

# PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Bell v Brisbane City Council & Ors* [2017] QPEC 26

PARTIES: **KATE PETA BELL**  
Appellant

v

**BRISBANE CITY COUNCIL**  
Respondent

and

**SUNLAND DEVELOPMENTS NO. 8 PTY LTD**  
Co-Respondent

and

**CHIEF EXECUTIVE ADMINISTERING THE  
SUSTAINABLE PLANNING ACT 2009**  
Co-Respondent by Election

FILE NO/S: 2868 of 2015

DIVISION: Planning and Environment

PROCEEDING: Appeal

DELIVERED ON: 10 May 2017

DELIVERED AT: Brisbane

HEARING DATE: 13, 14, 15, 16, 17, 20, 21, 22, 23, 24 June 2016, 27, 28 July  
2016, 18 August 2016

JUDGE: Rackemann DCJ

ORDER: **The further hearing of the appeal is adjourned.**

CATCHWORDS: PLANNING AND ENVIRONMENT – submitter appeal – proposal for 3 high-rise multi-unit towers, retention and reuse of a heritage place, open space and other uses on former ABC site at Toowong – where site in the Major Centre Zone, the Toowong Centre precinct, covered by a heritage overlay and designated as both a land mark site and a catalyst site – extent of centre issues – integration with the Toowong centre – height – bulk and scale – building separation – setbacks – infrastructure – heritage – traffic – amenity, privacy, overshadowing – economic and community need – architectural quality – landmark – subtropical design – tower-over-podium vs tower-in-plaza – streetscape and site activation – building transition – centre legibility – quality of open space – visual amenity, character and integration – site

planning generally – nature and extent of conflict and grounds

COUNSEL:

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M Hinson QC with N Loos for the Respondent

C Hughes QC with M Williamson, J Lyons and D Jones for the Co-Respondent

N Kefford for the Co-Respondent by Election

SOLICITORS:

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McCullough Robertson for the Co-Respondent

Norton Rose Fulbright for the Co-Respondent by Election

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## **Introduction**

[1] This is a submitter appeal against the respondent's approval of a development application by the co-respondent for a material change of use for multiple dwelling, centre activities and re-use and extension of a heritage place and a preliminary approval for building work and operational works. The appellant's family residence adjoins the subject site to the north. The co-respondent by election's interest relates to a heritage place on the site.

### (i) The site

[2] The subject site is the former ABC site in Toowong. It:

- (a) is located at 600 Coronation Drive, Toowong on land described as lot 13 on RP104400;
- (b) has an area of 1.4999 hectares;
- (c) has a long frontage to Coronation Drive (approximately 150 metres);
- (d) has a shorter frontage (approximately 64 metres) to Archer Street to the south;
- (e) has a long frontage (approximately 136 metres) to the Brisbane River;
- (f) is relatively regular in shape, with the exception of the north eastern corner which has an obtuse angle of intersecting boundaries which envelop the adjoining parcel of land owned by the appellant;
- (g) has been cleared of buildings with the exception of a former residential building, Middenbury House (Middenbury), which is listed on the Queensland Heritage Register, and two small utility structures;
- (h) is mostly cleared of vegetation with the exception of two large mature fig trees near Coronation Drive which are listed on the Queensland Heritage Register and remnants of vegetation around Middenbury and along the riverbank, and
- (i) is in a derelict state and is ripe for redevelopment.

[3] The topography of the site has been altered over the years. In general terms, it falls from its south western corner along Coronation Drive to the north and to the east where the site adjoins the Brisbane River. The highest point of the site is where Middenbury is located (elevated above Coronation Drive). The elevated platform

upon which Middenbury sits creates a prominent upper level platform on the subject site.

(ii) The proposal

[4] The development proposal has the following elements:

(a) 555 units with a gross floor area of 49,231.6 m<sup>2</sup> comprised as follows:

| <b>Dwelling</b> | <b>Tower A</b> | <b>Tower B</b> | <b>Tower C</b> | <b>Total</b> |
|-----------------|----------------|----------------|----------------|--------------|
| 1 bedroom       | 30             | 12             | 142            | 184          |
| 2 bedroom       | 106            | 80             | 104            | 290          |
| 3 bedroom       | 16             | 38             | 19             | 73           |
| Villa           | 4              | 4              | 2              | 8            |
| <b>Total</b>    | <b>156</b>     | <b>134</b>     | <b>269</b>     | <b>555</b>   |

- (b) combined community use areas and food and drink outlets;
- (c) public open space comprising some 53% of the site area;<sup>1</sup>
- (d) a sculpture park within the publicly accessible open space;
- (e) private open space of 12.3% of site area;<sup>2</sup>
- (f) site cover of only 31.4%, with a ground level site cover of 28.74%;<sup>3</sup>
- (g) 800 car parks (714 resident and 86 visitor spaces) spread across 4 basement levels;
- (h) 680 bicycle spaces;
- (i) a public bikeway and pedestrian way, to be kept in private ownership (protected by easements to be granted to the Council), traversing the subject land providing a connection to the bicentennial bike way and across the site, and
- (j) the retention and extension of Middenbury and its adapted re-use.

