the evidence of Dr McGowan, Mr Peabody and Mr Ovenden, whose evidence is more closely aligned with, and supported by, the other evidence that I accept. That other evidence includes the photographs that show the appearance of the area and the plans that depict the design attributes of the proposed development.

- [69] Fourth, my findings below reflect the aggregate impression that I have formed having regard to the collective effect of the evidence, to the extent that it is accepted by me.

What is the character of Port Douglas?

- [70] The character of a locality, and of a streetscape, is the aggregate impression formed having regard to the individual features and traits of the existing development, landscaping and natural environment in the street or locality.⁵⁷ It may also be informed by the perceptions or expectations that people hold about a place. This is recognised in s 3.2.2.2 of the Strategic framework, which relevantly states:

“3.2.2.2 Reinforcing Douglas Shire’s sense of place and identity

- (1) **Sense of place is a dual characteristic that derives from certain distinctive features of a place and the feelings and perceptions that people hold with regard to that place.** In planning, it is usually used to promote positive places that foster community attachment.”

(emphasis added)

- [71] Douglas Shire is characterised by four primary landscape types, namely:
- (a) elevated landscapes that are comprised of the vegetated and grassed hillslopes and the mountainous terrain of the Great Dividing Range which:
 - (i) bound the Shire to the north, south and west;
 - (ii) extend to the coastline in several locations;
 - (iii) are prominent from most of the open and elevated viewpoints around the Shire; and
 - (iv) often form an attractive, scenic backdrop to views;⁵⁸

⁵⁷ *McKay v Brisbane City Council & Anor; Panozzo v Brisbane City Council & Anor; Jensen v Brisbane City Council & Anor* [2021] QPEC 42; [2022] QPELR 963, 990 [72].

⁵⁸ Revised Visual Amenity Joint Expert Report: Exhibit 5.08 p 10 [17] and [18]; Planning Scheme s 3.2.1.1: Exhibit 9.01 p

- (b) lowland landscapes that are comprised of:
 - (i) alluvial coastal plains, river plains, valleys and estuarine flats, which are characterised by riparian and wetland vegetation;
 - (ii) cane and agriculturally productive landscapes; and
 - (iii) landscapes around settlement;
 - (c) coastal landscapes comprised of the water and coastal strip along the Coral Sea and headlands; and
 - (d) urban landscapes, including the urban areas of Mossman, Port Douglas, Craiglie and smaller towns.
- [72] The topography of Douglas Shire acts as a substantial point of difference to other parts of the Far North Queensland region. The contrast between the four primary landscape types is also a defining feature of the character and identity of Douglas Shire. The elevated landscapes rise dramatically above the horizontal lowland landscapes, prominently so when viewed from scenic outlooks such as the north-eastern headland of Port Douglas, known as Flagstaff Hill. The dominance of the natural environment throughout the Shire and the unique value of forests growing down to the shoreline are features that are recognised.
- [73] Residents identify closely with the Shire's physical setting as defining the boundaries to their community. This contributes significantly to the Shire's heightened sense of identity.
- [74] The character, identity, and sense of place of Port Douglas are not only influenced by the four primary landscape types described in paragraph [71] above and its topography and setting. The tropical climate is an ever-present element that contributes to people's experience and perception of Port Douglas. The Shire's physical setting in a wet tropical climate that is framed by lush World Heritage listed forests, fringed by the Coral Sea, and associated World Heritage listed Barrier Reef Marine Park to the east makes the Shire a desirable location for its residents and for tourists alike.
- [75] The character, identity, and sense of place of Port Douglas is also derived from the landscape values and built form elements that are perceptible at a local level within the settled areas. They are comprised of:
- (a) the prominent landscape features;
 - (b) the tropical landscape setting; and
 - (c) the built-form character of the area as informed by the road networks, the interplay between the built form and local landscape features and the predominant, observable activity.
- [76] The prominent landscape features include:
- (a) the beach, which is both a prominent structuring element of the settlement and an important attraction;

- (b) the oil palms that line both sides of Port Douglas Road for almost its entire length into the heart of Port Douglas and which form an iconic avenue of oil palms that accentuates the entrance to Port Douglas; and
- (c) Flagstaff Hill, which is a prominent, recognisable headland on the northern side of Port Douglas town centre that provides a green tropical backdrop to the town.

[77] The dominance of vegetation over built form is an important element in the townscape of Port Douglas. The perception of a tropical landscape setting is conveyed by the combined effect of:

- (a) the enclosed character of the roads, where the private and public landscapes form avenues of native and non-native planting, including the iconic avenue of oil palms;
- (b) the high-quality, lush landscaping that complements the tropical resort town atmosphere, including:
 - (i) the dense stands of tropical vegetation that form distinctive edges, such as that along the coastal edge;
 - (ii) the semi-enclosed, resort-style landscapes with an informal semi-natural character that combine a diverse range of exotic and native plant species to provide lush, multi-layered planting around the built form;
- (c) the open, golf-course landscapes; and
- (d) the landscapes around the town centre that interface with the commercial and higher-density residential built forms.

[78] The Shire's natural environmental features are recognised to play an important role in defining the area's identity. The prominent landscape features and the visual predominance of landscape vegetation over built form are defining character traits of Port Douglas. That said, the relationship between landscape and built form is not one-dimensional. It is not simply characterised by the visual presence and prominence of vegetation or the predominance of the landscape elements over the built form elements. It is informed by a more nuanced consideration of the interplay between built form, landscape and topographic characteristics. This was acknowledged by Mr Butcher. It is also identified in the Planning Scheme, which defines "*neighbourhood character*" as:

"The qualitative interplay of built form, vegetation and topographic characteristics that make one place different from another."

[79] With respect to the built environment, the Shire is characterised by a variety of buildings that contribute to the sense of place and have informed the character and style of the settlement areas in the Shire. A distinct tropical vernacular is established in the Shire. It is represented in buildings from a wide variety of different eras of Shire development and progress. This distinctive tropical vernacular is recognised in the Planning Scheme as contributing significantly to the identity of the Shire, making the place special for visitors and residents alike.

- [80] For this appeal, the settled areas of Port Douglas are of relevance. They are generally contained along a peninsula that terminates at Flagstaff Hill in the north and extends north-south between the estuarine and wetland landscape of Packers Creek to the west and the coastal edge to the east.
- [81] Port Douglas Road, which becomes Davidson Street towards the Port Douglas town centre, is the main armature along this linear settlement area. It is the principal route by which people experience the locality. This is recognised on the Landscape Values Overlay Map in the Planning Scheme, which marks the length of the road as a scenic route and an area of about 100 metres width on either side of the road as a “*Scenic route buffer*”.⁵⁹
- [82] The built form typologies and uses differ along the length of Port Douglas Road but there are three discernible sections, namely:
- (a) the southern section, which is characterised by a range of residential and commercial uses, with the residential uses mainly taking the form of detached houses;
 - (b) the northern section, where Port Douglas Road becomes Davidson Street, which is characterised by a greater mix of uses, including resorts, smaller multiple dwellings and community facilities; and
 - (c) the central section, between Port Douglas Road’s intersection with Port Street in the north through to its intersection with Old Port Road and Barrier Street in the south, which is predominantly characterised by resorts.
- [83] Despite the varying built form typologies in the three distinct sections along Port Douglas Road, the built form character within the township exhibits a recognisable consistency across a range of building typologies, scale, use and age. It is a character that is recognisable in both heritage and contemporary buildings. It generally reflects a European, tropical colonial style of architecture comprised of rectilinear buildings with:
- (a) expressed and steep pitched roofs, including gable and hipped roof forms;
 - (b) generous projecting eave overhangs;
 - (c) verandas and breezeways; and
 - (d) consistent building heights in the order of three storeys.
- [84] The built-form character of the existing development in Port Douglas accords with the description of the tropical Queensland vernacular architectural style in Planning Scheme Policy – Building design and architectural elements. That policy provides guidance on achieving consistency with the requirements and outcomes of various parts of the Planning Scheme. The purpose of the Planning Scheme Policy is to:
- (a) specify and illustrate the architectural elements and building design features considered appropriate for residential, commercial and tourist developments in the Shire;
 - (b) encourage high quality tropical vernacular architecture throughout the Shire;

⁵⁹ Exhibit 9.01 pp 451 and 477-8.

- (c) provide for the development of a distinctive architectural style in the Shire; and
- (d) encourage architecture that is relevant to and compatible with the tropical climate of the Shire.

[85] The Planning Scheme Policy – Building design and architectural elements explains that a tropical Queensland vernacular architectural style has developed in response to the tropical climate of the Shire. It says that many of the elements and features of the architectural style originate from older style Queenslander buildings. However, modern interpretations have resulted in a distinctive architectural style that is aesthetically appealing and responsive to the tropical climate. It is those architectural elements and building design features that are responsive to the tropical climate which are said to be representative of the tropical Queensland vernacular architecture and encouraged in the Planning Scheme.

[86] The Planning Scheme Policy describes the key architectural elements as:

- (a) large open balconies and verandahs with balustrading that:
 - (i) provide an interface between indoor and outdoor areas;
 - (ii) are of a size and configuration that facilitates their use as outdoor living spaces year round in the tropics;
 - (iii) are designed and positioned to provide privacy, access to cooling breeze and refuge from intense heat while affording protection from intense rains;
 - (iv) appear open and light weight with strong horizontal, vertical or diagonal lines;
- (b) awnings, eaves and overhangs that:
 - (i) are responsive to the climate and sited to afford weather protection;
 - (ii) provide for filtered light to enter the building;
 - (iii) articulate the building's façade and add visual interest;
 - (iv) for eaves, are a minimum of 700 millimetres;
- (c) a variety of roof profiles that:
 - (i) are a distinctive element of the building and which are well-articulated with several apexes and profiles. They typically include hipped roofs, gable roofs and a combination of the two, but may include a curved roof;
 - (ii) are steeply pitched or have an angle generally greater than 30 per cent to provide good air circulation;
 - (iii) include roof ventilation systems, such as ridge vents, to improve air circulation within the roof cavity, thereby assisting in climate control;
 - (iv) are generally of light weight metal construction;

- (d) gables that:
 - (i) articulate the roof and the façade of the buildings;
 - (ii) provide visual interest at roof level;
 - (iii) reduce the overall bulk of the building; and
 - (iv) may extend from the building façade to provide additional eaves and screening;
- (e) columns and posts that:
 - (i) assist in articulating the building facades;
 - (ii) are light weight and slim line;
 - (iii) are structural and which may also be decorative;
- (f) shutters and screens that:
 - (i) protect windows, doors and other openings in a building from the sun and other climatic elements such as wind and rain;
 - (ii) facilitate air circulation;
 - (iii) are often adjustable or moveable;
 - (iv) may provide privacy;
 - (v) may be a functional and an aesthetic element of a building;
 - (vi) may be timber, metal or glass;
 - (vii) may be perforated surfaces such as battens, lattice and mesh to provide privacy while facilitating ventilation;
 - (viii) screen utility areas and undercrofts; and
- (g) expansive windows and doors that:
 - (i) can be opened or adjusted to allow flow through ventilation; and
 - (ii) facilitate good circulation of people between indoor and outdoor spaces.

[87] The Planning Scheme Policy – Building design and architectural elements further explains that key building design features that are representative of tropical Queensland vernacular architecture are:

- (a) repetitive design features in a building that reduce the bulk of the building;
- (b) elevation of a building on lightweight pier foundations and incorporating lightweight exterior building materials;
- (c) articulation to a building façade and roof profile to reduce the bulk of the building and provide weather protection;
- (d) large recesses under the roof creating indoor and outdoor living spaces as a main feature of a building; and

- (e) the reduction of the scale and bulk of buildings through a mix of articulation, use of architectural elements and exterior finishes.

What is the character of the local area surrounding the subject land?

- [88] The subject land is of an irregular shape and has a total area of 20,670 square metres. It has an approximate frontage of 169 metres to the western side of Port Douglas Road. It is separated from the carriageway of Port Douglas Road by a wide road verge, ranging between 31 and 38 metres in width, which slopes steeply away from the road. The subject land sits approximately two to three metres below the level of the carriageway of Port Douglas Road. There is a concrete path in the road verge, which is positioned close to the boundary of the subject land and at a similar level to the subject land.
- [89] The subject land is in a local area comprised of the central section of Port Douglas Road. It sits within an urban context of resort-style tourist accommodation and recreation land uses. Consistently with the character of Port Douglas township, those urban uses are set within a dominant landscape setting where the built form is only partially visible.
- [90] To the west, the subject land is adjoined by the open landscape of the Mirage Country Club golf course. Beyond this are views of the lowland in the foreground and the elevated landscapes of the Shire in the background. To the north, the subject land is bounded by the Mirage Country Club and golf course. Along the subject land's boundary, on the Mirage Country Club land, there is a group of large, established shade trees, which are mapped as a major area of vegetation on the Port Douglas / Craiglie Townscape Plan in the Planning Scheme. Beyond those trees is an open, grassed putting green and the two-storey club house and facilities of the Mirage Country Club. The clubhouse sits in vegetated and open-grassed surrounds. The Mirage Country Club golf course also occupies the land on the eastern side of Port Douglas Road, opposite the subject land.
- [91] To the south, the subject land is adjoined by the Oaks Port Douglas Resort. Along the boundary, there is a band of vegetation that includes established and establishing palms trees. Some of the vegetation is on the subject land, and some is within the adjoining land. The resort is comprised of a central building that houses the hotel facilities and several, separate accommodation buildings. The buildings are up to three storeys in height and are arranged in a pavilion-style layout. The space between the buildings is punctuated by landscaping. Breezeways link the accommodation buildings to the centrally located swimming pool and the central facilities building. Dense landscaping is provided in the front setback and road reserve. It conceals most of the resort from views obtainable from the Port Douglas Road carriageway. Only the central facilities building is visible from Port Douglas Road.
- [92] Further south, on the western side of Port Douglas Road, is the Reef Resort. It is comprised of multiple buildings with heights of up to two storeys.
- [93] Approximately 110 metres north of the subject land is the nearest roundabout on Port Douglas Road, where the avenue of oil palms exits toward the Sheraton Grand Mirage Resort. The Sheraton Grand Mirage Resort is approximately 540 metres to the northeast of the subject land, on the eastern side of Port Douglas Road. The

central facilities and guest room buildings are located behind car parking. They are well set back from the landscaped frontage. The buildings have a height of up to three storeys. They are situated within a large, landscaped site, which provides extensive swimming pools and water features adjacent the buildings. The three main hotel buildings are centrally located, adjacent to Four Mile Beach. Several smaller groups of buildings are located to the north and south of the main resort complex. The spaces between the buildings are interspersed with dense, tropical landscaping, pools and parts of the golf course.

- [94] The local area also contains other resort-style tourist accommodation with frontage to Port Douglas Road, including Mantra PortSea, Port Douglas Sands, the Ramada Resort, Silkari Lagoons and the Niramaya Villas.
- [95] The resort-style tourist accommodation in the local area, and Port Douglas generally, incorporates the key architectural elements that are identified and explained in the Planning Scheme Policy – Building design and architectural elements as those that are representative of tropical Queensland vernacular architecture. These developments have adopted what the architects described as “*passive*” responses to achieving comfortable micro-climates for common spaces including lobbies, lounges, food and beverage facilities and access corridors. These passive responses are spaces that are typically open to the environment and hosted under large roof forms offering shelter and allowing for air flow. Reliance on air conditioning in these developments is often limited to individual hotel suites and enclosed function and administration facilities. These resort-style tourist accommodation developments illustrate an appropriate design response to the tropical climate and reinforce to residents and visitors a sense of place particular to Port Douglas, being built-form designed to allow one to comfortably appreciate the tropical climate.
- [96] Port Douglas Road is a well-vegetated road. It has a range of vegetation along its alignment, the most visible of which is the iconic oil palms that sit in a predominantly grassed verge. The oil palms are an established feature of the Port Douglas landscape and streetscape. They are complemented by a range of other tropical trees species along the road’s alignment that help reinforce the tropical character of Port Douglas. Although views of the broader landscape setting from Port Douglas Road are available through gaps in the existing vegetation, the broader setting is not prominent in the immediate vicinity of the subject land. Along some sections of Port Douglas Road, the verge landscapes present as near impermeable screens to the adjoining built form behind.
- [97] In the central section of Port Douglas Road, the visibility of the built form of the development is typically reduced due to dense tropical vegetation. This is a feature of the area that contributes to the character, identity and sense of place of Port Douglas. Nevertheless, the character of the built form is appreciable from:
- (a) the glimpses of the resorts obtained from the carriageway of Port Douglas Road;
 - (b) the extensive lengths of existing concrete paths located along the road verge;
 - (c) the beach; and

- (d) the resort facilities that are open to the public, such as the golf course and spa facilities.
- [98] The central section of Port Douglas Road exhibits the recognisable built-form character of Port Douglas described in paragraph [83] above. In addition, the character of the local area is informed by:
- (a) buildings that typically do not exceed three storeys in height; and
 - (b) resort-style tourist accommodation development that comprises a main building surrounded by several smaller building modules, such that the built form is dispersed amongst areas of landscaping and pools.
- [99] Whether the buildings within the resort-style tourist accommodation development are modulated and stepped or separated into smaller building envelopes, they have a built form pattern of smaller building envelopes that collectively contribute to a larger development.
- [100] Although the developments in the central section of Port Douglas Road, and elsewhere in Port Douglas, were constructed at different times and under different planning regimes, they are nevertheless relevant to an appreciation of the character of the area. To disregard existing development because it was approved prior to the planning controls would attribute to the area a character that it simply does not have.⁶⁰
- [101] The character of this resort-style tourist accommodation development in the central section of Port Douglas Road is one of Queensland tropical vernacular, built form arranged in a pattern of smaller building envelopes within a tropical landscape context that provides a sense of visual, physical and environmental permeability.

What are the design attributes of the proposed development?

- [102] The development application seeks a material change of use for a luxury, five-star resort complex. The use is to be conducted in a single building with five levels and a rooftop terrace containing roofed structures.
- [103] After the conclusion of the evidence in the trial, Chiodo Corporation Operations Pty Ltd made a minor change to its development application.⁶¹ Relevantly, it now seeks to make a material change of use that is defined by reference to architectural plans, landscaping plans and the outcome depicted in the photomontages.
- [104] There is uncertainty about the natural ground level. Consequently, there is disagreement between the experts about the precise height of the building. Leaving those issues aside, the experts agree that:
- (a) from the west the building presents as a building with five levels plus a roof top terrace containing structures; and

⁶⁰ *The Purcell Family v Gold Coast City Council* [2004] QPEC 9; [2004] QPELR 521, 524 [20]; *K Page Main Beach Pty Ltd v Gold Coast City Council & Ors* [2011] QPEC 1; [2011] QPELR 406, 414 [54]-[56]; *McKay v Brisbane City Council & Anor*; *Panozzo v Brisbane City Council & Anor*; *Jensen v Brisbane City Council & Anor* [2021] QPEC 42; [2022] QPELR 963, 984 [49].

