

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Brisbane Prestige Property Developments Pty Ltd v Mackay Regional Council* [2023] QPEC 48

PARTIES: **BRISBANE PRESTIGE PROPERTY DEVELOPMENTS
PTY LTD ACN 100 391 562**
(Appellant)

v

MACKAY REGIONAL COUNCIL
(Respondent)

FILE NO/S: 1693/2023

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 23 November 2023

DELIVERED AT: Brisbane

HEARING DATE: 13 – 15 and 17 November 2023

JUDGE: Everson DCJ

ORDER: **Appeal dismissed**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal
against refusal of a service station in the Medium density
residential zone

PLANNING AND ENVIRONMENT – ASSESSMENT –
compliance with the planning scheme

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

Broad v Brisbane City Council [1986] 2 Qd R 317

Intrafield Pty Ltd v Redland Shire Council [2001] QCA 196

Isgro v Gold Coast City Council & Anor [2003] QPELR 414

Navara Back Right Wheel Pty Ltd v Logan City Council
[2020] QPELR 899

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

Zappala Family Co Pty Ltd v Brisbane City Council [2014]

QCA 147

LEGISLATION: *Planning Act 2016* (Qld)
Planning and Environment Court Act 2016 (Qld)
Planning Regulation 2017 (Qld)

COUNSEL: K W Wylie for the Appellant
M J Batty and M Rodgers for the Respondent

SOLICITORS: Drakos & Company for the Appellant
Clayton Utz for the Respondent

Introduction

- [1] This is an appeal against the refusal by the respondent of a development application for a development permit for a material change of use for a service station (“the proposed development”) over land at 214 - 216 Nebo Road and 2 Lagoon Street, West Mackay (“the site”).
- [2] Although the site is well located for a service station given the volumes of passing traffic, when regard is had to the relevant assessment benchmarks such a use is only contemplated in this part of Mackay in certain limited circumstances.

The site and the surrounding area

- [3] The site is a corner lot of approximately 2,551m² with frontages to both Nebo Road and Lagoon Street. The corner is controlled by a signalised intersection that allows for traffic movements in all directions.¹ Nebo Road is described as a “Highway” and Lagoon street is described as an “Arterial” road.² The site is described as being “prominent and highly accessible”.³ It is included in the Medium density residential zone (MD3 Multi-storey medium density precinct) pursuant to the Mackay Regional Council Planning Scheme 2017 (“the planning scheme”).⁴
- [4] The site comprises three separate allotments, each of which is improved by a residential dwelling.⁵ It is surrounded by predominantly residential uses and adjoined immediately to the east by a motel.⁶ Approximately 670 metres to the east

¹ Ex. 5, para 16.

² Ibid, paras 20 and 21.

³ Ibid, para 56.

⁴ Ex. 8.

⁵ Ex. 5, Fig. 1.

⁶ Ibid, para 19.

is land within the District centre zone which contains a range of commercial land uses including a service station, a supermarket and health care services.⁷ To the west on the opposite side of Lagoon Street is the Nebo Road Water Treatment Plant which adjoins the Mackay Regional Botanic Gardens.⁸ The site is also located along important public transport corridors with regular bus services on Nebo Road and Lagoon Street providing accessibility to major destinations including the city centre, the university and the hospital.⁹ It is proximate to public open space, multi-purpose centres and activity nodes.¹⁰ There is also a bikeway along Lagoon Street connecting the site to the botanic gardens and the area where the hospital is located.¹¹

The proposed development

- [5] The proposed development will include a building of approximately 240m² containing a convenience shop. There are intended to be three fuel bowsers underneath a forecourt canopy with six filling spots.¹² Vehicle access is proposed to be via a left in/left out crossover from Lagoon Street and a left in/left out crossover from Nebo Road, and provision for ten parking spaces is made.¹³ An extensive hard stand area with minimal landscaping around the perimeter of the site and elevated, prominent signage is also proposed.¹⁴

The statutory assessment framework

- [6] Pursuant to the *Planning and Environment Court Act 2016* (Qld) (“PECA”), the appeal is by hearing anew,¹⁵ and the appellant must establish that the appeal ought to be dismissed.¹⁶ Section 46 of the PECA addresses the nature of an appeal and relevantly provides:

- (2) The Planning Act, section 45 applies for the P&E Court’s decision on the appeal as if—
 - (a) the P&E Court were the assessment manager for the development application; and

⁷ Ex. 5, para 24.