[5] The three residential towers are to be relatively evenly spaced across the site and identical in architectural expression and design. Designed by the late, internationally renowned, architect Dame Zaha Hadid, they feature a glazed external finish with a white sculptured skeletal frame, visible as a deliberate design element. Each of the

<sup>1</sup> Excluding areas of planting along the northern and southern boundaries, an area for road widening and areas to be given over for existing riparian vegetation. See exhibit 52, p 3.

<sup>2</sup> Exhibit 52, p 4.

<sup>3</sup> Exhibit 52, pp 1-2.

towers tapers to a narrow base. The widest part of each building is located at approximately level 5, which is the floor with the greatest tower site cover. The shape of the buildings has been described as champagne flute like.

(iii) The locality

[6] The site is part of the Toowong major centre. The core of that centre is focused on High Street, Jephson Street and Sherwood Road, which lie to the west of Coronation Drive and the railway line. The centre and its immediate area is undergoing rapid transformation in terms of its built form. A number of recent approvals have been granted by the Council for high-rise, high density residential development. A number of approvals have been actioned and construction is under way. The centre enjoys excellent access to public transport, with rail, ferry and bus services all within walking distance. The subject site provides the only riverfront site within the centre.

[7] As to development surrounding the subject land:

- (a) land to the north is outside the designated centre and presently comprises mostly low or medium density residential dwellings. This includes the appellant's land which is included in the High Density Residential zone;
- (b) land to the south is developed with a 2 storey, local heritage listed house (St Briavels). A 9 storey apartment complex has been recently approved on this site (20 Archer Street), located between St Briavels and the Brisbane River;
- (c) further south in Archer Street, development comprises a mix of residential forms, from older 1 and 2 storey homes of significant character and amenity to older apartment blocks (3 – 7 storeys) to high-rise apartments up to 15 storeys (the Aspect development) which were under construction at the time of the hearing, and
- (d) land to the west across Coronation Drive is the “core” of the centre including the Toowong Tower and department store based shopping centre, offices and a recently approved 17 storey, mixed use development. The Toowong Tower has been a prominent feature of this centre for many decades but much taller development is now occurring and will likely occur in the centre in the future.

### **The assessment regime**

- [8] The development application was impact assessable and so is to be assessed pursuant to s 314 of the *Sustainable Planning Act 2009* (SPA). Public notification generated 521 submissions, although of those, 502 were not properly made. The overwhelming majority of submitters were opposed to the development.
- [9] The application is to be decided in accordance with sections 324 and 326 of SPA. A decision on the application must not conflict with a “relevant instrument” unless there are sufficient grounds to justify the decision. A relevant instrument includes a planning scheme. Grounds are matters of public interest.
- [10] Grounds may be those relevant to the part of the application which is in conflict with the planning scheme or may be grounds in favour of the application as a whole and which, on balance, are sufficient to justify approval notwithstanding conflict.<sup>4</sup> Whilst the court must not usurp the local government’s role as planning authority, by adopting its own planning strategies in preference to those in the planning scheme,<sup>5</sup> the discretion to approve a particular proposal notwithstanding conflict (where there are sufficient grounds) recognises that a degree of flexibility is desirable, in the public interest, in development assessment. The co-respondent bears the onus of establishing that the proposed development should be approved and the appeal dismissed.

### **The issues**

- [11] The appellant, as she is entitled to do, did not confine her case to issues which directly affect her family residence. The appellant’s lawyers exhibited considerable diligence in identifying and putting in issue, compliance with 82 provisions of the planning documents.<sup>6</sup> Helpfully, counsel for the appellant ultimately identified some 37 “central provisions” and acknowledged that, if the appellant’s case was not made good by reference to some or all of those provisions, it would not be necessary for the court to consider the remaining 45 provisions with which the appellant also alleged conflict. Further, the “central provisions” included provisions of the Queensland Heritage Regulations, which the appellant ultimately did not contend were applicable

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<sup>4</sup> *Weightman v Gold Coast City Council* [2003] 2 Qd R 441 [3].