⁶¹ Exhibit 1.86.

- (b) from the east the building presents as a building with four levels plus a roof top terrace containing structures.
- [105] The distance between the proposed lower ground level and the top of the lift overrun (being the highest element on the rooftop terrace) is approximately 20.8 metres.
- [106] The building outline has a site coverage of approximately 11,253 square metres (or about 54 per cent of the area of the subject land).⁶²
- [107] The building is proposed to be constructed diagonally across the subject land from the front southeast corner to the rear northwest corner. The overall building envelope measures approximately 165 metres in length and 75 metres in width.
- [108] Due to the adoption of curved floor plans and tapering floor plates at the upper levels, the distance between the building and the boundaries varies at different locations across the subject land. The setbacks to the northern and southern boundaries increase where the building curves away from these boundaries. The plans depict the building with approximate minimum boundary setbacks of:
- (a) 17 metres from the eastern boundary, which fronts Port Douglas Road;
 - (b) seven metres from the northern side boundary, which adjoins the Mirage Country Club;
 - (c) four metres from the western rear boundary, which adjoins the Mirage Country Club golf course; and
 - (d) six metres from the southern side boundary, which adjoins the Oaks Port Douglas Resort.
- [109] The single, enclosed building envelope is to contain a central, multi-storey atrium that will incorporate the hotel lobby, lounges, and food and beverage facilities. Hotel suites, and various function rooms, food and beverage facilities, administration spaces, and back of house areas are proposed across the balance five functional levels of the building.
- [110] The proposed building provides external private balconies for each unit on the upper ground floor and those floors above. It provides external, at-grade patio spaces for each lower ground floor unit. Given the building's organic and irregular shape, the proposed development does not have uniformly shaped balconies.
- [111] Almost all the balconies terminate with prominent planters at their outer edge. The landscape planters extend beyond the line of the balconies at each level and are approximately 1.2 metres deep. They have a curved form that oscillates between balconies.
- [112] The proposed development adopts an open, flat roof structure that is proposed to include leisure facilities, such as a pool, restaurant and a wedding deck; and functional elements, such as lift overruns, stair access and air-conditioning plant. Another prominent feature of the roof top design is two large skylights.

⁶² Exhibit 7.06 p 2.

- [113] The landscape and open space elements of the proposed development include:
- (a) three communal pool areas, of which:
 - (i) one pool area is on the south-eastern corner within natural ground;
 - (ii) one pool area is on the south-western corner; and
 - (iii) one pool area is on the rooftop;
 - (b) a three-metre-wide pedestrian path, which also functions as a stormwater overland flow, that is offset from and adjacent to the southern boundary;
 - (c) balcony planters on each floor and on the roof terrace;
 - (d) a combination of deep planting and podium planting areas around the building; and
 - (e) containerised planters on the roof terrace.
- [114] The proposed plant species include endemic, native and exotic plants and a range of trees, palms, shrubs, groundcovers, and other plant types. Some of the existing trees and palms within the subject land are proposed to be retained, and some will be removed to accommodate the proposed building.
- [115] Chiodo Corporation Operations Pty Ltd proposes planting within the road verge for Port Douglas Road. The planting is to comprise species identified in the plant schedule. To accommodate the proposed entry road locations, four existing oil palms in the Port Douglas Road verge are to be relocated or replaced with six new palms.
- [116] Overall, considering the combined effect of the various elements of the building, the proposed development conjures an image reminiscent of the shape and structure of Uluru. It is oblong and organic in shape. The curve in the building creates a similar dome-like effect to that of Uluru. Visually, the relativity of the building's height to its length and width reinforces a visual appearance reminiscent of Uluru. In addition, like Uluru, the proposed development's hill-like form stands out as a distinctive element that is discordant with the surrounding landscape character.
- [117] Chiodo Corporation Operations Pty Ltd's election to define its proposed development by reference to a visual outcome that is generally in accordance with photomontages suggests that it accepts the evidence of Mr Butcher that, absent landscaping that hides the built form from view, the proposed development would be visually jarring.
- [118] Having regard to the landscape plans and photomontages, it seems to me that Chiodo Corporation Operations Pty Ltd proposes to disguise the building's indomitable form by shrouding it in vegetation and by incorporating other landscaping on the subject land and in the Port Douglas Road verge.
- [119] With those design attributes in mind, I now turn to consider whether the proposed development is consistent with the character of the area.

Will the proposed development have an unacceptable impact on the character and sense of place of Port Douglas and the local area?

- [120] As I have mentioned in paragraph [70] above, the character of a locality, and of a streetscape, is the aggregate impression formed having regard to the individual features and traits of the existing development, landscaping and natural environment in the street or locality.⁶³
- [121] The character and sense of place of Port Douglas and the local area within which the subject land sits is informed by the geography, topography, tropical climate, landscape, and built-form character in the manner described in paragraphs [70] to [101] above. The design attributes of the proposed development are identified in paragraphs [102] to [118] above.
- [122] Before considering the aggregate impression created by the proposed development, it is convenient to first assess the development application against the three assessment benchmarks in issue that deal with individual traits of the proposed development, being those related to height, setbacks, and site coverage.
- [123] The Council contends that the proposed development does not comply with performance outcome PO1 of the Tourist accommodation zone code (extracted at paragraph [43] above). That assessment benchmark requires that the height of all buildings align with the residential character of the area. The associated acceptable outcome anticipates buildings are not more than 13.5 metres and three storeys in height, with height being inclusive of roof height.
- [124] The Planning Scheme defines building height as:
- “If specified:
- (a) in metres, the vertical distance between the ground level or the flood hazard level (where the building is in a flood hazard area) and the highest point of the building roof (apex) or parapet at any point but not including load-bearing antenna, aerial, chimney, flagpole or the like
- (b) in storeys, the number of storeys above ground level or the flood hazard level (where the building is in a flood hazard area) or
- (c) in both metres and storeys, as specified in (a) and (b) respectively.”
- [125] Roof height is defined in the Planning Scheme as:
- “The vertical distance between the upper most point of the exterior wall of the building and the highest point of the roof (apex) or parapet at any point, but not including non-load bearing antenna, chimney, flagpole or the like.
- Roof height is contained within building height.”

⁶³ *McKay v Brisbane City Council & Anor; Panozzo v Brisbane City Council & Anor; Jensen v Brisbane City Council & Anor* [2021] QPEC 42; [2022] QPELR 963, 990 [72].

[126] The Planning Scheme defines ground level as:

“The level of the natural ground, or, where the level of the natural ground has been changed, the level as lawfully changed.”

[127] Chiodo Corporation Operations Pty Ltd accepts that, given the previous disturbances and approvals over the subject land, it is unclear whether ground level is correctly depicted on the drawings. Consequently, there is disagreement between the experts about the precise height of the building.

[128] It is unnecessary to resolve the dispute about ground level. For present purposes, it is sufficient to observe that:

(a) Chiodo Corporation Operations Pty Ltd concedes that:

- (i) the proposed development does not comply with the acceptable outcome;
- (ii) the building is proposed to have a vertical dimension of 15.09 metres between the ground level of RL 3.920 and the roof terrace level at RL 19.01;
- (iii) the building is proposed to have a vertical dimension of 16 metres between the lower ground level of RL 3.01 and the roof terrace level at RL 19.01;

(b) the roof terrace level is not the highest point of the roof (apex) or parapet;

(c) the plans show that the distance between the proposed lower ground level and the top of the lift overrun (being the highest element on the rooftop terrace) is approximately 20.8 metres;

(d) the architecture and visual amenity experts agree that:

- (i) from the west, the building presents as a building with five levels plus a roof top terrace containing structures;
- (ii) from the east, the building presents as a building with four levels plus a roof top terrace containing structures; and

(e) the proposed building would be the tallest structure in the surrounding area.

[129] Regardless of the actual height of the proposed development, there is a dispute as to whether a building of that height is keeping with the residential character of the area. Chiodo Corporation Operations Pty Ltd submits that the locality surrounding the subject land does not have a residential character, rather it is characterised by tourist activities in a dominant landscaped setting. The Council submits that performance outcome PO1 of the Tourist accommodation zone code should be given meaning and effect and that, as such, the “*residential character*” height test applies to all development proposed in the zone, including resort complexes. It says that the most intense form of residential development envisaged by the Planning Scheme is in the Medium density residential zone, which is up to three storeys in height.

[130] Both arguments have force. It is unnecessary to resolve this dispute as, regardless of the correct approach, the height of the proposed development is not, of itself,

determinative of the character issue. This is because, in this case, the height will not be viewed as a single, defining dimension of the proposed development. That is so for four reasons.

- [131] First, the proposed development does not adjoin dwelling houses or multiple dwellings to which a building height transition might be warranted to moderate differences in building scale between differing land uses.
- [132] Second, the subject land sits at a lower topographical level to Port Douglas Road and slopes away from the road. This results in the eye level of those driving along Port Douglas Road being higher than the lower ground level and in the proposed development presenting as a four-level building to the road.
- [133] Third, there is significant separation distance between the proposed development and most other tourist accommodation buildings such that the buildings will not appear side-by-side or in a cheek-by-jowl arrangement. This makes clear comparisons between building height more difficult.
- [134] Fourth, there is a substantial band of vegetation along the southern boundary of the Oaks Port Douglas Resort site, which the proposed landscaping will supplement. This landscaping will limit the extent to which the heights of the respective developments will be compared.
- [135] For those reasons, an assessment of the development application against performance outcome PO1 of the Tourist accommodation zone code does not lend any meaningful weight to either the case for refusal or the case for approval. That is not to say that the height of the proposed development is irrelevant. Its relevance is in its contribution to the aggregate impression of character, rather than as a single, defining dimension. The aggregate impression of character, and the contribution made by the height of the proposed development, is considered later.
- [136] The setbacks of the proposed development are detailed in paragraph [108] above. Apart from the setback to the western rear boundary, they accord with those specified in acceptable outcome AO1 of the Tourist accommodation zone code. Along part of the western boundary, the suspended planters on the upper ground level are setback four metres as compared to the acceptable outcome of 4.5 metres.
- [137] As I have noted in paragraph [106] above, the architectural plans record that the proposed development has a site cover of 54 per cent. Acceptable outcome AO2 of the Tourist accommodation zone code admits of a limit of up to 50 per cent. This exceedance, of itself, is of little moment.
- [138] Viewed in isolation, the setbacks and site coverage of the proposed development are generally acceptable. However, this is not sufficient to overcome the inappropriate character impacts occasioned by the overall design nor to ensure that the built form is not bulky or visually obtrusive. On balance, an assessment of the development application against performance outcomes PO1 (Setbacks) and PO2 of the Tourist accommodation zone code does not lend any meaningful weight to either the case for refusal or the case for approval.
- [139] There are several other aspects of the proposed development that, when considered in isolation, provide a degree of consistency with the character of Port Douglas.

- [140] One such aspect is the nature of the use. The proposed development is located within a setting of resort-style tourism accommodation and recreation activities (including golf course land and golf course club house). It will add another resort-style tourist accommodation use and, in this regard, is complementary to its neighbouring land uses.
- [141] Another aspect that assists with achieving consistency in character is the location of the proposed development. The subject land sits at a location on Port Douglas Road where there is a wide road reserve that is already vegetated like its neighbouring properties, including with the iconic oil palms. This existing vegetation assists in achieving a visual outcome where the built form of the proposed development is only partially visible from the adjacent concrete path and the carriageway of Port Douglas Road.
- [142] The matters outlined above are insufficient to satisfy me that the proposed development appropriately responds to the sense of place and character and identity of Port Douglas and the local area within which the subject land sits. That issue requires consideration of the impression created by the aggregation of the built-form metrics, the use and the building's design.
- [143] With respect to the broader issue, Mr Curtis opines that the proposed development is not over-scaled. His opinion in that regard is informed by several design elements. He says that the break in the building façade above level two breaks up the overall length and proportions of the development. In his view, the layering of the building's height will fragment the height of the bulk to avoid any sense of overbearing. He opines that further fragmentation is provided by the inclusion of multi-level bays within the façade that interrupt the visual continuity of the balconies along each floor level. The bays accommodate larger clusters of landscaping that extend in height between the floor levels. In Mr Curtis' opinion, these clusters provide a series of localised vertical focal points that balance the horizontal proportions of the adjacent balconies. The clusters are complemented by the landscaping along the front of the balconies. Mr Curtis says that the combination of the vertical clusters at irregular locations, the balcony landscaping and the variety of plant species will create a mosaic-like appearance that contributes to the visual fragmentation of the building bulk.
- [144] In Mr Curtis' view, the proposed building offers curved walls that include balconies with curved planter boxes, which provide visual interest and screening. He says the roof forms are generally light weight, setback from building edges and landscaped. Mr Curtis says that the setback of the glazed external walls of the guest rooms from the front of the balconies will provide depth to the building's appearance. This will erode the solidity of the building's appearance to further mitigate to the visual impact of the building bulk. He says that it will also allow the landscaping of the facades to dominate the proposed development's visual character.
- [145] I do not accept Mr Curtis' opinions. They do not accord with the view I have formed having regard to the other evidence, including the plans and photomontages.

- [146] As is identified by Mr Curtis, the proposed development adopts a biophilic design approach such that “*the proposed development resembles a low, rounded vegetated hill rising from the ground amidst the landscape*”.⁶⁴
- [147] This is contrary to the geographic and topographic context of Port Douglas where the physical references of Flagstaff Hill to the north and the distant National Parks to the west are the natural landmarks. There is no immediate reference to low rounded hills within the surrounding context. Given that context, a biophilic design approach that endeavours to impose, or manufacture, a man-made hill as a built form response is contrived and an inappropriate response to the established sense of place and identity of Port Douglas.
- [148] In addition, the proposed development does not involve rectilinear buildings with prominent roof forms and verandas to project a European tropical colonial orthodoxy. Nor does the proposed development sufficiently incorporate the key architectural elements or building design features that:
- (a) the Planning Scheme Policy – Building design and architectural elements identifies as being representative of the tropical Queensland vernacular architecture that the Planning Scheme encourages within the Shire;
 - (b) provide the varying built form typologies in Port Douglas with a recognisably consistent character; and
 - (c) inform the character of the resort-style tourist accommodation development in the central section of Port Douglas Road.
- [149] Although the Planning Scheme Policy is not an assessment benchmark and does not set mandatory requirements, its description of Queensland tropical vernacular reflects the character of the built form that exists in Port Douglas. The explanation associated with each architectural element provides an insightful description that allows one to appreciate how the various elements affect a person’s perception of the built environment in a way that informs character. The guidance provided by the explanation is informative when considering whether a modern interpretation of those architectural elements is consistent with the intended, and existing, architectural style and character.
- [150] I do not regard the proposed development as a modern interpretation of the existing and intended character. The design of the proposed development provides a central, internalised, cavernous void rather than large open balconies and verandas that provide an interface between indoor and outdoor areas. Although the proposed development incorporates significant areas of recreational space on the landscaped roof terrace, the space is not amenable to use as an outdoor living space year-round in the tropics given it is exposed to the elements. The proposed development also does not provide balconies of a sufficient size and configuration to facilitate their use as outdoor living spaces year-round in the tropics. Some balconies will be afforded protection from intense rains by the protruding balcony above, but others do not enjoy the same extent of protection due to the tapering design of the upper floors.

⁶⁴ Exhibit 5.09 p 18 [35].

- [151] Adopting Chiodo Corporation Operations Pty Ltd's predicted growth rates and landscape maintenance regime, and assuming the landscaping will achieve the outcome depicted in the proposed plans and photomontages, the combined effect of the configuration of the planters and the vegetation within them will be to conceal the proposed glass balustrading. As such, it will obstruct those design elements that might otherwise provide an open appearance to the balconies. The balconies will not be dominant spaces that provide building articulation. If delivered as depicted, the proposed landscaping might also restrict the flow of cooling breezes.
- [152] Although the proposed development adopts strong horizontal banding by way of the perimeter balconies, this does not provide an open and light weight appearance to the building. This is because of the structure of the landscape planters that are included at the outer edge of the balconies. The landscape planters extend beyond the line of the balconies at each level and measure approximately 1.2 metres in depth. They present as continuous, heavy spandrels. This is inconsistent with the appearance of lightweight materials that is characteristic of built form in the area. In addition, irrespective of the landscaping contained within them, the landscape planters will accentuate the continuous linear arrangement and bulkiness of the building form.
- [153] The landscape planters are proposed to incorporate a curved form that oscillates between balconies. However, the subtlety of this articulation is somewhat lost by the extended length of each elevation and the repetitive banding of the balconies across the five levels of hotel suites.
- [154] Further, although the building is proposed to incorporate landscape planters to balcony edges and the roof area, from an architectural perspective this manufactured landscape response does not contribute to the tropical landscape character that is characteristic of Port Douglas or the local area, being a series of smaller building envelopes (either interconnected or stand-alone) that are located within and around a landscape environment. Rather, the proposed development will be perceived as a single large building envelope with landscape planters applied to the edge.
- [155] The roof profile of the proposed development is also discordant with that which informs the character of Port Douglas and the local area. As I have noted in paragraph [112] above, the proposed development adopts an open, flat roof structure that includes two large skylights. Even if I were to assume that the proposed plantings on the roof were well maintained and would provide some assistance in terms of climate control, it is reasonable to infer that the skylights will facilitate the unadulterated penetration of light into the cavernous void that is the atrium at the centre of the building and will funnel the heat of the northern sun into the central atrium. As such, that the proposed development does not provide a roof that is well-articulated or that materially assists with climate control.
- [156] Unlike other built-form in the local area, the design of the proposed development does not adopt the Queensland tropical vernacular design elements that are climatically responsive. It does not provide opportunities for the building to breathe by facilitating cross-ventilation and airflow through and around the building elements. As a single building envelope, the proposed development will be reliant on creating an air-conditioned, internalised environment. This will heighten people's perception of the proposed development as out of character.