⁸ Ibid, paras 26; Fig. 1.

⁹ Ibid, para 75; T3 – 25, ll 30 – 35.

¹⁰ Ibid.

¹¹ Ibid, para 76; T3 – 25, ll 30 – 35.

¹² Ex. 5, para 29; T2 – 59, l 39.

¹³ Ex. 5, para 29.

¹⁴ Ex. 1.

¹⁵ *Planning and Environment Court Act 2016* (Qld) s 43.

¹⁶ Ibid, s 45(1)(a).

- (b) the reference in subsection (8) of that section to when the assessment manager decides the application were a reference to when the P&E Court makes the decision.

[7] As the proposed development was impact assessable, s 45 of the *Planning Act 2016* (Qld) (“PA”) provides that the assessment must be carried out against the relevant assessment benchmarks in a categorising instrument for the development which, in the circumstances before me, are the relevant provisions of the planning scheme.¹⁷ It must also be carried out having regard to any matters prescribed by regulation. Accordingly, s 31(1)(g) of the *Planning Regulation 2017* (Qld) states that I must have regard to “the common material”. This is defined to include any properly made submissions about the development application which have not been withdrawn.¹⁸ A total of 189 properly made submissions and 7 properly made petitions were received during the public notification period, all of which were opposed to the proposed development.¹⁹ The issues raised by submitters included the lack of need for the proposed development and amenity impacts as a consequence of it. They are usefully summarised in the joint expert report of the town planners.²⁰

[8] Additionally, the assessment may be carried out having regard to any other relevant matter, other than a person’s personal circumstances, financial or otherwise.²¹

[9] Pursuant to s 60 of the PA, the court in determining an appeal about a development application is conferred a wide discretion. The section relevantly states:

- (3) To the extent the application involves development that requires impact assessment, and subject to section 62, the assessment manager, after carrying out the assessment, must decide—
 - (a) to approve all or part of the application; or
 - (b) to approve all or part of the application, but impose development conditions on the approval; or
 - (c) to refuse the application.

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

¹⁷ *Planning Act 2016* (Qld) s 45(5)(a)(i).

¹⁸ *Planning Regulation 2017* (Qld), Schedule 24.

¹⁹ Ex. 5, para 42; Ex. 9.

²⁰ Ibid, para 43.

²¹ *Planning Act 2016* (Qld) s 45(5)(b).

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

[43] ...The decision-maker may be balancing a number of factors to which consideration is permitted under s45(5) of the Act in making the decision under s 60(3) of the Act where the factors in favour of approval (or approval subject to development conditions) have to be balanced with the factors in favour of refusal of the application. The weight given to each of the factors is a matter for the decision-maker in the circumstances...²²

[11] The applicable principles for the construction of planning documents were considered by the Court of Appeal in *Zappala Family Co Pty Ltd v Brisbane City Council*, notably that the same principles which apply to statutory construction apply to the construction of planning documents,²³ and that such documents need to be read as a whole and in a way which is practical and as intended to achieve a balance between outcomes.²⁴

Relevant provisions of the planning scheme

[12] The proposed development is impact assessable pursuant to Table 5.5.12 of the planning scheme.²⁵ In circumstances where the parties have agreed that only provisions of the Medium density residential zone code ("MDRZC") remain an issue, s 5.3.3(4)(c) provides that code assessable development that complies with:

- (i) the purpose and overall outcomes of the code complies with the code
- (ii) the performance or acceptable outcomes complies with the purpose and overall outcomes of the code;

...²⁶

²² [2020] QCA 257.