<sup>5</sup> *Elan Capital Corporation Pty Ltd v Brisbane City Council* (1990) QPLR 209, 211.

<sup>6</sup> See the list in exhibit 3A.

to impact assessment. Notwithstanding the identification of the central provisions, the appellant's submissions addressed some other provisions which were not central provisions and, in some instances, not identified issues at all. These reasons deal with the "central provisions" in the context of the various issues to which they relate.

- [12] There is a contest about the nature and extent of the conflict with the planning scheme. The respondent and co-respondent assert that there are sufficient grounds to warrant approval despite any conflict which may be found to exist.

### **General town planning context**

- [13] The development application was made on 1 September 2014. City Plan 2014 (CP2014) was in force at that date. Under CP2014 the site is:
- (a) in an identified growth node on a selected transport corridor;
  - (b) in the Major Centre zone;
  - (c) included within the Toowong Centre Precinct of the Toowong – Auchenflower Neighbourhood Plan (TANP) for which there is a code which applies to development assessment;
  - (d) included within Sub Precinct NPP-001C of the TANP;
  - (e) in the heritage overlay;
  - (f) designated as one of the landmark sites throughout the city, and
  - (g) designated as one of the catalyst sites within the TANP area.<sup>7</sup>
- [14] There is a hierarchy of assessment criteria under CP2014, pursuant to which:
- (a) the strategic framework prevails over all other components to the extent of the inconsistency;
  - (b) state-wide codes prevail over all other components (other than the strategic framework) to the extent of the inconsistency;
  - (c) overlays prevail over all other components (other than the strategic framework and state-wide codes) to the extent of the inconsistency;
  - (d) neighbourhood plan codes prevail over zone codes, use codes and other development codes to the extent of the inconsistency, and
  - (e) zone codes prevail over use codes and other development codes to the extent of the inconsistency.

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<sup>7</sup> The other 2 being the Woolworths site and the Wesley Hospital – see figure a.

- [15] Part 3 of CP2014 contains the strategic framework. It includes Theme 5: Brisbane's City Shape, which has nine elements including:
- Element 5.3 Brisbane's major centres, and
  - Element 5.8 Brisbane's growth nodes on selected transport corridors.
- [16] The Toowong major centre is one of eight major centres outside of the Brisbane CBD. The specific outcomes for major centres include that they:<sup>8</sup>
- accommodate significant population-serving activities and employment;
  - are well serviced by the city's public transport and active transport network which are supported by development;
  - support an 18 hour economy, and
  - comprise integrated residential development.
- [17] The proposal is for an integrated residential development, with some other uses and facilities that will support the centre, which is well serviced by public transport and an active transport network.
- [18] The specific outcomes for Brisbane's growth nodes on selected transport corridors include that they:<sup>9</sup>
- provide opportunities for a range of more intense urban form, mix of land uses activities that are tailored to the locality and catchment's community needs in accordance with the applicable land use strategies;
  - provide an integrated urban form and exhibit leading practice in urban and public domain design and social environmental outcomes, and
  - are based on railway stations and land within the centre zone which are focus points of activity, accessibility and employment.
- [19] Insofar as the Milton to Wacol transport corridor is concerned, the following statement is made in CP2014 in relation to Toowong:<sup>10</sup>
- “The Toowong Major Regional Activity Centre will have a strong commercial office focus due to the centre's proximity to the city centre, including via the Centennial [sic] Pedestrian Cyclist Route along the Brisbane River. High density residential development builds

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<sup>8</sup> S3.7.4

<sup>9</sup> S3.7.9

<sup>10</sup> Exhibit 2, p 77.

on the centre's proximity to the river and the University of Queensland, St Lucia campus.”

- [20] One of the appellant's issues alleged conflict with this provision on the basis that the proposal does not have a commercial office focus. The provision however, speaks of the strong commercial focus of the centre as a whole (which is discussed later and which this proposal would not compromise). It does not require each development on each site to have this focus. As for the balance of the provisions, the proposal is for high density residential development which builds on the proximity of the Toowong Major Activity Centre to the river and the University of Queensland, St Lucia campus. It also proposes to augment the pedestrian/cyclist route. Perhaps understandably, this was not one of the appellant's “central provisions”.
- [21] The Major Centre Zone Code (MCZC) is an applicable code. The purpose of that code<sup>11</sup> is to provide a mix of uses and activities, including residential uses, capable of serving a subregion. In relation to Toowong (amongst other places), the purpose is to provide for the mix and intensity of uses and level of economic and social activity that support its role as an activity core, servicing a sub-regional catchment and complementing the role of regional centres.<sup>12</sup> Multiple dwellings are a form of centre activity.<sup>13</sup> The overall outcomes (OOs) include<sup>14</sup> that development is tailored to its specific location and to the role of the individual centre and is consistent with the location-specific provisions of the relevant neighbourhood plan.
- [22] The purpose of the TANP Code is to provide finer grained planning at a local level for the Toowong Auchenflower Neighbourhood Plan Area. The purpose of the TANP Code is to be achieved through OOs including those for each precinct of the neighbourhood plan area. The code also provides for assessment criteria in the form of performance outcomes (POs) and acceptable outcomes (AOs). The TANP Code contains provisions which are specific to the subject site, and also designates the site as both a landmark site and a catalyst site.