- [157] Chiodo Corporation Operations Pty Ltd sought to address this criticism of its proposed development by way of a proposed condition requiring it to achieve a green star energy rating. This misses the point. A green-star energy rating, whilst environmentally admirable, does not mitigate the inherent disparity between the proposed development's character and that of Port Douglas. Port Douglas' tropical vernacular enhances one's appreciation and feel of its unique tropical climate. Key to this enhancement is being able to comfortably experience heat, humidity, rainfall, and the other weather elements via a dispersed building design with passageways and airflow. Chiodo Corporation Operations Pty Ltd's emphasis of the proposed development's environmentally friendly energy responsiveness conflates climactically appropriate design with climactically appropriate design that aligns with Port Douglas' tropical vernacular. Transporting an environmentally friendly development that could sustainably exist in any number of hot or humid climates is not enough to accord with Port Douglas' existing, and planned, character. The proposed development's single enclosed building design is fundamentally at odds with the tropical vernacular and climactic experience one expects to enjoy in Port Douglas.
- [158] With a height of approximately 20 metres, the proposed development will be considerably taller than most of the developments in Port Douglas. The resort style holiday accommodation within the township is typically no greater than three storeys in height.
- [159] The overall proportions of the proposed development will not be visible as a singular mass from Port Douglas Road. It will be glimpsed from the carriageway of Port Douglas Road. Nevertheless, the built form character of the proposed development will be appreciable from the concrete path located along the road verge adjacent the subject land, particularly through the vehicular cross-over, and from the adjoining golf course. Visitors will also appreciate its character when attending the extensive facilities that are to be proposed to be provided, some of which are proposed to be open to the public.
- [160] Due to the combined effect of the height, setbacks, site cover, the adoption of a single, enclosed building design, the flat roof profile, and a design that fails to moderate its scale through the adoption of a Queensland tropical vernacular architectural style, the built form of the proposed development will be perceived as a dominant, bulky structure. It will be perceived as one large building form with minimal punctuation and modulation and no separation into a pattern of smaller building envelopes. As I have found in paragraph [116] above, the proposed development conjures an image reminiscent of the shape and structure of Uluru. The proposed development's hill-like form stands out as a distinctive element that is discordant with the built-form character of the area and the surrounding landscape.
- [161] The disparate character of the proposed development is material. It is not a matter that can simply be attributed to the adoption of a more modern design approach or the provision of a standard of service expected of a luxury five-star resort. Modernism can, no doubt, be achieved in a way that pays homage to the existing Queensland vernacular whilst remaining responsive to the tropical climate. The proposed development is not inappropriate because of a modern design, but because that design is wildly discordant with the character of Port Douglas.

- [162] The proposed development is to include a substantial quantum of landscaping that will shroud, and otherwise hide, the building. Mr Curtis and Mr Butcher opine that the proposed development will be subservient to the landscape, allowing the vegetation to grow over it and dominate it. If I adopt Chiodo Corporation Operations Pty Ltd's predicted growth rates and maintenance regime and assume the landscaping will achieve the outcome depicted in the proposed plans and photomontages, I can accept this description as apposite. I will address whether those assumptions are reasonable later in these reasons.
- [163] Of itself, a design that incorporates landscaping into the design of the building is not out of character for Port Douglas. There are other examples of development that incorporate vegetation into the building.⁶⁵
- [164] The incorporation of vegetation into building design is a design feature that is within contemplation when one reads performance outcome PO2 of the Landscaping code together with its associated acceptable outcomes. While acceptable outcome AO2.1 says that no acceptable outcomes are specified, acceptable outcome AO2.2 of the Landscaping code (extracted at paragraph [49] above) provides for tropical urbanism to be incorporated into building design. The associated note explains that tropical urbanism includes many things such as green walls, green roofs, podium planting and vegetation incorporated into the design of a building. In those circumstances, I am prepared to assume that the incorporation of vegetation into the design of a building is not, of itself, out of character for Port Douglas. Nevertheless, I am not satisfied that the incorporation of vegetation into the building design for the proposed development is consistent with the landscape character of the area.
- [165] The landscape character of Port Douglas is not simply characterised by the dominance of vegetation over built form, or by the incorporation of vegetation into building design, or by a combination of those two attributes. As was identified by Mr Butcher, it is the inter-relationship between the built form and the surrounding landscape that meaningfully contributes to the character, identity and sense of place of Port Douglas. That interplay between built form and landscaping provides a sense of visual, physical and environmental permeability within a tropical landscape context.
- [166] By virtue of the adoption of a single, large built form covered in vegetation, rather than a decentralised resort layout with a series of small buildings interspersed with landscaping at ground level, the landscape character of the proposed development is discordant with that which exists in the local area. To adopt the words of Mr Curtis, "*the proposed development will resemble a low, rounded vegetated hill rising from the ground*". It lacks permeability. I accept the opinion of Dr McGowan that there is an obvious difference in visual effect as between a vegetated hill or form emerging from the landscape and more scaled-back building forms being dispersed amongst densely planted landscaping. In this local area and region, the dominance of tropical landscaping is provided by the landscaping forming lush, multi-layered planting that softens and complements the built form, rather than hiding it. The proposed development does not provide the interplay between built form and landscaping that is characteristic of the resort-style tourist accommodation

⁶⁵ See, for example, Exhibit 5.08 p 45 figure 40.

development in the central section of Port Douglas Road. The landscaping seeks to disguise, not enhance.

- [167] Overall, the character of the resort-style tourist accommodation development in the central section of Port Douglas Road is one of Queensland tropical vernacular architectural style buildings with built form arranged in a pattern of smaller building envelopes within a tropical landscape context that provides a sense of visual, physical and environmental permeability. The proposed development is discordant with this character. It is inconsistent with the Douglas Shire and Port Douglas sense of place and identity and will not offer a positive or meaningful contribution to the character of the township or the local area within which it sits.
- [168] For the reasons provided above, I am satisfied that the proposed development does not:
- (a) achieve sensitive incremental change, rather it represents an instant, over-scaled development project that will have little local context or character;
 - (b) complement the tropical image of the town through distinctive tropical vernacular, urban design and landscaping;
 - (c) complement the existing tropical character of Port Douglas and Craiglie;
 - (d) have an appropriate scale and achieve an attractive built form that incorporates the character and natural attributes of the subject land and surrounding area as integral features of the theme and design of the development;
 - (e) have proportions and a scale that is consistent with the character of the area and local streetscape;
 - (f) achieve consistency with the prevailing landscape character of its setting;
 - (g) incorporate external finishes that are compatible with the landscape character;
 - (h) enhance the tropical, lush landscape character of the region;
 - (i) provide landscaping that contributes to and creates a high quality landscape character for the subject land, street and local area by enhancing the appearance of the proposed development from within and outside the development and that makes a positive contribution to the streetscape; and
 - (j) have landscaping that contributes to a sense of place, is functional to the surroundings, and enhances the streetscape and visual appearance of the development.
- [169] As such, an assessment of the development application against s 3.2.2.2(5) of the Strategic framework; the overall outcome in s 7.2.4.3(3)(d) and performance outcome PO4 of the Port Douglas / Craiglie local plan code; the overall outcome in s 6.2.14.2(3)(b) and performance outcome PO3 of the Tourist accommodation zone code; the overall outcome in s 8.2.6.2(2)(h) and performance outcome PO3(c) of the Landscape values overlay code; and the overall outcome in s 9.4.6.2(2)(a) and performance outcomes PO1(c) and PO2 of the Landscaping code weighs in opposition to approval of the development application.

Will the proposed development result in an unacceptable visual amenity impact?

- [170] The Council contends that the proposed development will have an unacceptable visual amenity impact, including an unacceptable impact on landscape character. Chiodo Corporation Operations Pty Ltd disagrees.
- [171] The Council's contentions about the unacceptable character impact are informed by the requirements of the Planning Scheme, particularly:
- (a) ss 3.5.5.1(1) and (2) of the Strategic framework; and
 - (b) the overall outcome in s 8.2.6.2(2)(h) and performance outcomes PO3(c) and (d)(i) of the Landscape values overlay code.
- [172] Chiodo Corporation Operations Pty Ltd disputes the alleged non-compliances with the Planning Scheme.

What do the assessment benchmarks require in terms of amenity impacts?

- [173] The first two assessment benchmarks relied on by the Council with respect to visual amenity impact are in the Strategic framework. They are ss 3.5.5.1(1) and (2).
- [174] Sections 3.5.5.1(1) and (2) are specific outcomes that relate to the element of scenic amenity that is part of Theme 2 – Environment and landscape values. They state:
- “(1) Development protects, maintains and enhances the region’s Landscape values as shown on the Landscape values overlay maps contained in Schedule 2.
 - (2) Major scenic routes and scenic outlooks, as shown on the Landscape values overlay maps contained in Schedule 2, are protected from both the detrimental visual impacts of development and inappropriate vegetation clearing that may detract from the scenic qualities of the scenic route, outlook or ocean-side views.”⁶⁶
- [175] The other three assessment benchmarks relied are in the Landscape values overlay code.
- [176] Overlays identify areas in the Planning Scheme that reflect state and local level interests.⁶⁷ Where development is proposed on premises partly affected by an overlay, the assessment criteria for the overlay only relates to the part of the premises affected by the overlay.⁶⁸
- [177] Part of the subject land, being that part adjacent Port Douglas Road, is mapped as the “*Scenic route buffer / view corridor*” area sub-category on the Landscape values overlay map.⁶⁹ As such, the Landscape values overlay code contains relevant assessment benchmarks.

⁶⁶ No issue is taken with ocean-side views.

⁶⁷ Planning Scheme s 8.1(1): Exhibit 9.01 p 235.

⁶⁸ Planning Scheme s 8.1(6): Exhibit 9.01 p 235.

⁶⁹ Planning Scheme Landscape Values Overlay Map: Exhibit 9.01 p 451.

[178] The assessment benchmarks in the Landscape values overlay code that are put in issue by the Council are the overall outcome in s 8.2.6.2(2)(h) and performance outcome PO3(c) and (d)(i).

[179] The overall outcome in s 8.2.6.2(2)(h) states:

“development is consistent with the prevailing landscape character of its setting, and is neither visually dominant nor visually intrusive.”

(emphasis added to reflect the allegations made by the Council about visual amenity)

[180] Performance outcome PO3 and the associated acceptable outcome state:

Performance outcomes	Acceptable outcomes
Development within a Scenic route buffer / view corridor area	
<p>PO3</p> <p>Development within a Scenic route buffer / view corridor area as identified on the Landscape values overlay maps contained in Schedule 2:</p> <p>(a) retains visual access to views of the surrounding landscape, the sea and other water bodies;</p> <p>(b) retains existing vegetation and incorporates landscaping to visually screen and soften built form elements whilst not impeding distant views or view corridors;</p> <p>(c) incorporates building materials and external finishes that are compatible with the visual amenity and the landscape character;</p> <p>(d) minimises visual impacts on the setting and views in terms of:</p> <p>(i) the scale, height and setback of buildings;</p> <p>(ii) the extent of earthworks and impacts on the landform including the location and</p>	<p>AO3.1</p> <p>Where within a Scenic route buffer / view corridor area, the height of buildings and structures is not more than identified within the acceptable outcomes of the applicable zone code.</p> <p>AO3.2</p> <p>No clearing of native vegetation is undertaken within a Scenic route buffer area.</p> <p>AO3.3</p> <p>Where within a Scenic route buffer / view corridor area development is set back and screened from view from a scenic route by existing native vegetation with a width of at least 10 metres and landscaped in accordance with the requirements of the landscaping code.</p> <p>AO3.4</p> <p>Development does not result in the replacement of, or creation of new, additional, or enlarged advertising devices.</p>

configuration of access roads and driveways; (iii) the scale, extent and visual prominence of advertising devices. Note - A visual impact assessment is undertaken in accordance with Planning scheme policy SC6.6 – Landscape values in order to satisfy performance outcomes.	
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(emphasis added to reflect the allegations made by the Council)

[181] Those assessment benchmarks raise the following five key factual questions for determination.

1. Does the proposed development incorporate building materials and external finishes that are compatible with the visual amenity?
2. Does the proposed development minimise visual impacts on the setting and views in terms of its scale, height and setback?
3. Will the proposed development be visually dominant or visually intrusive?
4. Will the proposed development have a detrimental visual impact on major scenic routes and scenic outlooks?
5. Does the proposed development protect, maintain and enhance the region's landscape values?

[182] To assist me with considering these issues, I had the benefit of:

- (a) a statement of agreed facts;⁷⁰
- (b) the plans of the proposed development,⁷¹ which depict, amongst other things, design details of the proposed building, including the height, setback and extent of site cover of the floorplates for the various levels of the building, and building elevations and sections;
- (c) a landscape design;⁷²
- (d) many photographs of the area, including photographs of other buildings in the area and of the streetscape;⁷³
- (e) documents providing details about other development sites and other development in Port Douglas;⁷⁴
- (f) expert evidence with respect to digital photomontages given by Mr Petersen;⁷⁵

⁷⁰ Exhibit 8.11.

⁷¹ Exhibits 7.02, 7.03, 7.06 and 8.20. The plans are understood in conjunction with the evidence in Exhibits 1.78, 1.79, 1.81, 1.82, 1.83 and 1.84.

⁷² Exhibit 7.03.

⁷³ Exhibits 5.08, 5.09, 5.11, 6.11, 6.12, 8.15, 8.38, 8.41, and 9.21.

⁷⁴ Exhibits 6.09, 8.01, 8.02, 8.03, 8.13, 8.15, 8.38, 8.41, 9.07, 9.13, 9.14, 9.16, 9.17, and 9.23.

⁷⁵ Exhibits 6.11, 6.12, 6.22, 8.21, 8.27, 8.28, and 9.06, and oral testimony by the expert.

- (g) expert evidence with respect to visual amenity and landscape architecture given by Mr Butcher and Dr McGowan;⁷⁶
- (h) expert evidence with respect to architecture given by Mr Curtis and Mr Peabody;⁷⁷
- (i) expert evidence with respect to town planning given by Ms Morrissy and Mr Ovenden;⁷⁸
- (j) evidence of lay witnesses about their perceptions of the local area and Port Douglas;⁷⁹ and
- (k) the Planning Scheme,⁸⁰ which informs the reasonable expectations people may hold about the place.⁸¹

[183] As with the character issues, these issues call for value laden judgments about which reasonable minds may differ. My findings below reflect the aggregate impression that I have formed having regard to the collective effect of that evidence, to the extent that it is accepted by me.

Does the proposed development incorporate building materials and external finishes that are compatible with the visual amenity?

[184] Performance outcome PO3(c) of the Landscape values overlay code requires that development within a scenic route buffer or view corridor area as identified on the Landscape values overlay maps incorporates building materials and external finishes that are compatible with the visual amenity.

[185] When this provision is read in context, it is apparent that it is closely linked to the character issue and the intention that development be designed to be consistent with the prevailing landscape character.

[186] As I have already explained above, the proposed development will not give the appearance of being made of lightweight materials. It does not include building materials such as timber framing or tin roofs that assist with such an appearance. Although it incorporates building design that is representative of tropical urbanism, it uses balcony planters that appear as heavy spandrels. The incorporation of vegetation on the roof does not assist in achieving visual compatibility.

[187] The proposed development is inconsistent with performance outcome PO3(c) of the Landscape values overlay code. This is a matter that tells against approval.

Does the proposed development minimise visual impacts on the setting and views in terms of its scale, height and setback?

[188] As I have already observed above, when height and setbacks are considered in isolation of other matters, such as the design of the proposed development, those

⁷⁶ Exhibits 5.04, 5.08, 6.04, and 8.24, and oral testimony by the experts.

⁷⁷ Exhibits 5.09, 6.05, and 6.06, and oral testimony by the experts.

⁷⁸ Exhibits 5.11, 6.01, 6.02, 6.31, and 9.24 and oral testimony by the experts.

⁷⁹ Exhibits 6.17, 6.18, 6.19, 6.20 and 6.21.

⁸⁰ Exhibits 7.01, 8.07 and 9.01.

⁸¹ *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2007] QPEC 112; [2008] QPELR 342, 348-9 [40].

individual metrics of the proposed development do not exceed the acceptable outcomes to such an extent as to represent a material consideration.

- [189] That said, I am not satisfied that the proposed development minimises visual impact on the setting and views in terms of its scale. As I have already observed, the design of the proposed development will be perceived as one large building form with minimal punctuation and modulation and no separation into a pattern of smaller building envelopes. The proposed development conjures an image reminiscent of the shape and structure of Uluru. Even though the full dimensions of the proposed building will not be visible from public vantage points, its imposing scale will unacceptably impact on the setting. It will be appreciable from the concrete path located along the road verge adjacent the subject land, particularly in views obtained through the vehicular cross-over. It would seem that the inappropriate scale of the proposed development is acknowledged in the extensive planting surrounding and covering the proposed development.
- [190] The scale of the proposed development is inconsistent with performance outcome PO3(d)(i) of the Landscape values overlay code. This is a matter that tells against approval.

Will the proposed development be visually dominant or visually intrusive?

- [191] The proposed development adopts landscaping measures that are intended to reduce its visual dominance and intrusiveness. They are:
- (a) deep soil areas, totalling approximately 2,330 square metres in area, in which it is proposed to establish a range of larger trees, palms and shrubs to screen the built form;
 - (b) planting on podium areas around the building and on the roof terrace;
 - (c) balcony planting around the building on each level that are intended to be used to establish shrubs, groundcovers and trailing species to soften, screen and moderate the building form; and
 - (d) garden areas on the Port Douglas Road verge that typically range between nine and 18 metres in width from the eastern property boundary to the new pedestrian path. This will provide a substantial area in which to establish large trees, palms and shrubs that would, along with the on-site planting, provide substantial screening of the built form when viewed from Port Douglas Road.
- [192] Adopting Chiodo Corporation Operations Pty Ltd's predicted growth rates and maintenance regime, and assuming the landscaping will achieve the outcome depicted in the proposed plans and photomontages, there will not be expansive views of the proposed development from most of the surrounding neighbours.
- [193] The built form of the proposed development is setback from the Port Douglas Road frontage behind landscaping. The proposed development is also set down from the frontage and aligned at an angle across the subject land to reduce its visibility from Port Douglas Road. Although these measures will restrict the proposed development's visibility from Port Douglas Road, they will not completely hide the proposed development. The proposed development will still be appreciable from

the carriageway of Port Douglas Road and the concrete path located along the road verge adjacent the subject land, particularly in views obtained through the vehicular cross-over.

- [194] It is likely that the proposed development will not be visible when looking south from the adjoining Mirage Country Club. The impact from that viewpoint will be limited. There is likely to be limited visibility of the proposed development from the car park of the Oaks Port Douglas Resort. Combined, the vegetation that will be retained along the boundary with the Oaks Port Douglas Resort and the supplementary landscaping and the proposed balcony planting will likely provide sufficient landscape screening between the two developments.
- [195] The proposed development will be most visible from across the pond and fairways of the adjoining Mirage Country Club golf course. Indeed, even though it will be partially screened by proposed landscaping and existing vegetation, it will be obvious from that location.
- [196] The ability to see a five-star luxury resort complex from the golf course is not necessarily inconsistent with the intended character or visual amenity of the Mirage Country Club golf course. The use is one that is to be expected. However, for reasons already explained, the design of the proposed development does not accord with the character of Port Douglas or the local area. The design of the proposed development is so discordant with the character of the area that, even though it is partially screened by vegetation, it will be visually intrusive.
- [197] For the reasons provided above, the proposed development is inconsistent with the overall outcome in s 8.2.6.2(2)(h) of the Landscape values overlay code. This is a matter that tells against approval.