²³ [2014] QCA 147 at [52].

²⁴ Ibid at [56].

²⁵ Ex. 8, p 87.

²⁶ Ibid, p 82.

[13] Relevantly, the MDRZC states:

6.2.12.2 Purpose

- (1) The purpose of the medium density residential zone is to provide for:
 - (a) medium density multiple dwellings; and
 - (b) community uses, and small-scale services, facilities and infrastructure, to support local residents.
- (2) The local government purpose of the zone code is to provide for low-medium and medium intensity residential development within key urban areas at locations which possess one or a combination of the following attributes:

...

 - (b) along important public transport corridors, including: Bridge Road, Glenpark Street, Holland Street, Juliet Street, Malcomson Street and Paradise Street; and

...
- (3) The purpose of the code will be achieved through the following overall outcomes:
 - (a) Uses:
 - (i) the predominant form of development within the zone is low-medium and medium density residential development; and

...

 - (iii) a limited range of small-scale and low intensity non-residential uses may be appropriate if these uses are:
 - (A) required to serve the needs of the local area; and
 - (B) located on prominent, highly accessible sites; and
 - (C) consistent with the amenity and character of the surrounding urban area; and

...
 - (d) Amenity:
 - (i) development does not adversely affect the amenity of adjacent areas and uses, particularly residential uses and other sensitive land uses; and

...

6.2.12.3 Assessment benchmarks

Performance outcomes
<p>PO1</p> <p>The zone primarily accommodates low-medium and medium density residential development including:</p> <p>(a) Multiple dwelling activities and dwelling houses in the Low-medium density precinct (precinct no. MD1) and the General medium density precinct (precinct no. MD2); and</p> <p>(b) Multiple dwelling activities, with the exception of dual occupancy, in the Multi-storey medium density precinct (precinct no. MD3).</p> <p>...</p>
<p>PO3</p> <p>Non-residential activities, such as centre activities and community activities, are:</p> <p>(a) required to serve the needs of the local area and do not compromise the viability of:</p> <p>(i) existing or intended uses within a multiple-purpose centre; and</p> <p>(ii) similar existing or approved uses in the local area; and</p> <p>(b) of a small scale and are subordinate to the primary residential character of the area; and</p> <p>(c) generate minimal impacts.²⁷</p>

Issues in dispute

[14] The issues in dispute narrowed in the course of the proceeding with the parties ultimately agreeing that the issues for determination in the appeal can be framed in the following terms:

1. whether the proposed development “is required to serve the needs of the local area”;
2. whether the proposed development is inconsistent with the scale, intensity, amenity and the present and anticipated character in the locality pursuant to the planning scheme; and
3. whether, in any event, the proposed development ought to be approved by the exercise of the discretion of the court, balancing the locational benefits and impacts of the proposed development.²⁸

²⁷ Ex. 8, pp 90 – 92.

²⁸ Outline of Argument of the Appellant, para 16; Outline of Argument of the Respondent, para 14.

Is the proposed development required?

[15] As noted above, Overall Outcome 3(a)(iii)(A) and PO3 of the MDRZC only contemplate non-residential uses in circumstances where they are “required to serve the needs of the local area”. The use of the word “required” is unorthodox. A more orthodox approach would be to refer to a planning need in this context. When regard is had to the definition of the word “require” nothing appears to turn upon this however. In circumstances where this term is not defined in the planning scheme, I note that the word “require” is defined in the Macquarie Concise Dictionary as, inter alia, “to have need of; need”.²⁹ The appellant has approached this provision as requiring the demonstration of a planning need for the proposed development and the appeal proceeded on this basis.³⁰

[16] The concept of planning need was explained by Wilson SC DCJ in *Isgro v Gold Coast City Council & Anor* in the following terms:

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 is not being adequately met...³¹

[17] Need, like love, is hard to measure. For example, when Michael Hutchence sang: “I need you tonight cause I’m not sleeping. There’s something about you girl that makes me sweat,”³² he was arguably also referring to a latent unsatisfied demand which is either not being met at all or, more likely, not being adequately met. This may well be a manifestation of love but certainly not in the biblical sense. When assessing a declaration of love, or an assertion of planning need, context is everything. As the Court of Appeal identified in *Intrafield Pty Ltd v Redland Shire Council*, “need is a relative concept to be given greater or lesser weight depending on all the circumstances which the planning authority was to take into account.”³³ The circumstances to be taken into account include:

²⁹ Fourth Edition Macquarie University 2006.

³⁰ T4 – 12, ll 35 – 42.

³¹ [2003] QPELR 414 at [21], approved in *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QCA 168 at [30].

³² Need You Tonight, INXS, Kick 1987.

³³ [2001] QCA 116 at [20].

1. The extent of the demand for the use;
2. The extent to which the demand is already met or could be met pursuant to the provisions of the planning scheme, enabling the use to be provided in a way consistent with the public interest; and
3. The extent to which the use would improve the services or facilities available in a locality.

[18] As noted above, the proposed development must serve “the needs of the local area” pursuant to the relevant provisions of the planning scheme. The term “local area” is not defined in the planning scheme. In the Macquarie Concise Dictionary it is defined as, *inter alia*, “relating to, characteristic of, or restricted to a particular place or particular places”.³⁴ Obviously the term involves a fluid concept when consideration is given to the proposed service station use. It is inherently a use which will be availed of by people using motor vehicles. The two town planners who gave evidence, Mr Stott who was called by the appellant and Mr Mewing who was called by the respondent, agreed that it is greater than a “walking catchment”.³⁵ Under cross-examination, Mr Stott agreed that the “local area” is “that within a car trip of approximately 5 kilometres or 10 minutes of travel time.”³⁶

[19] Two retail economists gave evidence at the hearing of the appeal, Mr Duane on behalf of the appellant and Mr Ganly on behalf of the respondent. Their evidence was of great assistance in assessing the demand for the proposed development and the extent to which it is currently being met or could be met pursuant to the assessment benchmarks in the planning scheme. Firstly, it is apparent that regardless of the precise parameters of the local area, it is an area with low population growth.³⁷ Secondly, regardless of whether the more extensive south Mackay area put forward by Mr Duane or the more restricted study area put forward by Mr Ganly is adopted, the area is extremely well supplied with service stations.³⁸ Across Australia the typical benchmark is one service station for every 3,500 people.³⁹ In the Mackay Local Government Area, however, there are 49 service stations resulting in one for every 2,580 people.⁴⁰ In the study area adopted by Mr

³⁴ Macquarie University 2006.

³⁵ Ex. 5, para 56.

³⁶ T3 – 26, ll 15 – 20.

³⁷ Ex. 4, paras 50 – 54; Table 1.

³⁸ Ibid, Map 14.

³⁹ Ibid, para 155.

⁴⁰ Ibid, para 156.

Duane there are 19 service stations representing one for every 1,700 people.⁴¹ In the area adopted by Mr Ganly there are 11 services stations representing one for every 1,210 people.⁴² There are also four service stations within approximately one kilometre of the site, two on the north side of Nebo Road and two on the south side of Nebo Road.⁴³ These are all within a three minute drive of the site.⁴⁴

[20] The appellant relies strongly upon the fact that it is intended that the site be purchased by OOM Energy Pty Ltd which has entered into contractual arrangements to develop the site and operate a discount service station business from it. Mr Patel, the sole director of OOM Energy Pty Ltd, gave evidence that he is an experienced service station operator, operating 31 service stations throughout Queensland, New South Wales and Victoria.⁴⁵ He gave evidence that he will provide discounted fuel for the benefit of consumers in circumstances where a number of independent discounters will result in a permanent reduction in the fuel price in the market.⁴⁶ Within seven minutes' drive of the site, however, there are already two service stations operating as discounters.⁴⁷ These are both within approximately three kilometres of the site.⁴⁸ There are a total of six such service stations within the study area adopted by Mr Duane.⁴⁹

[21] I now turn to consider whether any latent unsatisfied demand for the proposed development could be provided in accordance with the provisions of the planning scheme. This would result in an additional service station serving the needs of the local area without having to utilise land designated for residential purposes. I note that a service station is a code assessable use in 11 zones pursuant to the planning scheme and that a service station could be accommodated within Centre zoned land, within just five kilometres of the site.⁵⁰ Both experts agreed that the convenience shop component of the proposed development is of no consequence in terms of their assessment.⁵¹

⁴¹ Ex. 4, para 158.

⁴² Ibid, para 159.

⁴³ Ibid, para 160.

⁴⁴ Ex. 13.

⁴⁵ Ex. 6, para 4.

⁴⁶ Ibid, para 36.

⁴⁷ T2 – 47, ll 40 – 45.

⁴⁸ Ex. 4, Map 14.

⁴⁹ Ex. 7, para 11.

⁵⁰ Ex. 4, pp 59 – 65; T2 – 63, ll 35 – 45.

⁵¹ Ex. 4, para 199.

- [22] I note that in cross-examination Mr Ganly conceded that a three to five minute drive, covering three to four kilometres would be a reasonable duration of travel for fuel for a resident of the locality where the site is situated.⁵² In terms of ascertaining the “local area” for the purposes of the relevant provisions of the planning scheme, I note that this opinion is broadly similar to the opinion of Mr Stott referred to above. Their evidence demonstrates what the concept of a “local area” means in the context of a service station use. Unfortunately for the appellant, the wider the local area, the more service stations that are encountered.
- [23] I appreciate that in *Navara Back Right Wheel Pty Ltd v Logan City Council*,⁵³ the court approved a discount petrol station on the basis that it would benefit residents of the trade area. However, this occurred in circumstances where there was no discounter already operating within the trade area, an unsatisfied demand for an additional service station, and no prospect of it being provided in accordance with the planning scheme in its present form.⁵⁴ The circumstances before me are very different. Not only is there an absence of any significant demand which is not presently being met (even if one analyses demand through the prism of a discounter), there is also ample opportunity for any demand to be met in appropriately zoned land pursuant to the planning scheme. The appellant has not demonstrated that designated residential land should be used for the proposed development on the basis that it is required to serve the needs of the local area. Accordingly, Overall Outcome (3)(a)(iii)(A) and PO3 of the MDRZC have not been complied with.

Scale, intensity, amenity and character

- [24] It is clear from the provisions of the MDRZC quoted above, that the site is intended to provide for residential development and supporting uses despite not being along a nominated public transport corridor. In s 6.2.12.2(1)(b), the supporting uses include “small-scale services” to support local residents. In Overall Outcome (3)(a)(iii) it is contemplated that “a limited range of small-scale and low intensity non-residential uses may be appropriate” but they must be “consistent with the amenity and character of the surrounding urban area”.⁵⁵ It is also a requirement pursuant to

⁵² T2 – 74, ll 43 – 45 – T2 – 75, ll 1 – 2.

⁵³ [2020] QPELR 899.

⁵⁴ Ibid, paras [345] and [359].

⁵⁵ S 6.2.12.2(3)(a)(iii)(C); Ex. 8, pp 90 – 91.