Will the proposed development have a detrimental visual impact on major scenic routes and scenic outlooks?

- [198] The Landscape Values Overlay Map identifies:
- (a) the subject land as adjacent a scenic route and partially within a scenic route buffer /view corridor that runs along the subject land's entire frontage to Port Douglas Road for a depth of about 100 metres;
 - (b) the Captain Cook Highway as a scenic route;
 - (c) Flagstaff Hill as a lookout;
 - (d) areas of medium and high landscape values located to the west of, but not adjoining, the subject land; and
 - (e) a linear strip of coastal scenery located to the east along the coastline.
- [199] The Council contends that the proposed development will have an unacceptable visual impact on the scenic route along Port Douglas Road and the Captain Cook Highway and on scenic outlook from Flagstaff Hill.

- [200] Port Douglas Road is identified as a scenic route. The terms “*scenic route*” and “*scenic route buffer / view corridor*” are not defined. The term “*buffer*” is defined to mean:
- “An area required for ecological, acoustic, scenic amenity or potential hazard protection purposes that incorporates a separation distance and associated landscaping, structures and works:
- (a) between different land uses; or
 - (b) from a major noise source; or
 - (c) from a conservation area or a public recreation area; or
 - (d) from a wetland, waterway or waterbody.”
- [201] This definition does not preclude the possibility of development within a scenic route buffer /view corridor. This is clear from performance outcome PO3 of the Landscape values overlay code, which manages the impact of development within a scenic route buffer / view corridor. This reflects that the scenic qualities of the scenic route along Port Douglas Road are not limited to the iconic avenue of oil palms. Its scenic qualities include all those matters that inform the character of the area, including the built form.
- [202] The built form of the proposed development is setback from the Port Douglas Road frontage behind landscaping. It is set down from the frontage and aligned at an angle across the subject land to reduce its visibility from Port Douglas Road.
- [203] Limited glimpses of the vegetated hills to the west are presently available from Port Douglas Road. When driving along the Port Douglas Road, these views will be available for a short duration. The views are either non-existent or further limited from locations along the concrete path in the road verge because of the lower position of the path.
- [204] Although the proposed development will partially obscure these limited views, the subject land is in the Tourist Accommodation zone. As such, short term accommodation, supported by community uses, is a use that is contemplated on the subject land. In those circumstances, it is reasonable to expect that these views will not be retained. That expectation is also reasonable given the nature of the existing approval that attaches to the subject land.
- [205] The existing approval was most recently changed by way of a decision notice dated 22 August 2017. It is a development permit for a material change of use for:
- (a) 79 “*Multiple Dwellings (Tourist)*”, of which 47 can be used as “*Multiple Dwellings (Tourist)*” and “*Accommodation Premises (Motel)*” in a dual key arrangement and three can be used temporarily as a “*Display Home (Multiple Dwelling)*”;
 - (b) 127 “*Accommodation Premises (Motel)*”; and
 - (c) ancillary uses including gym, spa, relaxation lounge, retail, restaurant, café, bar, function centre, meeting rooms and administration facilities.

- [206] The built form of the development in that existing approval consists of seven separate buildings of two and three storeys in height. Landscaping is proposed around each of the buildings and there are pools and ponds between and around the buildings.
- [207] Although the built form in the existing approval is separated into several building modules separated by landscaping, it nevertheless extends across the frontage of the subject land to Port Douglas in a way that will result in the loss of the presently available glimpses of the vegetated hills to the west.
- [208] In those circumstances, the loss of those glimpses is not a consideration that weighs against approval of the proposed development.
- [209] That said, the impact on the scenic route along Port Douglas Road is not limited to the loss of glimpses of the vegetated hills to the west. The scenic qualities of this scenic route are not limited to the views of the elevated, lowland and coastal landscapes. The landscape character along Port Douglas Road that contributes to the distinctive visual imagery of Douglas Shire includes the appreciation of the character of the resort-style tourist accommodation development in the central section of Port Douglas Road. That character is one of Queensland tropical vernacular architectural style buildings with built form arranged in a pattern of smaller building envelopes within a tropical landscape context that provides a sense of visual, physical and environmental permeability.
- [210] As I have found above, the proposed development is discordant with this character. There is an obvious difference in visual effect between a vegetated hill or form emerging from the landscape and more scaled-back building forms that are dispersed amongst densely planted landscaping.
- [211] The extent of views of the proposed development's discordant character from Port Douglas Road will be reduced because of the proposed landscaping, including landscaping in the road verge. For those travelling the road in a motor vehicle, the views may be fleeting. The visual impact will be greater for pedestrians and cyclists. Nevertheless, the visual impact will be jarring. As such, approval of the proposed development will not protect this scenic route from visual impacts of development that detract from the scenic qualities of the scenic route.
- [212] Other impacts put in contention are the impact of the proposed development on views from the Captain Cook Highway and the designated lookout of Flagstaff Hill.
- [213] The visual amenity experts agree that the proposed development will be visible from the Captain Cook Highway. However, it will not be prominent to persons travelling along the highway at a speed of 80 to 100 kilometres per hour. Rather, it will form part of a dynamic experience of the area. In addition, when viewed from the Captain Cook Highway, the proposed development will appear distant. It will not be visible above the horizon of existing vegetation.
- [214] I am satisfied that the proposed development will not interfere with any identified scenic value on the Townscape plan map and the Landscape values map when viewed from the Captain Cook Highway. Those maps do not identify any important views or viewpoints from the highway towards the east or in the direction of the subject land. Rather, the identified views from the highway that are marked as

significant on the Townscape plan map are those to the west and southwest of the highway, towards the mountains.

- [215] Turning then to the potential impact on a scenic outlook, the Landscape values overlay map depicts the view corridor from the Flagstaff Hill lookout as extending towards the subject land, but not over the subject land. Although the extent of the view mapped is approximately two kilometres, the way the landscape values are mapped suggests that they are not intended to be read as prescriptive designations. Rather, they are indicative in nature. There is no physical feature present in the landscape that supports reading the depiction of the view corridor on the map as precise in its extent. To the contrary, when the map is read in conjunction with the balance of the Planning Scheme, a restrictive construction of the map is not warranted. That said, as the distance from the lookout increases, the extent to which a single development has the potential to impact on the view is likely to diminish.
- [216] A degree of visibility of buildings or structures on land within the Tourist Accommodation zone is to be reasonably expected given:
- (a) the purpose of the Tourist Accommodation zone is to provide for short term accommodation; and
 - (b) in that zone, the acceptable outcomes admit of buildings and structures not more than 13.5 metres high above ground level, with a site coverage of 50 per cent with a variety of roof forms, including reflective tin roof forms.
- [217] From the designated lookout of Flagstaff Hill, Mr Butcher opines that the proposed development will be relatively indistinguishable whereas Dr McGowan considers that the proposed development will be visible, albeit at some distance. Dr McGowan accepts that the photomontage indicates that the proposed roof top landscaping, as well as existing landscaping to the north of the proposed development, will substantially disguise the proposed development when viewed from Flagstaff Hill.
- [218] In the photomontages showing the view from the lookout on Flagstaff Hill, the proposed development is barely identifiable. Even if I were to assume a far greater degree of visual impact, I am satisfied that the scenic lookout on Flagstaff Hill will not be detrimentally impacted to a material extent.
- [219] When viewed from that location, the proposed development will form part of an existing urban landscape. To the extent that it will be visible from Flagstaff Hill, it will be appreciated as part of that urban landscape. The proposed development will not detrimentally impact on the wide, scenic views from the lookout. Viewed from the lookout, the proposed development will not erode the character of Port Douglas, nor diminish the landscape or scenic values of the area. Any visibility will be distant. The proposed development will be viewed from a low angle and sit behind protected vegetation to the north of the subject land. It will sit amongst other vegetation and other dispersed built structures, including the Sheraton Mirage and the Mirage Country Club.
- [220] Nevertheless, for the reasons provided above, although I do not accept all of the Council's allegations, the proposed development is inconsistent with s 3.5.5.1(2) of the Strategic framework. This is a matter that tells against approval.

Does the proposed development protect, maintain and enhance the region's landscape values?

[221] Section 3.5.5.1(1) of the Strategic framework requires development to protect, maintain and enhance the region's Landscape values as shown on the Landscape values overlay maps contained in Schedule 2.

[222] The Planning Scheme defines "*landscape values*" as:

"Landscape attributes perceived by the community and visitors as **contributing to the attractive scenery and distinctive visual imagery of the Douglas Shire**, comprising significant landscape elements and features, valued landscape character types and areas of high and moderate scenic amenity, taking into account scenic preferences and visual exposure. **These attributes include** (but are not limited to) mountain ranges, coastal headlands, beaches, rivers, valleys and gorges, rainforest, cane fields, wetlands and estuaries, **character towns**, islands and seascape; and views from lookouts, gateways and scenic routes."

(emphasis added)

[223] One of the region's landscape values shown on the Landscape values overlay maps is the scenic route along Port Douglas Road. As I have already found above, the scenic qualities of this route are not limited to the views of the elevated, lowland and coastal landscapes. The landscape character along Port Douglas Road that contributes to the distinctive visual imagery of Douglas Shire includes the appreciation of the character of the resort-style tourist accommodation development in the central section of Port Douglas Road. That character is one of Queensland tropical vernacular architectural style buildings with built form arranged in a pattern of smaller building envelopes within a tropical landscape context that provides a sense of visual, physical and environmental permeability. The proposed development is discordant with this character.

[224] In those circumstances, the proposed development will not protect, maintain and enhance that landscape value.

[225] As such, the proposed development is inconsistent with s 3.5.5.1(1) of the Strategic framework. This is a matter that tells against approval.

Conclusion regarding visual amenity impact

[226] It has long been recognised by this Court that new development will often affect existing amenity. The real issue is whether a development will have a detrimental effect to an unreasonable extent according to the reasonable expectations of other landholders in the vicinity given the requirements of the Planning Scheme. This is to be answered according to the standards of comfort and enjoyment that are expected by ordinary people of plain, sober and simple notion not effected by some special sensitivity or eccentricity.⁸²

⁸² *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2007] QPEC 112; [2008] QPELR 342, 348-9 [40].

[227] The visual amenity impact of the proposed development will not be as extensive as that alleged by the Council. Nevertheless, for the reasons provided above, the proposed development will have an unacceptable visual amenity impact. The proposed development is inconsistent with ss 3.5.5.1(1) and (2) of the Strategic framework, the overall outcome in s 8.2.6.2(2)(h) and performance outcomes PO3(c) and (d)(i) of the Landscape values overlay code. The visual amenity impact is a matter that tells against approval.

Does the proposed development include appropriate landscape works?

[228] The Council contends that the proposed landscaping outcome is not appropriate. It says this is a significant issue given it is relied on by Chiodo Corporation Operations Pty Ltd to mitigate an inappropriate built form issue.

[229] The Council's contentions about the unacceptable landscaping outcome are informed by the requirements of the Planning Scheme, particularly the overall outcome in s 9.4.6.2(2)(g) and performance outcomes PO2 and PO6 of the Landscaping code.

[230] Chiodo Corporation Operations Pty Ltd disputes the alleged non-compliances with the Planning Scheme.

What do the assessment benchmarks require in terms of landscape works?

[231] The overall outcome in s 9.4.6.2(2)(g) states:

“(g) Landscaping is functional, durable, contributes to passive energy conservation and provides for the efficient use of water and ease of ongoing maintenance.”

[232] Performance outcomes PO2 and PO6, and their associated acceptable outcomes, state:

Performance outcomes	Acceptable outcomes
Landscape design	
<p>PO2</p> <p>Landscaping contributes to a sense of place, is functional to the surroundings and enhances the streetscape and visual appearance of the development.</p>	<p>AO2.1</p> <p>No acceptable outcomes are specified.</p> <p>Note - Landscaping is in accordance with the requirements specified in Planning scheme policy SC6.7 – Landscaping.</p> <p>AO2.2</p> <p>Tropical urbanism is incorporated into building design.</p> <p>Note – ‘Tropical urbanism’ includes many things such as green walls, green roofs, podium planting and vegetation incorporated into the design of a building.</p>
<p>PO6</p> <p>Landscaped areas are designed in order to allow for efficient maintenance.</p>	<p>AO6.1</p> <p>A maintenance program is undertaken in accordance with Planning scheme policy SC6.7 – Landscaping.</p> <p>AO6.2</p> <p>Tree maintenance is to have regard to the ‘Safe Useful Life Expectancy of Trees (SULE).</p> <p>Note – It may be more appropriate to replace trees with a SULE of less than 20 years (as an example), and replant with younger healthy species.</p>

(emphasis added to reflect the allegations made by the Council)

[233] Those assessment benchmarks raises two key factual questions for consideration. They are:

- (a) What is proposed in terms of landscaping?
- (b) Is the proposed landscaping functional and durable and does it provide for ease of ongoing maintenance?

- [234] To assist me with considering that question, I had the benefit of, amongst other evidence:
- (a) the plans of the proposed development,⁸³ which depict, amongst other things, design details of the proposed balcony planters;
 - (b) a landscape design;⁸⁴
 - (c) expert evidence with respect to digital photomontages given by Mr Petersen;⁸⁵ and
 - (d) expert evidence with respect to landscaping by Mr Butcher and Dr McGowan.⁸⁶
- [235] As with the character and visual amenity issues, these issues call for value laden judgments about which reasonable minds may differ. My findings below reflect the aggregate impression that I have formed having regard to the collective effect of the evidence, to the extent that it is accepted by me.

What is proposed in terms of landscaping?

- [236] After the conclusion of the evidence in the trial, Chiodo Corporation Operations Pty Ltd made a minor change to its development application.⁸⁷ Relevantly, it now seeks to make a material change of use that includes integrated landscaping on all levels including the roof terrace. The landscaping is to be provided generally in accordance with the architectural plans, the landscaping plans (excluding the off-site verge planting) and in a manner that will achieve the outcome shown in the photomontages.
- [237] The landscaping proposed as part of the development includes on-site landscaping on and around the proposed building. Chiodo Corporation Operations Pty Ltd also offered to provide off-site landscaping along the Port Douglas Road verge as part of the proposed development. As it is entitled to do, the Council has refused to accept such landscaping. In the circumstances, provision of off-site landscaping is no longer part of the proposed development.
- [238] Considering the Council's position, Chiodo Corporation Operations Pty Ltd had Mr Petersen prepare photomontages that illustrate the outcome said to be achievable with no verge planting. Those are the photomontages that have been incorporated into the description of the proposed development. That said, Chiodo Corporation Operations Pty Ltd remains willing to accept a condition that requires the provision of the verge planting that is identified in the landscape plans.
- [239] The proposed on-site landscaping detailed in the landscape plans consists of deep planting, podium planting and on-building planters. There is a proposed plant schedule that nominates a mix of endemic, native and exotic species, which are consistent with the species used in other landscaping in Port Douglas. The plant

⁸³ Exhibits 7.02, 7.03, 7.06 and 8.20. The plans are understood in conjunction with the evidence in Exhibits 1.78, 1.79, 1.81, 1.82, 1.83 and 1.84.

⁸⁴ Exhibit 7.03.

⁸⁵ Exhibits 6.11, 6.12, 6.22, 8.21, 8.27, 8.28, and 9.06, and oral testimony by the expert.

⁸⁶ Exhibits 5.04, 5.08, 6.04, and 8.24, and oral testimony by the experts.

⁸⁷ Exhibit 1.86.

schedule also includes several species consistent with the Douglas Shire Planning Scheme Policy SC6.7.8 Plant Species Schedule. The nominated tree species are to have a minimum size of 25 litre pots, which are anticipated to have a minimum height at planting of 1.5 metres. Some of the trees will be considerably larger, such as relocated ground stock, which are likely to have heights more than eight metres. Palms range in size from 200 millimetre pots up to the more substantial heights of existing ground stock that is to be relocated. The nominated shrubs range from 200 millimetre pots up to 45 litre pots or bags.

[240] The landscaping is proposed to be fully irrigated to promote the growth and establishment of all planting areas. The irrigation design will be resolved as part of the further detailed design. It is proposed to be a permanent part of the ongoing maintenance and management of the landscaping.

[241] Attachment A to the Appellant's Written Submissions⁸⁸ contains conditions that Chiodo Corporation Operations Pty Ltd proposes. With respect to landscaping, those conditions provide:

	Condition	Timing for compliance
1	<p>(a) Construct and maintain the development generally in accordance with the following approved Landscaping and Architectural Plans and documents unless these conditions expressly provide otherwise: (Refer to attached Approved Documents and Drawings Table)</p> <p>(b) In relation to the provision of landscaping on and around the development where there is any inconsistency as between the Approved Landscape Plans and the Approved Architectural Plans, the Approved Landscape Plans are to prevail.</p>	At all times after commencement of the use.
Landscaping		
6	<p>The landscaping shall be generally in accordance with:</p> <p>(a) The approved Landscaping Plans; and</p> <p>(b) The outcomes represented in the Zone Landscape Architecture Photomontages in Exh 6.11 for VP1, VP3, VP4, VP5, VP7, VP8, VP11, VP13, VP14 and VP15 and Exh 6.12 (Option 3 – no verge planting) VP2, VP6, VP9 and VP10 at both the 5 year and 10 year timeframes.</p>	<p>(a) From the commencement of the use.</p> <p>(b) At 5 years after the commencement of the use and at 10 years after the commencement of the use.</p>
7	In the event of any damage or destruction caused	At a reasonable time

	by severe weather events, ensure that within a reasonable period the landscaping is to be returned to as close as practicable the state it was in immediately prior to that event occurring.	following the occurrence of a severe weather event.
8	Ensure that the degree of vegetated screening of the Resort Complex from all vantage points (VP1 – VP15) remains consistent with the degree of vegetated screening depicted in the Zone Landscape Architecture Photomontages for both the 5 year and 10 year timeframes post development in Exh 6.11 for VP1, VP3, VP4, VP5, VP7, VP8, VP11, VP13, VP14 and VP15 and Exh 6.12 (Option 3 – no verge planting) for VP2, VP6, VP9 and VP10.	At the relevant times, being 5 years after the commencement of the use and at 10 years after the commencement of the use.
10	<p>Prepare and submit to Council an arborist report prepared and certified by a suitably qualified arborist which identifies:</p> <ul style="list-style-type: none"> (a) the trees on the site and in the verge which are to be protected and transplanted; in accordance with the Vegetation Retention and Removal Plan Drawing No. 620.30673 – 018 of the Amended Landscape Concept Response to Visual Amenity Experts Request – 8 August 2023; (b) protection measures for trees, including fencing and limitations on root disturbance; (c) transplantation methodology for those specimens to be transplanted (eg. preparation, removal, containerisation/ temporary replanting and relocation); (d) maintenance and monitoring activities; and (e) qualifications/ experience for contractors undertaking the works. 	Prior to site works commencing.
11	A maintenance manual shall be prepared and certified by a suitability qualified landscape maintenance contractor with details of an ongoing and regular maintenance program including a clearly defined access plan and which ensures the long term success of all landscape areas throughout the site which aligns with the strategies and outcomes described in these conditions. The maintenance manual should include details regarding a reticulated irrigation system to all areas to be landscaped including deep planting, podium planting and balcony planters.	Prior to site works commencing.