Overall Outcome (3)(d) that the proposed development not “adversely affect the amenity of adjacent areas and uses, particularly residential uses”.⁵⁶ These concepts are picked up in PO3 as well.⁵⁷

- [25] The first matter for determination is whether or not the proposed development can be classified as a small-scale use in the context of the above provisions. In my view when this term is considered in the context of the wider MDRZC, a distinction is made between built form and development intensity. This occurs in the headings of the assessment benchmarks in s 6.2.12.3.⁵⁸ Consistent with the approach I adopted in *Richards v Brisbane City Council*,⁵⁹ I am of the view that reading the MDRZC as a whole leads to the conclusion that it is intended that scale refers to considerations of built form and intensity refers to considerations of use. Accordingly, when regard is had to the fact that acceptable outcome AO7(1) of the MDRZC contemplates multi-storey medium density buildings of up to 17 metres or five storeys above ground level, I am of the view that the proposed development can appropriately be described as small-scale pursuant to the relevant provisions that the planning scheme.
- [26] Turning to the question of whether the proposed development can be described as low intensity, I note firstly the evidence of Mr Patel that the service station use is modelled on 500 customers per day at a maximum of approximately 45 per hour.⁶⁰ Furthermore, it is intended that the proposed development close at 11:00pm.⁶¹ In my view this is a much more intense use than would occur if the site was developed for multiple dwellings and Mr Stott conceded as much.⁶² Although the site is located at a busy intersection, the activity of cars entering and exiting the site, particularly in the evening and the early hours of the morning, is such that this cannot be classified as a low intensity non-residential use. Despite appropriate conditions, there will still be adverse amenity impacts from the intensity of this development for surrounding residents as a consequence.⁶³ The proposed development is clearly not consistent with the amenity and character that exists in

⁵⁶ Ex. 8, p 91.

⁵⁷ Ibid, p 92.

⁵⁸ Ibid, p 92.

⁵⁹ [2021] QPELR 319 at 331, [34].

⁶⁰ T3 – 5, ll 20 – 46.

⁶¹ T3 – 6, ll 1 – 2.

⁶² T3 – 23, ll 19 – 40.

⁶³ Particularly given the wide concept of amenity discussed in *Broad v Brisbane City Council* [1986] 2 Qd R 317 at 326.

the surrounding urban area and what is intended for the surrounding urban area when regard is had to the relevant provisions of the MDRZC. While the site adjoins two busy roads, it is nonetheless designated for residential development in the context of it being surrounded by predominantly residential development. The proposed use is discordant from both an amenity and character perspective. There is therefore non-compliance with both Overall Outcomes 3(a)(iii)(C) and (d) and PO3. This is despite the fact that I accept that the predominant form of development within the zone would remain residential even should the proposed development be approved.

Discretion

- [27] The appellant relies upon relevant matters as justifying approval and seeks an approval in the exercise of the court's discretion pursuant to s 60(3) of the PA.⁶⁴ The relevant matters are that the proposed development would improve the wellbeing of local residents; that it is on a prominent site adjoining two higher order roads making it well suited for a service station; and that the site is less suited for residential development.
- [28] Despite adjoining two major roads, the site has a number of attributes from a residential amenity perspective, including accessibility, given its position along two public transport corridors which provide regular bus services to important destinations in Mackay. It also benefits from an adjacent bikeway, its proximity to the Mackay Regional Botanic Gardens and multi-purpose centres and activity nodes. The relevant matters identified, either individually or together, do not justify approval of the proposed development in circumstances where it is not consistent with the relevant provisions of the planning scheme discussed above. It is not suggested that the designation of the site for medium density residential development is lacking legitimacy and, given its attributes from a residential perspective, such an argument would appear unsustainable. In these circumstances there is no warrant for the exercise of the court's discretion to approve the proposed development.

⁶⁴ Ex. 3, as modified by the Outline of Argument of the Appellant.

Conclusion

- [29] The proposed development is not required to serve the needs of the local area. It would have unacceptable impacts as a consequence of the intensity of the proposed development in the context of surrounding residential development. These impacts are such that it is not consistent with the amenity and character of the surrounding urban area. The appeal is therefore dismissed.