12	At the time of planting the minimum size of the plants are to be in accordance with the Plant Schedule in the Approved Landscaping plans.	Prior to the commencement of the use.
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[242] These conditions differ from those advanced by Chiodo Corporation Operations Pty Ltd at the start of the trial.⁸⁹ Those conditions included:

“12. A minimum of 1m height of shrub planting to be maintained above the edge of the balcony planters (currently shown as 200mm above the FFL of the balconies) or level with the glass balustrade.

13. Balcony planters shall typically consist of the following planting breakdown.

50% medium shrubs;

40% trailing species and groundcovers; and 10 per cent large shrubs.”

Is the proposed landscaping functional and durable and does it provide for ease of ongoing maintenance?

[243] The Council identifies five problems with Chiodo Corporation Operations Pty Ltd’s proposed landscaping outcome. It says these issues call into question the viability, durability and functionality of the containerised planters.

[244] First, even if the planting can be established in the containerised planters as proposed, Dr McGowan is concerned that the density and scale of planting will vary over time because of pruning or removal of plants. The plants not only take time to grow, but there will often be a need to prune or remove plants, including to improve the outlook or access to sunlight for guests from the private balconies to ensure their useability. The variability will affect the visibility of the built form during these stages of growth. The Council’s concerns were reinforced by condition 12 as proposed at the start of the hearing, which required a “*minimum of 1m height of shrub planting to be maintained above the edge of the balcony planters*”. That could result in a uniform one-metre-high shrub line, rather than the layered, tropical outcome depicted in the landscape plans and photomontages. In Chiodo Corporation Operations Pty Ltd’s latest set of conditions, attached to its written submissions delivered after the close of the evidence, there is no minimum height specified.

[245] Second, maintenance itself is problematic where containerised planters are used. Common issues include waterproofing fails, soil nutrient depletion, and plants outgrowing the planter and either becoming unstable or causing root intrusion into the concrete structures. Such problems are difficult to remedy and often require rectification of built form, not just the replacement of plants. Even if landscaping in the planter boxes is achieved as intended, there is a potential that because of the design and location of the planters, landscaping will be downscaled to improve the outlook for guests and access to sunlight.

⁸⁹ Exhibit 8.10.

[246] Third, the Council submits that the volume of the planters appears insufficient to maintain the amount of planting required to ensure the outcome is as voluminous and multi-tiered as that depicted in the plans and photomontages. Draft condition 13, as originally proposed, did not appear to require trees within the balcony planters at all. That impression was reinforced by the evidence of Mr Butcher, who sought to defer confirmation of the planting outcome within the planters with respect to tree species to the detailed design stage. Dr McGowan maintained his concerns under cross-examination, during which he said:⁹⁰

“...I’ve expressed concerns about particularly the size and density of planting in the containerised planting, and I don’t think those – those outcomes were achievable, and I don’t think they could be conditioned.

You don’t think it can be conditioned to achieve the sizes nominated?---Not with the amount of what’s been – what has been indicated at the density into the containerised planters.”

[247] Fourth, Mr Butcher says that the issues raised by Dr McGowan with respect to the containerised planters could be dealt with by a condition requiring the preparation of a detailed plant management and maintenance plan at the detailed design phase. The Council submits that the appearance and maintenance of the planting in the containerised planters is fundamental to the appearance of the building and its impact upon the landscape character of the local area. As such, the nature of such a condition could fundamentally change the nature of the development in terms of its impacts. In those circumstances, the Council submits that Mr Butcher’s suggestion raises an issue of finality and is inappropriate, particularly in circumstances where no such management plan has been prepared to date.⁹¹

[248] Fifth, the Council says Mr Butcher’s reliance on an example at Kangaroo Point of containerised planting on balconies is misplaced and, if anything, weakens confidence that the proposed development can be completely veiled and provide a degree of landscaping that remains dominant over built form by using a “*vertical greening*” strategy. In that respect, the Council notes that when Dr McGowan was queried about the example during cross-examination, he said:

“You don’t take issue that, for example, the building at Kangaroo Point has been a success?---The Walan building – the – yes. The vertical landscaping there – Mr Butcher’s got it in his statement – shows land – vertical landscaping that’s successful. The points are different there as, I guess – well, it’s a – it’s a different climate. This is subtropical. In a – Brisbane, it’s not a coastal tropical environment, which could be harsher. The planter boxes are, perhaps, not as wide but they have a more consistently deep profile, whereas the proposal has these tapered sections horizontally and vertically. And, I guess, the main point is that those planters aren’t trying to put as much into each planter box. Some of them have a tree and then one or two very small – or one or two small shrubs rather than, as I explain in the

⁹⁰ Transcript of proceedings, *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* (Planning and Environment Court of Queensland, 2827 of 2021, Kefford DCJ, 13 September 2023) 53.

⁹¹ *Harris v Scenic Rim Regional Council* [2014] QPEC 16; [2014] QPELR 324, 371-372 [229].

joint report, the proposed planter boxes are accommodating an awful lot. For example, the - the typical section and the architectural drawings indicate that some of them are accommodating a tree and large – a number of large shrubs and small shrubs and trailing plants, and I just don't think there's sufficient soil volume to support those in the long run.”

[249] The Council also takes issue with landscaping other than that in the containerised planters. In that respect, it relies on Dr McGowan's concerns that:

- (a) the proposed planting in the road verge is shown at a much greater depth and layering than would be expected for planting in a typical width of 3.2-5.9 metres; and
- (b) without the verge planting, assuming the photomontage depictions are accurate, the Port Douglas Road frontage after five years growth would be less substantial, less dense and unlikely to dominate the built form.

[250] For those reasons, the Council submits that the proposed landscaping outcome, even if it were achievable generally in accordance with the landscaping plans, cannot be said to be functional, high quality, efficiently maintainable, or otherwise appropriate to complement the tropical character of Port Douglas. Essentially, it is not fit for purpose in circumstances where it is being relied on to mitigate an inappropriate built form design.

[251] The Council's submissions are supported by the evidence of Dr McGowan.

[252] In response to these criticisms, Chiodo Corporation Operations Pty Ltd:

- (a) made a change to its development application to require landscaping to achieve the outcome depicted in the photomontages; and
- (b) changed its proposed conditions to:
 - (i) remove the previously proposed conditions 12 and 13; and
 - (ii) include a requirement for a maintenance manual to be prepared and certified by a suitability qualified landscape maintenance contractor with details of an ongoing and regular maintenance program including a clearly defined access plan, as suggested by Mr Butcher.

[253] Chiodo Corporation Operations Pty Ltd also relies on the evidence of Mr Butcher.

[254] During his oral evidence, Mr Butcher said that Dr McGowan's opinion about soil volumes is overly conservative because he relies on two, conservative, online soil volume simulators. Mr Butcher sought to demonstrate the overly conservative nature of the opinion by reference to an example at Kangaroo Point.

[255] Mr Butcher also opines that the proposed planters can be efficiently irrigated. He supports that opinion by reference to a site-specific document prepared by DPoV Consulting titled "*Irrigation Concept and Water Usage Plan*". A copy of the document is attached to Mr Butcher's individual statement of evidence.

[256] Mr Butcher opines that the proposed development provides deep planting areas, podium planting areas, balcony planting and planting within the Port Douglas Road verge that are capable of supporting a diverse range of tropical tree, palms, shrub, groundcover species to screen, soften, buffer and shade the built form and external spaces, and enhancing the amenity of users on the site and on adjoining sites. On that basis, he considers that the proposed development satisfies the provisions of the Landscaping code.

[257] As this Court has previously recognised, with any development, there is a degree of uncertainty about the final product that will be delivered.⁹² As was noted by His Honour Judge Robin in *Gaven Developments Pty Ltd v Scenic Rim Regional Council & Ors*,⁹³ full detailed design for a development is often left for later, once the Court has decided that a proposal should proceed. Similar observations were made by His Honour Senior Judge Skoien with respect to a rezoning application in *Buderim Private Hospital Pty Ltd v Maroochy Shire Council & Anor*.⁹⁴ His Honour observed:⁹⁵

“On an application for a rezoning it would obviously be unreasonable in most cases to require an applicant to supply detailed plans and specifications for the development which is to be constructed if the application should be successful. That would often involve great expense which would be wasted if the application were refused. All that the applicant need do is supply conceptual plans which indicate with reasonable accuracy the proposed development together with evidence that it can be developed in accordance with accepted principles of planning and engineering procedures. If the application should be successful conditions can properly be imposed requiring that technical and engineering works be carried out to the satisfaction of the Council’s proper officer. If the matter is sufficiently sensitive that satisfaction may be required before approval to rezone is given.”

[258] It does not necessarily follow that an applicant for a development approval will never be required to descend into matters of detail before being granted an approval.⁹⁶ Whether the degree of uncertainty attending a development tells against approval is a question of fact and degree that turns on the circumstances of the case.

[259] Here, the evidence of Dr McGowan is compelling. It satisfies me that the Council’s concerns about the functionality and durability of the proposed landscaping, and the ease of its ongoing maintenance, are legitimate. The evidence raises doubt in my mind about whether it is realistic to expect that the proposed landscaping can be delivered in the manner proposed. In this case, this is a matter that cannot simply be addressed by the conditions proposed or deferred to consideration as part of detailed design when applying for a development permit for operational works for the landscaping. It is a matter on which Chiodo Corporation Operations Pty Ltd places

⁹² *Southway Services No. 2 Pty Ltd v Brisbane City Council* [2022] QPEC 8; [2023] QPELR 544, 599-600 [246]-[248].

⁹³ [2010] QPEC 51; [2010] QPELR 750, 775 [75].

⁹⁴ [1996] QPELR 249.

⁹⁵ *Buderim Private Hospital Pty Ltd v Maroochy Shire Council & Anor* [1996] QPELR 251, 254.

⁹⁶ *Garyfy Pty Ltd v Maroochy Shire Council & Ors* [2008] QPEC 101; [2009] QPELR 435, 453 [131].

fundamental importance to demonstrate the acceptability of the proposed development.

[260] The question then becomes: Are the changes to the development application, the changes to the proposed conditions and the evidence of Mr Butcher sufficient to assuage those concerns? In short, the answer is no.

[261] Chiodo Corporation Operations Pty Ltd now seeks to define its development, insofar as it relates to the proposed landscaping, by reference to the photomontages prepared by Mr Petersen. This elevates the importance of having a precise understanding of the species composition and the density of planting depicted by Mr Petersen. This is because there is a close correlation between:

- (a) the species composition and density of planting and the visual outcome;
- (b) the species composition and density of planting and the volume of soil required to sustain such planting; and
- (c) the size of the container and the volume of soil available for containerised plantings.

[262] Mr Petersen's report does not reveal the species composition and density of planting that he incorporated into the photomontages, only that he relied on the landscape plans and the plant schedule. Those documents provide options for the species that might be used but do not provide detail of species composition and density of planting for the containerised planters on the balconies and on the roof. The documents do not, for example, specify how many trees, shrubs and trailing plant species are to be included in each balcony planter. During cross-examination, Mr Petersen confirmed that he was unable to provide details of the individual species depicted or of the size and location of the species depicted in the photomontage. He could not recall whether he exercised a judgment about those matters having regard to the landscape concept plan or whether someone else made the decision about what to input into the program. The absence of this information is troubling and does not inspire confidence in the viability or feasibility of the species composition depicted in the photomontages.

[263] With respect to the proposed in-ground plantings, Mr Petersen explained that the photomontage reflects that he input the existing vegetation that is to be retained and the proposed landscaping, even where that involved including new vegetation on top of retained vegetation. He made no judgment about the feasibility of such decisions. It is evident from the cross-examination that the outcomes specified on the plans are not achievable.⁹⁷

[264] In the circumstances, Chiodo Corporation Operations Pty Ltd has not discharged its onus of demonstrating compliance with the overall outcome in s 9.4.6.2(2)(g) and performance outcomes PO2 and PO6 of the Landscaping code.

[265] That said, the failure to demonstrate compliance, or that compliance can be appropriately conditioned, is not determinative in this case. Even assuming the

⁹⁷ Transcript of proceedings, *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* (Planning and Environment Court of Queensland, 2827 of 2021, Kefford DCJ, 12 September 2023) 51-5.

landscape results are achieved in the manner suggested by Chiodo Corporation Operations Pty Ltd, that landscaping is insufficient to ensure that the proposed development will not have an adverse character impact.

Is the scale of the proposed development appropriate given its location?

[266] The Council accepts that the nature of material change of use proposed, being for a resort complex, is one that can appropriately locate on the subject land. However, as I have identified in paragraph [10] above, the Council contends that the proposed development, by reason of its incorporation of intense dining, function and entertainment uses, is not appropriately located. It says the leisure facilities that are proposed to be integrated with the short-term accommodation are of a scale that would draw focus away from the Port Douglas town centre, contrary to the Council’s deliberate forward planning strategy.⁹⁸

[267] In support of its contention, the Council relies on the assessment benchmarks in:

- (a) s 3.8.3.1(4) of the Strategic framework; and
- (b) the overall outcome in s 7.2.4.3(3)(b) of the Port Douglas / Craigie local plan code.

[268] It is uncontentious that the provisions to which the Council refers are relevant assessment benchmarks, but Chiodo Corporation Operations Pty Ltd disputes that the proposed development fails to comply with them.

What do the assessment benchmarks require?

[269] Section 3.8.3.1(4) is a specific outcome that relates to the element of tourism that is part of Theme 5 – Economy. It states:

“Major tourist accommodation and entertainment area will continue to focus in the Port Douglas Town Centre.”

[270] The overall outcome in s 7.2.4.3(3)(b) of the Port Douglas / Craigie local plan code seeks a similar outcome. It states:

“Major tourist, retail, dining and entertainment facilities will consolidate in the Town Centre and the Waterfront North sub-precincts, with improved pedestrian connections between the town centre and the waterfront.”

[271] Those assessment benchmarks raise two key factual questions for determination, namely:

1. What is the extent of the tourist, retail, dining and entertainment facilities that are proposed?
2. Will the proposed development create a major tourist accommodation and entertainment area that will draw focus from the Port Douglas Town Centre?

⁹⁸ Written opening on behalf of the Respondent p 22 [99(d)] and pp 24-5 [110]-[114].

[272] To assist me with the assessment of the proposed development against the applicable assessment benchmarks, I had the benefit of varied forms of evidence, including:

- (a) the plans of the proposed development;⁹⁹
- (b) documents providing details about other development sites and other development in Port Douglas;¹⁰⁰
- (c) expert evidence with respect to digital photomontages given by Mr Petersen;¹⁰¹
- (d) expert evidence with respect to visual amenity and landscape architecture given by Mr Butcher and Dr McGowan;¹⁰²
- (e) expert evidence with respect to architecture given by Mr Curtis and Mr Peabody;¹⁰³
- (f) expert evidence with respect to town planning given by Ms Morrissy and Mr Ovenden;¹⁰⁴
- (g) evidence about the Fairmont brand of resorts;¹⁰⁵ and
- (h) the Planning Scheme.¹⁰⁶

What is the extent of the tourist, retail, dining and entertainment facilities that are proposed?

[273] The proposed development is a resort complex which integrates leisure facilities that include:

- (a) restaurants and bars;
- (b) meeting and function facilities, including an events zone on the roof (described on the plans as a wedding deck);
- (c) fitness facilities, including a gym, spa, massage facilities and area for yoga;
- (d) transport facilities directly associated with the tourist facility, including a shuttle bus, e-scooters and bicycles;
- (e) pools;
- (f) local First Nation's Peoples cultural activities and experiences; and
- (g) tourist focussed shopping, including the display and sale of local First Nation's Peoples art and an atelier.

⁹⁹ Exhibits 7.02, 7.03, 7.04, 7.06 and 8.20. The plans are understood in conjunction with the evidence in Exhibits 1.78, 1.79, 1.81, 1.82, 1.83 and 1.84.

¹⁰⁰ Exhibits 6.09, 8.01, 8.02, 8.03, 8.13, 8.15, 8.38, 8.41, 9.07, 9.13, 9.14, 9.16, 9.17, and 9.23.

¹⁰¹ Exhibits 6.11, 6.12, 6.22, 8.21, 8.27, 8.28, and 9.06, and oral testimony by the expert.

¹⁰² Exhibits 5.04, 5.08, 6.04, and 8.24, and oral testimony by the experts.

¹⁰³ Exhibits 5.09, 6.05, and 6.06, and oral testimony by the experts.

¹⁰⁴ Exhibits 5.11, 6.01, 6.02, 6.31, and 9.24 and oral testimony by the experts.

¹⁰⁵ Exhibits 1.80, 6.13 and 8.23.

¹⁰⁶ Exhibits 7.01, 8.07 and 9.01.

- [274] The proposed development is sought to be undertaken generally in accordance with the architectural plans, including the hotel program, which lists the various public spaces using descriptors such as lower ground function room and level 4 events zone. It provides a corresponding area for each of those public spaces. There is a dispute about the accuracy of the areas recorded.
- [275] On Mr Ovenden’s analysis of the areas referenced in the hotel program, the proposed development entails:
- (a) a total of 3,550 square metres dedicated to food and drink facilities;
 - (b) a total of 2,072 square metres dedicated to function facilities; and
 - (c) a total of 1,559 square metres dedicated to spa and gym facilities.
- [276] These areas do not include other areas that may be needed for the proper functioning of the food and drink facilities and the function facilities, such as kitchens.
- [277] Chiodo Corporation Operations Pty Ltd’s description of its proposed development concludes with the following statement:

“... and with any limitations on the use of the integrated leisure facilities (including restaurants and bars and meeting and function facilities) by persons other than in house guests as is reasonably required to ensure that car parking demands generated by the development (by staff, guests, and other users of the development) are fully contained within the development at all times, without car parking generated by the development occurring in the street or on other land, and the operator taking all reasonable steps in managing operation of the carpark to ensure that primary objective is achieved.”

- [278] The Council submits that the inclusion of this description in the development application increases the inherent uncertainty about what is proposed. At first blush, there is force to this submission. However, the statement may also be construed as a concession that, should I determine that such a limitation would ensure no unreasonable impact associated with car park generation, a condition that imposes such a limitation would be relevant to, and not an unreasonable imposition on, the use of the premises as a consequence of the development. That is the basis on which I intend to proceed.¹⁰⁷

Will the proposed development create a major tourist accommodation and entertainment area that will draw focus from the Port Douglas Town Centre?

- [279] There is no dispute that the subject land is not in the Port Douglas Town Centre. It is approximately 2.5 kilometres from the Port Douglas activity centre that is focussed on Macrossan Street.
- [280] The Council accepts that a resort complex is a use that is anticipated on the subject land and that such a use would have integrated facilities of the kind proposed (as is inherent from the definition of resort complex). The Council says the leisure

¹⁰⁷ *Planning Act 2016* s 65.

facilities are too intense and of too great a scale to be located on the subject land. Its contention in this regard is premised on its view that the ancillary uses are not designed to operate in an ancillary way at all. The Council submits that it appears to be Chiodo Corporation Operations Pty Ltd's intention to operate the proposed development as a standalone facility that will be the largest and most intense in the region. It further submits that the facilities within the building appear to be the intended drawcard of the hotel, rather than Port Douglas and the natural attributes of the Shire. It says that guests will be enticed to use the facilities, rather than going elsewhere. The Council submits that it follows that, if approved, the proposed development would create a major tourist, dining and entertainment facility.

[281] The Council submits that, although the concept of "*major tourist, retail, dining and entertainment facilities*" is not defined in the Planning Scheme, the creation of a de facto tourist destination or attraction in this area is precisely the kind of situation that the Planning Scheme seeks to avoid.

[282] According to the Council, "*major tourist, retail, dining and entertainment facilities*" should be given a different meaning to "*tourist attraction*" given tourist attraction is defined in the Planning Scheme as:

"Premises used for providing on-site entertainment, recreation or similar facilities for the general public. The use may include provision of food and drink for consumption on site."

[283] The Planning Scheme also gives examples of uses that would fit the definition of a tourist attraction, being theme park and zoo.

[284] The Council says that although the proposed development does not position itself as a tourist attraction, it is not precluded from falling within the term "*Major tourist, retail, dining and entertainment facilities*". In that respect, it notes that the defined uses of Food and drink outlet (not providing a drive through facility), Shop and Function facility all fall within the "*Centre activities*" activity group and are facilities ordinarily encouraged to occur in a centre zone when considered as standalone uses.

[285] For those reasons, the Council submits that the proposed development does not comply with the forward planning strategy in s 3.8.3.1(4) of the Strategic framework and the overall outcome in s 7.2.4.3(3)(b) of the Port Douglas / Craiglie local plan code.

[286] I do not accept the Council's submissions.

[287] The Council's case with respect to non-compliance with s 3.8.3.1(4) of the Strategic framework is premised on an assumption that "*major tourist, retail, dining and entertainment facilities*" (emphasis added) are only to occur in the Port Douglas Town Centre. I disagree. The provision refers to "*major tourist, accommodation and entertainment areas*", not "*facilities*". When one reads the whole Planning Scheme, there is strong encouragement for tourist accommodation uses and entertainment uses in the Port Douglas Town Centre in preference to, but not to the exclusion of, its development in other parts of the Shire, such as Daintree Village, Cape Tribulation, or Craiglie.¹⁰⁸

¹⁰⁸ See, for example, Planning Scheme ss 3.8.3.1(3), (5), (6), (7) and (8), 6.2.14.2(1), (2), (3)(a), (b), and (c), and 7.2.4.3(3)(a) and (c).

[288] The development application seeks a material change of use for a resort complex. That use is defined in the Planning Scheme as:

“Premises used for tourist and visitor short-term accommodation that include integrated leisure facilities including:

- (a) restaurants and bars;
- (b) meeting and function facilities;
- (c) sporting and fitness facilities;
- (d) staff accommodation;
- (e) transport facilities directly associated with the tourist facility such as a ferry terminal and air services.”

[289] It is apparent from this definition that the use involves the provision of integrated leisure facilities.

[290] The Planning Scheme does not contain an assessment benchmark that prescribes a quantitative limit on the integrated leisure facilities. Contextual guidance as to what might be expected by way of integrated leisure facilities is provided by:

- (a) the overall outcome in s 7.2.4.3(3)(c) of the Port Douglas / Craiglie local plan code, which states:

“Craiglie will develop as an integrated residential community with some low scale tourism development opportunities in appropriate locations. Craiglie will also function as small scale commercial and light industry noted, providing employment opportunities for the Shire’s permanent residential population.”

(emphasis added)

- (b) performance outcome PO9 of the Tourist accommodation zone code and the associated acceptable outcomes, which state:

Performance outcomes	Acceptable outcomes
<p>PO9</p> <p>Tourist developments include recreational and ancillary services and facilities for the enjoyment of guests.</p>	<p>AO9.1</p> <p>Development which includes accommodation for tourists incorporates a mix of the following recreational and ancillary services and facilities:</p> <ul style="list-style-type: none"> (a) swimming pools; (b) tennis courts; (c) barbecue areas; (d) outdoor lounging / recreation areas;

	<p>(e) restaurants / bars;</p> <p>(f) tourist-focussed shopping;</p> <p>(g) tour booking office;</p> <p>(h) spa / health clubs.</p> <p>AO9.2</p> <p>Any commercial services or facilities incorporated into a tourist development are small scale and predominantly service in-house guests only.</p> <p>AO9.3</p> <p>Where a commercial service or facility offers services to persons over and above in-house guests, the commercial component provides on-site car parking for 50% of the floor area available for use in accordance with the relevant requirements of the Parking and access code.</p>
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(emphasis added)

- [291] It is apparent from these assessment benchmarks that use of the integrated leisure facilities need not be limited to only in-house guests, but they should be to predominantly service the in-house guests.
- [292] The real question is whether the proposed leisure facilities form part of the planning unit that is a resort complex, or whether they constitute a separate planning unit.
- [293] The need to identify the correct planning unit when determining the use of land is a concept that has long been recognised in town planning law.¹⁰⁹ It involves an evaluative exercise involving considerations of fact and degree.
- [294] Under the *Planning Act 2016*, a use for premises is defined to include an ancillary use of the premises. Recently the term “*ancillary*”, as it appears in the definition of use in the *Planning Act 2016*, was considered by His Honour Judge Williamson KC in *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council*¹¹⁰ and by His Honour Judge Cash in *Sanad Capital Pty Ltd v Sunshine Coast Regional Council & Anor.*¹¹¹ I agree with the observations of their Honours. A use will be ancillary if subordinate to the principal use of premises. As was observed by His Honour Judge Cash, in a practical sense, a use will form part of the dominant use of land where it is an integral or essential component of that use. A

¹⁰⁹ See, for example, *Woolworths Ltd v Maryborough City Council (No. 2)* [2005] QCA 262; [2006] 1 Qd R 273, 290-1 [38]-[40].

¹¹⁰ [2018] QPEC 52; [2019] QPELR 221, 226-9 [9]-[17].

¹¹¹ [2023] QPEC 8, [139].

use will be ancillary where it is not integral or essential but would not occur absent the dominant use.

[295] As I have noted in paragraph [275] above, on Mr Ovenden's analysis of the areas referenced in the hotel program, the proposed development entails:

- (a) a total of 3,550 square metres dedicated to food and drink facilities;
- (b) a total of 2,072 square metres dedicated to function facilities; and
- (c) a total of 1,559 square metres dedicated to spa and gym facilities.

[296] These measurements do not necessarily provide a true indication of the scale of the leisure facilities if those facilities were to be considered as separate uses. This is because the ascribed floor areas on the hotel program do not include areas such as kitchens, amenities, and the "*breakout area*" of the function space. This is a matter that was conceded by Ms Morrissy, who provided the other experts with assistance in calculating the extent of use areas.

[297] During cross-examination, Ms Morrissy accepted that, given the extent of leisure facilities proposed, the proposed development will be a destination in itself.

[298] Mr Ovenden opines that, by floor area, the so-called ancillary facilities in the proposed development are staggeringly large and dwarf those in other integrated resort developments in the local area, such as the Sheraton Grand Mirage Resort Port Douglas and Pullman Port Douglas Sea and Temple Resort and Spa. Mr Ovenden says that his opinion in this regard is supported by the observations he made when visiting those other facilities and from his discussions with managers of the other facilities, who apparently informed Mr Ovenden that:

- (a) the Pullman Port Douglas Sea and Temple Resort and Spa has indoor restaurant and function areas totalling 315 square metres and three outdoor event spaces that can cater for between 45 and 200 guests;
- (b) Oaks Port Douglas Resort has indoor total function, restaurant and bar areas totalling 621 square metres; and
- (c) Sheraton Grand Mirage Resort Port Douglas has indoor function areas totalling 1,557 square metres, excluding kitchens and other support facilities.

[299] Mr Ovenden did not record his observations in photographic form or otherwise, other than to the extent that he provides details of function facilities that he was provided by others and that he says accord with what he observed. Nevertheless, given I had the benefit of an extensive site inspection to assist me to understand his evidence, I accept that the extent of leisure facilities in the proposed development generally exceeds that associated with other resort-style development in the area.

[300] The significance of the leisure facilities to the potential operator was the subject of evidence from individuals associated with Fairmont Hotels & Resorts. The Fairmont brand obtains more than 40 per cent of its revenue from meeting and events, food and beverage and outside catering. Mr Willis, the Chief Executive Officer of Fairmont Hotels & Resorts at the Accor Group, gave evidence that the quality and scale of the integrated leisure facilities proposed are what he considers will set the Fairmont Port Douglas apart from the current hotel offerings in the region. He is of the view that there are currently no hotels or resorts within the Port

Douglas area that can provide the proposed facilities, entertainment, event facilities and activities in a single resort location.

- [301] Although the proposed development might generate more than 40 per cent of its operational income from meeting and events, food and beverage and outside catering, it is not apparent that percentages of that magnitude are remarkable for a resort-style complex. Comparable information was unavailable with respect to the operating income derived by Pullman Port Douglas Sea and Temple Resort and Spa, Oaks Port Douglas, or the Sheraton Grand Mirage Resort Port Douglas.
- [302] The way an operator charges for the provision of its accommodation in conjunction with integrated leisure facilities is a matter of private economics. That said, the evidence demonstrates that the proposed leisure facilities are an integral part of the proposed development.
- [303] Having regard to the design of the proposed development, including the location of the component parts that constitute the facilities other than accommodation, I am satisfied that those aspects of the proposed development that are to be provided in addition to the accommodation constitute integrated leisure facilities that form part of the resort complex use. They do not constitute a separate or distinct use such that the proposed development would properly be characterised as a composite use comprised of a resort complex and another separate use.
- [304] This then begs the question: is the overall scale of the proposed resort complex use such that it cuts across the planning intention that:
- (a) major tourist accommodation and entertainment area will continue to focus in the Port Douglas Town Centre; and
 - (b) major tourist, retail, dining and entertainment facilities will consolidate in the Town Centre and the Waterfront North sub-precincts, with improved pedestrian connections between the town centre and the waterfront.
- [305] It can readily be accepted that the protection of centres represents a critical matter of forward planning under the Planning Scheme,¹¹² and that the appropriate approach to such matters of town planning import is one of restraint.¹¹³ That said, in order to ascertain whether the proposed resort complex use cuts across the relevant planning intention, it is necessary to understand the existing context in terms of major tourist accommodation, retail, dining and entertainment facilities. This is because the relevant assessment benchmarks call for a continuation and consolidation of the existing arrangements.
- [306] At present, there is a distinct focal point for tourist accommodation within the Port Douglas Town Centre. Of the 67 tourist accommodation offerings in Port Douglas identified by Mr Duane, the majority are located very close to, or within, the Port Douglas Town Centre.
- [307] However, not all tourist accommodation is in the Port Douglas Town Centre. There are several larger sites that accommodate tourist accommodation and ancillary uses

¹¹² Planning Scheme ss 3.4.1(3), 3.4.3(1), (2), (3) and (4), 3.4.3.1(7) and 3.8.3.1(4); Exhibit 9.01 pp 41, 43, 44, and 60.

¹¹³ *Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157, [15]-[16]; *I.B. Town Planning v Sunshine Coast Regional Council* [2021] QPEC 36; [2022] QPELR 791, 811 [82]-[83].

outside of the Port Douglas Town Centre. There are five tourist accommodation offerings in Port Douglas with over 100 rooms. None of them are located within the Port Douglas Town Centre. They all offer a wide range and combination of meeting rooms and conference facilities, massage and spa facilities, sporting facilities, transportation options, restaurants, shops and free parking.

- [308] Based on the calculations from Mr Ovenden, the Sheraton Grand Mirage Resort Port Douglas provides the greatest extent of function space. It has a total of 1,577.5 square metres of function space. That calculation only includes the area of the indoor function rooms. It does not include any outdoor function areas on the Sheraton land, nor does Mr Ovenden reference to kitchen space for the respective function areas that contribute to that total. Although the function space is extensive in area, it does not present as a separate and distinct use. It is fairly described as a resort, where the leisure facilities are integrated with the accommodation offer. This is apparent from the evidence, my appreciation of which was enhanced by the familiarity obtained during the extensive site inspection of the Sheraton Grand Mirage Resort Port Douglas.
- [309] In addition to the present supply of tourist accommodation, in considering the extent to which the proposed development would cut across the relevant planning intention, it is also relevant to have regard to the existing approval for the subject land. As I have already indicated in paragraph [205] above, under the existing approval, the subject land could lawfully be used for tourist accommodation in 253 rooms together with multiple swimming pools, a business centre, conference facilities, retail space, day spa, gym, food and beverage facilities (including restaurant, lounge, bar and café) and basement car parking spaces. The proposed development includes a similar number of guest rooms and the same type of offerings, albeit at a lesser scale and only for guests.
- [310] Turning then to the retail and non-retail facilities within and around the Town Centre that serve tourists for a wide variety of purposes: on the evidence of Mr Duane, these total 15,000 to 20,000 square metres. In combination, the two pubs in the Port Douglas Town Centre, namely The Court House Hotel and The Central Hotel, account for over 3,000 square metres of that space. Mr Duane opines that the proposed dining and bar facilities of between 3,000 and 3,500 square metres would have no appreciable impact on the functioning of the cafes, restaurants, pubs and takeaway food facilities in the Port Douglas Town Centre, which are more than 35 in number. Mr Duane's evidence in that respect was unchallenged and I accept it.
- [311] In those circumstances, I am satisfied that, although the proposed development will not advance the planning intention in s 3.8.3.1(4) of the Strategic framework and the overall outcome in s 7.2.4.3(3)(b) of the Port Douglas / Craigie local plan code, it will not cut across it in a meaningful way. An assessment of the proposed development against s 3.8.3.1(4) of the Strategic framework and the overall outcome in s 7.2.4.3(3)(b) of the Port Douglas / Craigie local plan code does not lend support to, nor meaningfully detract from, the case for approval of the proposed development.

Does the proposed development provide adequate car park numbers and car park management?

[312] The Council contends that Chiodo Corporation Operations Pty Ltd has not demonstrated that the proposed development provides acceptable car parking arrangements.

[313] The assessment benchmarks that the Council relies on with respect to the car parking issue are the overall outcome in s 9.4.1.2(2)(a) and performance outcome PO1(a), (b) and (c) of the Access, parking and servicing code. That code applies to a development application for a material change of use that is impact assessable, to the extent relevant.¹¹⁴

What do the assessment benchmarks require in terms of car parking?

[314] The purpose of the Access, parking and servicing code is to assess the suitability of access, parking and associated servicing aspects of a development.¹¹⁵ This purpose is to be achieved through the overall outcomes.

[315] The overall outcome in s 9.4.1.2(2)(a) states:

“sufficient vehicle parking is provided on-site to cater for all types of vehicular traffic accessing and parking on-site, including staff, guests, patrons, residents and short term delivery vehicles.”

[316] Performance outcome PO1, and the associated acceptable outcome, state:

Performance outcomes	Acceptable outcomes
For self-assessable and assessable development	
<p>PO1</p> <p>Sufficient on-site car parking is provided to cater for the amount and type of vehicle traffic expected to be generated by the use or uses of the site, having particular regard to:</p> <p>(a) the desired character of the area;</p> <p>(b) the nature of the particular use and its specific characteristics and scale;</p> <p>(c) the number of employees and the likely number of visitors to the site;</p> <p>(d) the level of local accessibility;</p>	<p>AO1.1</p> <p>The minimum number of on-site vehicle parking spaces is not less than the number prescribed in Table 9.4.1.3.b for that particular use or uses.</p> <p>Note - Where the number of spaces calculated from the table is not a whole number, the number of spaces provided is the next highest whole number.</p> <p>AO1.2</p> <p>Car parking spaces are freely available for the parking of vehicles at all times and are not used for external storage purposes, the display of products or rented/sub-leased.</p>

¹¹⁴ Planning Scheme s 9.4.1.1(1): Exhibit 9.01 p 356.

¹¹⁵ Planning Scheme s 9.4.1.2(1): Exhibit 9.01 p 356.

<p>(e) the nature and frequency of any public transport serving the area;</p> <p>(f) whether or not the use involves the retention of an existing building and the previous requirements for car parking for the building</p> <p>(g) whether or not the use involves a heritage building or place of local significance;</p> <p>(h) whether or not the proposed use involves the retention of significant vegetation.</p>	<p>AO1.3</p> <p>Parking for motorcycles is substituted for ordinary vehicle parking to a maximum level of 2% of total ordinary vehicle parking.</p> <p>AO1.4</p> <p>For parking areas exceeding 50 spaces parking, is provided for recreational vehicles as a substitute for ordinary vehicle parking to a maximum of 5% of total ordinary vehicle parking rate.</p>
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(emphasis added to reflect the allegations made by the Council)

[317] To assist me with the assessment of the proposed development against the applicable assessment benchmarks, I had the benefit of evidence in various forms, including:

- (a) the plans of the proposed development;¹¹⁶
- (b) the Transport Management Plan;¹¹⁷
- (c) the affidavit of Mr Palamara about area calculations;¹¹⁸ and
- (d) expert evidence with respect to traffic engineering given by Mr Bryce Trevilyan and Mr Stuart Holland, the traffic engineers retained by Chiodo Corporation Operations Pty Ltd and the Council respectively.¹¹⁹

[318] My findings below are informed by the combined effect of the evidence that I accept, including from my own observations about details shown on the plans.

Are the proposed car parking arrangements satisfactory?

[319] It is common ground that for the proposed development to be acceptable, all car parking demand must be accommodated on the subject land. This is so for two reasons. First, although there is a wide road verge immediately adjacent to the subject land, the use of it for car parking would have a detrimental impact on the character of the locality. Second, use of the verge would pose an unacceptable safety risk given its profile.

[320] There is no dispute that the proposed development does not provide the minimum number of on-site vehicle parking spaces prescribed in acceptable outcome AO1.1 of the Access, parking and servicing code. In that respect, I accept the unchallenged

¹¹⁶ Exhibits 7.02, 7.04, 7.06 and 8.20.

¹¹⁷ Exhibit 8.05.

¹¹⁸ Exhibit 1.81.

¹¹⁹ Exhibits 5.03, 6.07, 6.24, and 6.28, and oral testimony by the experts, and other documents referenced by them including Exhibits 9.19 and 9.20.

evidence of Mr Holland that, to achieve compliance with the acceptable outcome, the proposed development would need to provide 521 vehicle parking spaces.

- [321] The proposed development includes 332 car parking spaces, 14 motorcycle bays and 88 bicycle bays. The use of those vehicle parking spaces is proposed to be managed in accordance with the Transport Management Plan, as amended and varied by the recommendations of Mr Holland in section 3 of his individual statement.¹²⁰
- [322] Chiodo Corporation Operations Pty Ltd's development application states that the car parking management is to be conducted with the primary objective of ensuring that car parking demands generated by the proposed development (by staff, guests, and other users of the proposed development) are always fully contained within the proposed development. It accepts that car parking generated by the proposed development is not to occur in the street or on other land and says that the operator will be required to take all reasonable steps in managing the operation of the carpark to ensure that primary objective is achieved.
- [323] To facilitate this end, Chiodo Corporation Operations Pty Ltd has changed its development application to:
- (a) indicate that there will not be any more than the equivalent of 200 full time staff on-site in any 24-hour period; and
 - (b) describe the development as including:
 - “any limitations on the use of the integrated leisure facilities (including restaurants and bars and meeting and function facilities) by persons other than in house guests as is reasonably required to ensure that car parking demands generated by the development (by staff, guests, and other users of the development) are fully contained within the development at all times, without car parking generated by the development occurring in the street or on other land, and the operator taking all reasonable steps in managing operation of the carpark to ensure that primary objective is achieved.”
- [324] Chiodo Corporation Operations Pty Ltd submits that, in those circumstances, either:
- (a) there are a satisfactory number of car parking spaces provided; or
 - (b) conditions could be imposed restricting the extent to which the integrated leisure facilities could be used by those who are not in-house guests to achieve a satisfactory outcome.
- [325] Chiodo Corporation Operations Pty Ltd's submissions detail how it says compliance could be achieved through conditions. There is a degree of complexity to them. They provide a series of calculations that calculate the number of car parks that they say would be required based on varying combinations of public use of identified aspects of the leisure facilities. Scrutiny of the submissions, and the evidence that informs them, reveal that there are two assumptions that underpin all scenarios.

¹²⁰ Exhibit 6.28.

- [326] First, each scenario assumes that the imposition of a condition that caps the number of staff employed during any 24-hour period to a maximum of 200 staff. It also relies on the evidence of Mr Trevilyan that with staff numbers capped at 200, it is reasonable to impose a condition that caps the number of staff car parks at 62.
- [327] Mr Trevilyan's opinion is premised on:
- (a) a "*gut feel*" that a five star resort complex would have some staff rostered on at all hours of the day but that there would be eight hours a day of high activity, eight hours of medium activity and eight hours of low activity and in his opinion a likely division of a 200 daily staff number would reasonably be estimated to be 100 staff at the busiest 8 hours of the day, and for the remaining 16 hours, 70 staff at the somewhat busy period of the day and 30 staff overnight;¹²¹ and
 - (b) an expectation that of the 100 staff present on the site at the busier time of day, only about 60 per cent would drive as Mr Trevilyan expected that most staff would live within a three or four kilometre radius of the facility and would have ample opportunity to walk, cycle or travel to work with another staff member, or would get dropped off by a friend or spouse or would take a shuttle bus.
- [328] I have concerns about the veracity of these assumptions. Leaving aside the absence of evidence that demonstrates that it is reasonable to impose a condition limiting the number of staff employed during any 24-hour period to a maximum of 200, Mr Trevilyan's assumptions about the breakdown of staff across the day and their likely travel habits are not matters about which Mr Trevilyan has any evident experience. Nor were his views about these matters informed by enquiries made of the proposed hotel operator or of other nearby resorts. This was confirmed during cross-examination.
- [329] Although there was evidence from the proposed hotel operator, that evidence did not address:
- (a) the number of staff that might be required to operate the proposed development to the standard expected at a luxury, five-star resort;
 - (b) the proportion of staff on-site at various times of the day; or
 - (c) the travel habits of staff.
- [330] Second, each scenario assumes that it is appropriate to apply the relevant Council standard for car parking generation for each integrated leisure facility component and to then proportionately reduce the number of carparks provided on the basis that there will be a limitation on the extent to which the ancillary facilities can be used by non-resident guests.

¹²¹ Transcript of proceedings, *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* (Planning and Environment Court of Queensland, 2827 of 2021, Kefford DCJ, 14 September 2023) 34.

[331] That approach does not accord with that called for in acceptable outcome AO1.1 of the Access, parking and servicing code and Table 9.4.1.3.b. For a resort complex, Table 9.4.1.3.b requires the minimum number of ordinary vehicle parking spaces to be calculated on the following basis:

“Use standard for relevant standard for each component.

For example: Use Short Term Accommodation standard for accommodation component and Food and Drink Outlet for restaurant component.”

[332] Applying that approach, 521 car parking spaces would be required.

[333] Chiodo Corporation Operations Pty Ltd justifies proportionately reducing the number of car parks attributable to each component on the basis that:

- (a) acceptable outcome AO9.3 of the Tourist accommodation zone code provides that where a commercial service or facility offers services to persons over and above in-house guests, the commercial component is to provide on-site car parking for 50 per cent of the floor area available for use in accordance with the relevant requirements of the Access, parking and servicing code. In this context, Chiodo Corporation Operations Pty Ltd says that “*available for use*” evidently means available for use by patrons that are not in-house guests; and, in any event
- (b) if it was reasonably required, the Court could impose a condition to restrict the extent to which each of the leisure facilities could be made available for use by those who are not in-house guests.

[334] I have several reservations about adopting this approach.

[335] Although, at first blush, the application of acceptable outcome AO9.3 of the Tourist accommodation zone code appears reasonable, care must be taken to read that acceptable outcome in its relevant context. That context includes:

- (a) s 5.4(1)(c) of the Planning Scheme, which indicates that:
 - (i) development that complies with the purpose and overall outcomes of the code complies with the code;
 - (ii) development that complies with the performance or the acceptable outcomes, where prescribed, complies with the purpose and overall outcomes of the code; and
- (b) the note to s 5.4, which indicates that the acceptable outcomes that are associated with a performance outcome are technical measures or standards that set a benchmark for assessment of individual applications, which may only be varied on the merits of an assessment of the corresponding performance outcomes and the purpose and overall outcomes of the relevant code; and
- (c) performance outcome PO9 and acceptable outcomes AO9.1 and AO9.2 of the Tourist accommodation zone code, which are set out in paragraph [290] above.

- [336] Two material observations follow when acceptable outcome AO9.3 of the Tourist accommodation zone code is read in its relevant context.
- [337] First, acceptable outcome AO9.3 of the Tourist accommodation zone code is not intended to be a technical measure or standard that sets a benchmark for demonstrating the merits for the purpose of performance outcome PO1 and the purpose and overall outcomes of the Access, parking and servicing code. As I have already mentioned, to comply with acceptable outcome AO1 of the Access, parking and servicing code, 521 car parking spaces would be required.
- [338] Second, provision of on-site car parking for 50 per cent of the floor area available for the leisure facilities is considered an appropriate technical measure or standard where the commercial services or facilities that are incorporated are small scale and predominantly service in-house guests only. That is not what is sought in the development application.
- [339] My reservations about adopting this approach are not assuaged given that neither of the traffic engineers gave evidence about the appropriateness of the approach contended for by Chiodo Corporation Operations Pty Ltd. The relevant analysis and calculations, and the explanation for their foundation, first appeared in the written submissions for Chiodo Corporation Operations Pty Ltd. They were not put to Mr Trevilyan or Mr Holland. Chiodo Corporation Operations Pty Ltd did not cross-examine Mr Holland at all.
- [340] Further, I am not persuaded that the Court should impose a condition to restrict the extent to which each of the leisure facilities could be made available for use by those who are not in-house guests.
- [341] Chiodo Corporation Operations Pty Ltd's invitation to impose a condition limiting use of the leisure facilities to achieve compliance with this assessment benchmark does not appear to involve an assessment by the Court of the proposed development against the benchmark.
- [342] Performance outcome PO1 of the Access, parking and servicing code calls for sufficient on-site car parking to be provided for the amount and type of vehicle traffic expected to be generated having regard to, amongst other things, the likely number of visitors to the subject land. Instead of demonstrating that the number of car parks are sufficient having regard to the likely number of visitors to the subject land, Chiodo Corporation Operations Pty Ltd invites the Court to:
- (a) determine the number of visitors that should be permitted given the number of car parking spaces that will be provided; and then
 - (b) re-define the nature of the proposed development accordingly by specifying those components of the leisure facilities that are permitted to be used by people who are not in-house guests.
- [343] I am not persuaded that such an approach is appropriate given that:
- (a) I have concerns about the appropriateness of the criteria that I am asked to apply to draw the necessary conclusions; and

- (b) it has long been recognised by this Court that it is not the function of the Court to redesign a development: rather, the Court’s function is to pass judgment on the development that is proposed.¹²²

[344] That the Court should be circumspect about setting limits on the extent of use of the integrated leisure facilities is also apparent from the evidence about the operations of Fairmont, the proposed hotel operator. The evidence indicated that the Fairmont brand obtains more than 40 per cent of its revenue from meeting and events, food and beverage and outside catering. It is unclear whether the proposed development could operate as a Fairmont, or as a differently branded luxury, five-star resort offering the extent of integrated leisure facilities proposed if there were a limitation on the public’s use of such facilities.

[345] It is also inappropriate to defer formulation of an appropriate condition to a later date. The integrated leisure facilities are an essential component of the proposed development. It is not appropriate that the nature and extent of their use be left to be determined later without any certain, objective standard prescribed.¹²³

[346] In the circumstances, Chiodo Corporation Operations Pty Ltd has not discharged its onus of demonstrating there is adequate car parking provided by the proposed development, nor has it persuaded me that an appropriate quantum of car parking could be conditioned. It has not demonstrated that the proposed development complies with the overall outcome in s 9.4.1.2(2)(a) and performance outcome PO1(a), (b) and (c) of the Access, parking and servicing code. This is a matter that tells against approval of the proposed development.

What are the relevant matters relied on by the parties under s 45(5)(b) of the *Planning Act 2016*?

[347] Chiodo Corporation Operations Pty Ltd relies on several relevant matters that it says arise for consideration under s 45(5)(b) of the *Planning Act 2016*. They are framed in the following terms:

- “6. Whether the proposed development can be conditioned to comply with the applicable assessment benchmarks.
7. Whether the proposed development is able to be provided on the site without unacceptable impacts to the visual amenity, character and general amenity of Port Douglas.
8. Whether there is any economic or other benefit provided by the proposed development.”

[348] With respect to the issue of conditions, Chiodo Corporation Operations Pty Ltd submits that conditions can appropriately address the Council’s concerns with

¹²² *Wingate Properties Pty Ltd v Brisbane City Council & Ors* [2001] QPELR 272, 276 [21]; *Heath v Brisbane City Council* [2008] QPEC 33; [2008] QPELR 566, 569 [23]; *Parmac Investments Pty Ltd v Brisbane City Council & Ors* [2018] QPEC 32; [2018] QPELR 1026, 1060; *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16; [2019] QPELR 793, 833 [206].

¹²³ *McBain v Clifton Shire Council & Ors* (1996) 2 Qd R 493; *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd R 347. See also *Westfield Management Limited v Pine Rivers Shire Council & Anor* [2005] QPEC 15; [2005] QPELR 534.

respect to landscaping and car parking. I am not persuaded that is so for the reasons already provided.

[349] Having regard to my findings above, I am also not persuaded that the proposed development can be provided on the subject land without unacceptable impacts to the visual amenity, character and general amenity of Port Douglas.

[350] The substantive issues that remain for consideration call for the following factual determinations:

1. Is there a need for the proposed development?
2. Are there other benefits provided by the proposed development that lend weight to its approval?

Is there a need for the proposed development?

[351] Chiodo Corporation Operations Pty Ltd advances the existence of an economic need for the proposed development as a matter supportive of its approval.

[352] The existence of a need for the proposed development is relevant under s 45(5)(b) of the *Planning Act*.

[353] General principles that inform and guide an assessment of need are well-settled. Many of them are conveniently summarised in *Isgro v Gold Coast City Council & Anor*,¹²⁴ wherein His Honour Judge Wilson SC (as His Honour then was) stated:¹²⁵

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

[354] Need, in the town planning sense, does not mean a pressing need or a critical need or even a widespread desire but relates to the well-being of the community.¹²⁶ Planning need is also not limited to the need for the proposed development on the particular site in question and no other site, but the existence of other sites for which the proposed development is permitted under the applicable code may be a relevant matter, depending on all the circumstances of the case.¹²⁷

¹²⁴ [2003] QPEC 2; [2003] QPELR 414, 417-20 [20]-[30].

¹²⁵ [2003] QPEC 2; [2003] QPELR 414, 418 [21].

¹²⁶ *Isgro v Gold Coast City Council & Anor* [2003] QPEC 2; [2003] QPELR 414, 417-8 [20] citing *Watts & Hughes Properties Pty Ltd v Brisbane City Council* [1998] QPELR 273, 275 and *Cut Price Stores Retailers v Caboolture Shire Council* (1984) QPLR 126, 131.

¹²⁷ *Abeleda & Anor v Brisbane City Council & Anor* [2022] QCA 168; [2021] QPELR 1003, 1018 [51].

- [355] It must be remembered that these are general statements of principle that inform and guide an assessment of need. They are not a checklist that must be established in every case. Rather, the assessment of need in this context is a flexible process. This has long been recognised. It was again confirmed by the Court of Appeal recently in *Yorkeys Knob BP Pty Ltd v Cairns Regional Council*.¹²⁸
- [356] Need is a relative concept to be given a greater or lesser weight depending on all the circumstances that the decision maker is to consider.¹²⁹ Whether need is shown to exist is to be decided from the perspective of a community and not that of the applicant, a commercial competitor, or even particular objectors.¹³⁰
- [357] With those general principles in mind, it is convenient to now turn to the relevant evidence in this case.
- [358] As a starting point, the existence of a development approval over the subject land that permits its use for tourist accommodation indicates that there is a planning need for use of the subject land for tourist accommodation.
- [359] In considering the need for tourist accommodation, including resort complexes, it is also relevant that:
- (a) the tourism and sugar industries are the principal determinants of economic activity, employment and population growth in Douglas Shire;
 - (b) the development and construction industry and the retail service sectors are dependent on these important income generating industries;
 - (c) both domestic and international tourist visitation continues to be vital to the Shire's economy;
 - (d) Port Douglas is one of Australia's premier tourism destinations, and is intended to retain its lively, tropical tourism "buzz" as a premier tourist destination;
 - (e) the urban area of Port Douglas is intended to accommodate tourist accommodation facilities; and
 - (f) the subject land is zoned for tourist accommodation.
- [360] These matters are recognised in the Planning Scheme.¹³¹ Taken in combination, they demonstrate that the Planning Scheme has made express provision for a town planning and community need for land in Port Douglas to be used for tourist accommodation facilities. Those tourist accommodation facilities include resort complexes that provide short-term accommodation for tourists and visitors that is integrated with leisure facilities such as restaurants and bars, meeting and function facilities, and sporting and fitness facilities. The Planning Scheme makes provision for that need to be met on land that includes the subject land, subject to it meeting other criteria, such as the assessment benchmarks that seek to protect the character of the area.

¹²⁸ *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QCA 168, [30].

¹²⁹ *Intrafield Pty Ltd v Redland Shire Council* [2001] QCA 116; (2001) 116 LGERA 350, 354 [20].

¹³⁰ *Isgro v Gold Coast City Council & Anor* [2003] QPEC 2; [2003] QPELR 414, 418 [22].

¹³¹ Planning Scheme ss 3.2.1.7(1) and (3), s 6.2.14.1(1), (2) and (3): Exhibit 9.01 pp 34 and 176.

- [361] The planning purpose and associated public benefit of the provision of an appropriately designed resort complex on the subject land is evident from the Planning Scheme. Appropriate use of the subject land for a resort complex will support the tourism industry and, as such, the economy of the Shire. It has the potential to achieve the Council's forward planning intent to retain its lively, tropical tourism "buzz" as a premier tourist destination.
- [362] To assist me with whether there is need for a resort complex in the form proposed, I had the benefit of expert opinion evidence from Mr Gavin Duane, the economist retained by Chiodo Corporation Operations Pty Ltd.
- [363] Mr Duane opines that there is a clear economic and community need for the continued diversification of accommodation facilities to serve the existing and future tourist base within Port Douglas. In particular, he says that there is need for luxury facilities, including five-star resort hotels as proposed at the subject land. In Mr Duane's opinion, the need exists whether the hotel is operated by Fairmont or another luxury hotel operator not currently within the Port Douglas market, such as Four Seasons, Sofitel, or the like.
- [364] Mr Duane's opinion is premised on his view that:
- (a) Douglas Shire is looking to diversify its offering to broaden its tourist base, and the facility would provide a modern five-star hotel operator with a well-recognised international brand (being Fairmont Hotel and Resorts) which does not exist in Australia currently;
 - (b) the proposed development would be particularly attractive to high-value domestic and international tourists;
 - (c) the proposed development would take advantage of infrastructure such as the Cairns airport;
 - (d) the proposed development would support Port Douglas' position as a premier tourist destination;
 - (e) the proposed development is consistent with elements of the local economic and tourism strategies; and
 - (f) the proposed development would fulfil a recognised gap in the market for five-star resorts or rooms.
- [365] Mr Duane says that these benefits will accrue whether the proposed development is operated under the banner of Fairmont Hotels and Resorts or another luxury brand.
- [366] In addition to the evidence of Mr Duane, Chiodo Corporation Operations Pty Ltd relies on a Hotel Management Agreement for Fairmont Port Douglas Resort dated 20 December 2018 as evidence of a need for the proposed development. AAPC Properties Pty Ltd is a signatory to that agreement. It is a corporate entity that is associated with Fairmont Hotels and Resorts.
- [367] Fairmont Hotels and Resorts is an internationally renowned operator of luxury resorts. It manages over 80 hotels around the world.

- [368] The Hotel Management Agreement for Fairmont Port Douglas Resort indicates that Fairmont Hotels and Resorts has an interest in operating a resort complex on the subject land. The agreement, by itself, is not compelling evidence of a need for the proposed development. There are discrepancies between the facilities described in that agreement and the proposed development. Also, several key milestone dates in that contract have passed. In those circumstances, AAPC Properties Pty Ltd could terminate the contract if it so desired.
- [369] Although the ability to terminate the contract detracts from the strength of the evidence of economic interest provided by the Hotel Management Agreement for Fairmont Port Douglas Resort, that is not the only evidence that this luxury hotel operator has interest in opening a resort in Port Douglas.
- [370] There was evidence from two highly positioned organisational officers, namely Mr Basha and Mr Willis.
- [371] Mr Basha is the director of AAPC Properties Pty Ltd. He signed the Hotel Management Agreement for Fairmont Port Douglas Resort. He gave evidence that there is no desire to terminate the agreement. Mr Basha affirmed the support and continued commitment by the entities that comprise Fairmont Hotels and Resorts to the proposed development. He indicated that AAPC Properties Pty Ltd would, if necessary, amend the agreement.
- [372] Mr Willis is the global Chief Executive Officer of Fairmont Hotels & Resorts at the Accor Group. He also confirmed a commitment by Fairmont Hotels and Resorts to the proposed development. He indicated that if the proposed development did not proceed, Fairmont Hotel and Resorts would explore other opportunities to develop a resort in Port Douglas. This is because Fairmont Hotels and Resorts to the proposed development considers Port Douglas to be a key destination for a new luxury hotel development.
- [373] Combined, the Hotel Management Agreement for Fairmont Port Douglas Resort and the evidence of Mr Willis and Mr Basha is supportive of the existence of an economic need for a further luxury resort complex on the subject land, or otherwise at another location in Port Douglas.
- [374] When that evidence is considered in conjunction with the evidence of Mr Duane, I am persuaded that the need for tourist accommodation (which is recognised by, and provided for in, the Planning Scheme) is a need that presently exists. The introduction of an appropriately designed, luxury, five-star resort complex on the subject land would positively contribute to the well-being of the community. It would strengthen the region's attraction for high-value domestic and international tourists. It would support Port Douglas' position as a premier tourist destination while taking advantage of the existing infrastructure, such as the Cairns Airport. These benefits would be achieved whether the ultimate operator of the proposed development is Fairmont Hotels and Resorts or some other luxury resort operator that is not currently with in the Port Douglas market.
- [375] These are matters that lend weight to approval of the proposed development.
- [376] That said, in considering the weight to be attributed to these benefits, it is relevant that the introduction of a luxury resort complex elsewhere in Port Douglas has the

potential to deliver similar benefits.¹³² Other such possibilities exist, such as by way of redevelopment of land at the Marina in the Waterfront North sub-precinct of the Port Douglas precinct in the Port Douglas / Craiglie local plan area. The Planning Scheme contemplates use of that land for a resort complex. The Port Douglas / Craiglie local plan code, read in conjunction with the Port Douglas Waterfront Master Plan (which is called up by the code), encourages the establishment of a high-quality resort with complementary uses in place of the existing Marina Mirage building.

- [377] The existence of other possible sites that might deliver similar economic benefits to the community is a matter that tempers the weight to be attributed to the existence of a need in the balancing exercise. Nevertheless, the recognised planning need, coupled with evidence of an existing economic need, is a matter that lends considerable weight to the case for approval.

Are there other benefits provided by the proposed development that lend weight to its approval?

- [378] Chiodo Corporation Operations Pty Ltd raises two additional benefits that it contends lend weight to an approval.
- [379] The first is the economic benefits associated with the initial investment in construction of the proposed development and the ongoing operational employment. This was the subject of evidence from Mr Duane.
- [380] In Mr Duane’s view, the key employment benefits include:
- (a) construction expenditure in excess of \$290 million spent over a two-year construction period;
 - (b) direct and indirect economic value added to the Douglas Shire in excess of \$200 million over the construction period;
 - (c) more than “350 *person years*” (full-time equivalent) onsite over the construction period;
 - (d) direct and indirect employment in the Douglas Shire of about “480 *person years*” (full-time equivalent) over the construction period;
 - (e) on an ongoing basis:
 - (i) annual revenue of more than \$30 million;
 - (ii) direct and indirect economic value to the Douglas Shire of over \$20 million;
 - (iii) more than 200 full-time employees onsite; and
 - (f) direct and indirect employment in the Douglas Shire in excess of 300 full-time equivalent persons.
- [381] In his report, Mr Duane does not reveal the basis for his calculations about the extent of benefits to the Port Douglas economy in monetary terms, nor does he provide a cogent explanation for his opinions in that regard. When tested about

¹³² *Abeleda & Anor v Brisbane City Council & Anor* [2022] QCA 168; [2021] QPELR 1003, 1018 [51].

those matters during cross-examination, Mr Duane revealed that his opinions about the benefits delivered during construction were based on information provided by Chiodo Corporation Operations Pty Ltd and its solicitors. He accepted this at face value. The source information was not appended to his report nor was it the subject of evidence from Chiodo Corporation Operations Pty Ltd.

[382] In those circumstances, I am not persuaded to accept Mr Duane's evidence about the monetary value of economic benefits that the proposed development would deliver, or about the number of people who would be employed during the construction period. Although Mr Duane's report also did not reveal the basis for his opinions about the monetary and employment benefits of the resort from its ongoing operation, during cross-examination he provided a cogent explanation for those opinions, and I accept them.

[383] I have reservations about the extent of benefits described by Mr Duane, particularly as it relates to the benefits associated with construction of the proposed development. Nevertheless, I am persuaded that the proposed development would deliver economic benefits associated with the initial investment in construction and the provision of ongoing operational employment. It would also provide additional economic benefits by reason of the flow on benefits to the economy associated with increased employment and the attraction of additional tourists to Port Douglas. The public benefit of this is obvious enough, particularly when one recalls the importance of tourism to the local economy. This is a matter that lends weight to approval of the proposed development.

[384] The second benefit on which Chiodo Corporation Operations Pty Ltd relies is a cultural benefit. The cultural benefit is said to flow from the inclusion of local First Nation's Peoples cultural activities and experiences as part of the integrated leisure facilities to be delivered by the proposed development. They are to be provided generally in accordance with a Statement of Cultural Intent. This is a relevant matter that lends weight to the approval of the proposed development.

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

[385] The appropriate approach to the exercise of the planning discretion is explained in paragraphs [18] to [22] above.

[386] Chiodo Corporation Operations Pty Ltd's case in support of approval is founded on its contention that the proposed development complies with all the assessment benchmarks put in issue by the Council.

[387] As I have already identified above, Chiodo Corporation Operations Pty Ltd has not demonstrated compliance with all the assessment benchmarks put in issue by the Council.

[388] Chiodo Corporation Operations Pty Ltd's alternative case is founded on the proposition that, in the event that the Court finds non-compliance with any of the assessment benchmarks, the non-compliances do not sound in any planning consequences in terms of:

- (a) the suitability of the land use;

- (b) hard impacts; or
- (c) intangible impacts.

- [389] The case for approval has merit. There are five matters that lend weight to an approval of the proposed development.
- [390] First, the Planning Scheme makes express provision for a town planning and community need for land in Port Douglas, including the subject land, to be used for tourist accommodation facilities. The Planning Scheme anticipates that those accommodation facilities may be provided in the form of a resort complex that provides short-term accommodation for tourists and visitors that is integrated with leisure facilities of the type proposed. This is a matter to which weight should attach, in support of approval, in the exercise of discretion.
- [391] Second, there is no suggestion of any hard amenity impacts, such as noise impacts, occasioned by the use. This is a matter that weighs in support of approval.
- [392] Third, the evidence establishes that there is an existing need for a further luxury resort complex in Port Douglas. This is a matter of importance that weighs in favour of approval, particularly given the importance of tourism to the economy of Douglas Shire.
- [393] Fourth, the proposed development would deliver economic benefits in terms of employment and flow-on benefits to the economy from such employment. This is a matter of importance that weighs in favour of approval.
- [394] Fifth, the proposed development will deliver cultural benefits by reason of the inclusion of local First Nation's Peoples cultural activities and experiences as part of the integrated leisure facilities to be delivered by the proposed development. This is a matter of public interest that weighs in favour of approval.
- [395] Against those matters, it is necessary to weigh the non-compliances with the Planning Scheme.
- [396] As a consideration of the cases referred to in paragraphs [18] to [22] above reveals, whether an approval is in the public interest is a question of fact to be determined in the exercise of the planning discretion. A planning decision, and the inherent balancing exercise it entails, is invariably complicated and multifaceted.¹³³ The discretion is to be exercised based on the assessment carried out under s 45 of the *Planning Act 2016*. It is not a matter of mere caprice. The decision must withstand scrutiny against the background of the applicable planning scheme and proper planning practice.¹³⁴ It must strike the balance between the maintenance of confidence in a planning scheme on the one hand and dynamic land use needs and recognition that town planning is not an exact science on the other. It should recognise that the provisions of a planning scheme are seen to embody the public

¹³³ *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16; [2019] QPELR 793, 808 [60].

¹³⁴ *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16; [2019] QPELR 793, 809 [63] citing *Hua Sheng Co Pty Ltd v Brisbane City Council & Ors* [1991] QPLR 99, 102.

interest and, as such, there is a public interest in compliance with them.¹³⁵ However, not every non-compliance is contrary to public interest or will warrant refusal. The extent to which a flexible approach will prevail in the face of any given non-compliance with a planning scheme (or other assessment benchmark) will turn on the facts and circumstances of each case, which includes a consideration of the “*relevant matters*”.¹³⁶

[397] Here, given the Planning Scheme anticipates the type of use proposed on the subject land, and there is a need for it, careful consideration must be given to the verbiage of the Planning Scheme to ascertain whether the need for a luxury resort complex and the other matters that support approval would render the effect on character justifiable.¹³⁷

[398] In this case, the collective weight of the matters that support approval does not provide a sound town planning basis to approve the proposed development in face of the identified non-compliances with the assessment benchmarks in the Planning Scheme. The non-compliances relate to a matter of significant town planning consequence, namely the character and sense of place of Port Douglas.

[399] The planning context traversed in my reasons above demonstrates an important planning strategy to protect the character and sense of place of Port Douglas. Although the Planning Scheme anticipates use of the subject land for a resort complex, it is apparent that the support is conditional upon any such development achieving consistency with the intended character of the area.

[400] The importance of the planning strategy with respect to character and sense of place is well-explained by reference to but a small selection of the many provisions in the Planning Scheme that seek to protect Port Douglas’s character and sense of place.

[401] With respect to the built environment, s 3.2.1.6 records:

“(1) **Douglas Shire is characterised by a variety of buildings and places of heritage significance which contribute to the sense of place and have informed the character and style of the settlement areas in the Shire.**

(2) **A distinct tropical vernacular is established in the Shire, representing a wide variety of different eras of Shire development and progress. This distinctive tropical vernacular contributes significantly to the identity of the Shire, making the place special for visitors and residents alike.”**

(emphasis added)

¹³⁵ *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexu Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95, [178]-[179] citing *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257; [2021] QPELR 1003.

¹³⁶ *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexu Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95, [178]-[179] citing *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257; [2021] QPELR 1003.

¹³⁷ See *Austin BMI Pty Ltd v Ipswich City Council & Ors* [2023] QPEC 27, [871] and *Arksmead Pty Ltd v Gold Coast City Council* [2001] 1 Qd R 347, 357 [13].

[402] It is apparent from these statements of strategic intent that while the Shire’s natural environmental features are invaluable from a tourism perspective, so too is the distinctive tropical vernacular displayed by the variety of buildings constructed across different eras. The distinctive tropical vernacular is highly valued for its contribution to the identity of the Shire, which makes the place attractive for visitors.

[403] The importance to the Shire of both the natural environment and the character of the built and landscaped environment is also evident from the strategic intent with respect to the economy in s 3.2.1.7, which relevantly states:

“(1) **The tourism and sugar industries are the principal determinants of economic activity, employment and population growth in Douglas Shire. The development and construction industry and the retail service sectors are dependent on these important income generating industries.** Other primary production activities, such as fisheries, although important, have a relatively minor role to play.

(3) **Both domestic and international tourist visitation continues to be vital to the Shire’s economy. The tourism industry relies primarily on the internationally renowned natural attractions of the Great Barrier Reef and the World Heritage Area rainforests, as well as the Shire’s outstanding scenic setting. Port Douglas will continue to be one of Australia’s premier tourism destinations. Great care is needed to ensure that development not only protects the Shire’s natural assets, but promotes attractions that are relevant to, and appropriate for the Shire, so that the long-term unique attractiveness of the Shire to tourists is sustained.”**

(emphasis added)

[404] Having identified the important attributes of the Shire in terms of its physical setting, environment, historical context, built and landscaped environment and economy, the strategic intent in the Planning Scheme goes on to address its plans to shape the future in s 3.2.2. In s 3.2.2.1(1), the Planning Scheme records:

“(1) **The planning scheme has a very important role to play in ensuring that growth in Douglas Shire is aimed at minimising human impact on the environment while continuing to support economic progress and social well-being. Essentially this entails strong stewardship and the pursuit of planning strategies that:**

- (a) conserve the Shire’s natural environment and outstanding biodiversity values;
- (b) utilise the region’s natural resources efficiently, in particular water and energy, while reducing waste;
- (c) ensure the region’s atmosphere remains clear and clean;

- (d) **contain urban growth to a defined footprint and promote the best use of land that is allocated for that purpose;**
- (e) **support development of a diverse thriving economy that complements the region's green and environmentally responsible image.**
- (f) **provide opportunities that ensure everyone is able to participate, live, work and benefit in the healthy cohesive environment that the Shire promotes."**

[405] How the planning strategies relate to sense of place and identity are explained in s 3.2.2.2, which relevantly states:

"3.2.2.2 Reinforcing Douglas Shire's sense of place and identity

- (1) **Sense of place is a dual characteristic that derives from certain distinctive features of a place and the feelings and perceptions that people hold with regard to that place. In planning, it is usually used to promote positive places that foster community attachment.**
- (2) **At the Shire-wide scale, the topography, creeks and rivers, and the coastline contribute significantly to the Shire's sense of identity. Residents identify closely with the Shire's physical setting, and this in part, contributes to a heightened sense of place and interest in local issues. This physical definition creates a range of smaller communities within the Shire's boundaries, many with their own unique sense of identity, character, history and culture. It is important to protect this sense of place as it enhances the quality of life for its residents, and is of enormous value for tourism.**
- (3) **During the life of this planning scheme, the Shire will continue to grow while retaining the unique characteristics of individual communities and building upon these qualities through local variation in development requirements. This will be done through the Local Plans which are tailor-made to suit local needs. Amongst other things, each local plan will:**
 - (a) **identify the qualities that make the individual place special, including environmental and built form characteristics;**
 - (b) **promote gateway treatments, nodes of activity, viewing corridors and landmark sites;**
 - (c) **define an urban / rural interface boundary to reinforce the sense of town and country."**

[406] It is in the context of these provisions about the sense of place that s 3.2.2.2(5) calls for development to be carefully planned to achieve sensitive incremental change,

rather than instant, over-scaled development projects, that have little local context or character.

[407] The planning goals with respect to built form design and character are also further explained in Theme 4 – Strong communities and identity, particularly in the element that relates to sense of place, community and identity. In that regard, s 3.7.4 relevantly states:

“(1) **Sense of place is the dual characteristic that derives from certain distinctive features of a place and the feelings and perceptions that people hold with respect to that place. Fostering a good sense of place promotes community attachment. New development in the Shire should avoid the delivery of homogeneous development consisting of identical communities.** In growth areas, gated enclave communities will not be encouraged. The larger new developments will be supplied with a range of facilities to support new residents and to ensure that these new developments are a good place to live.

...

(3) **New development will not be characterised by off-the-shelf corporate designs that have little regard for the Shire’s unique communities and sense of place, in order to ensure the experience of living and visiting the Shire is not diminished.”**

(emphasis added)

[408] The specific outcomes sought for this element include:

“(1) **The distinctive character and unique sense of place of towns and villages and other communities, including Aboriginal communities, throughout the Shire is maintained, promoting community pride and well-being and community safety and prosperity.**

...

(3) **Through site specific tropical design, franchise corporate designs are adapted to integrate with established urban qualities that make the Shire’s local communities unique and distinct from other places.”**

(emphasis added)

[409] Reading those provisions with which the proposed development is inconsistent in the broader context of the Strategic framework referred to above, one can readily discern a strong planning policy to maintain the distinctive sense of place and character of Port Douglas, and of the various communities within Port Douglas. The character and sense of place that is sought to be achieved is not one that is “*distinctive*” in terms of being different to the design and character of built form present in the local area. Rather, the built form is to integrate with established urban qualities that distinguish the local area from other parts of Queensland. The

distinctive sense of place is one that is informed by the Shire's natural and rural settings, its unmistakable Queensland tropical vernacular built form, and its landscape setting. In combination, these attributes make a vital contribution to the Shire's identity that, in turn, contributes to the everyday experiences of residents and visitors alike. They are identified as critical to the tourism industry – one of two principal determinants of economic activity and employment in Douglas Shire.

- [410] The proposed development is not, as I have outlined above, without merit. Strong arguments have been made for its approval. That said, as I have already observed in paragraph [161] above, the disparate character of the proposed development is material. It is not a matter that can simply be attributed to the adoption of a more modern design approach or the provision of a standard of service expected of a luxury five-star resort. Modernism can, no doubt, be achieved in a way that pays homage to the existing Queensland vernacular whilst remaining responsive to the tropical climate. The proposed development is not inappropriate because of a modern design, but because that design is wildly discordant with the character of Port Douglas. It has the potential to diminish the experience of those visiting Port Douglas by detracting from their perception that the built form of Port Douglas is one characterised by Queensland tropical vernacular architectural style buildings with built form arranged in a pattern of smaller building envelopes within a tropical landscape context that provides a sense of visual, physical and environmental permeability.
- [411] What rings through with great finality is the importance of protecting what is unique and special to Port Douglas' character. The proposed development's many merits do not eclipse this essential consideration.
- [412] In the circumstances, I am not persuaded that a combination of partial compliance with the Planning Scheme and the matters supportive of approval provide a sound town planning basis to approve the development in the face of the non-compliances with assessment benchmarks that relate to character and sense of place of Port Douglas and the local area.

Conclusion

- [413] Chiodo Corporation Operations Pty Ltd has not discharged its onus. The development application is refused.