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<sup>11</sup> S6.2.2.2

<sup>12</sup> S6.2.2.2

<sup>13</sup> See table SC1.1.2.B – Defined activity groups.

<sup>14</sup> OO(4)(b).

[23] The OOs of the TANP Code include the following with which the proposal is consistent and in respect of which the appellant's issues did not allege conflict:<sup>15</sup>

- (f) Higher density development is located in areas with high amenity, close to major open space or the Brisbane River, or in centres and around major public transport to promote legible centre structure and support transit oriented development.
- (n) Development enhances the public realm and pedestrian and cycle movement with a network of parks, arcades and plazas (e.g. predominantly hard-surfaced open space used by the general public).
- (o) Development encourages walking, cycling and public transport as attractive options for daily travel for residents, employees and visitors, and improves pedestrian/cycle connections to key destinations.
- (p) Development contributes to the creation of new public spaces and improves existing public spaces, ensuring casual surveillance, providing new pedestrian connections and where possible, integrating with and providing direct access to open space.
- (q) The Brisbane River has a renewed focus within the neighbourhood plan area, and residents, employees and visitors are provided with easy access to active and passive recreational opportunities that make the most of this important natural asset.

[24] The 'public realm' to which reference is made in OO(3)(n) is defined<sup>16</sup> to mean any publicly accessible streets, pathways, cross-block links, arcades, plazas, open spaces and any public and civic building and facilities. It is not limited to areas in public ownership. The proposal includes a significant contribution to the public realm. Other overall outcomes (with which the appellant contends the proposal conflicts) are discussed later.

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<sup>15</sup> The submission for the appellant addressed OO(3)(o), but that is not one of its central provisions or issues and it is not an objective with which the proposal is in conflict in any event.

<sup>16</sup> Table SC1.2.3.B.

- [25] The TANP Code also has OOs for the Toowong Centre Precinct, of which the site forms part. Those OOs with which conflict is alleged (b, c, d and h) are discussed later.
- [26] Other applicable codes of relevance are:
- the Centre or Mixed Use Code (CMUC);
  - the Multiple Dwelling Code (MDC);
  - the Road Hierarchy Overlay Code (RHOC);
  - the Transport Access Parking and Servicing Code (TAPS Code);
  - the Bicycle Network Overlay Code (BNOC); and
  - the Heritage Overlay Code (NOC).
- [27] Compliance with an applicable code under City Plan 2014 can be demonstrated by adoption of the acceptable solutions or consistency with the corresponding performance outcomes or with the purpose and overall outcomes of the code.<sup>17</sup>
- [28] The Queensland Heritage Place State Code (QHPSC) is later discussed in relation to the heritage issues.

### **Site specific provisions of the TANP**

- [29] It has already been observed that the TANP contains provisions which specifically relate to the subject site.
- [30] The OOs for the neighbourhood plan area include the following:
- “(3)(k) New development along the river’s edge on the former ABC site improves public river access and provides appropriate building design using setbacks, bulk and separation and the provision of public open space.”
- [31] The subject development will improve public river access by providing, for the first time, public open space on this riverfront site, including public open space along the river’s edge. The building design is discussed later and for the reasons given, is appropriate.

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<sup>17</sup> S5.3.3(1)(d)(i), read with (c)(iii).

[32] The OOs for the Toowong Centre Precinct (NPP-001) contain provisions which, whilst not specifically naming the subject site, can only be referring to it, because it is the only site within the precinct with a river frontage. OO(4)(g) is as follows:

“Development in this precinct extends to and engages with the river, while providing public spaces that are linked to the remainder of the precinct by high quality streets and pedestrian connections.”

[33] The proposal will allow the precinct to extend to and engage with the river. Whilst the subject site is separated from the balance of the precinct by Coronation Drive and the railway line, the proposal provides for a very permeable site within which there is a generous provision of public space to which the streets and pedestrian connections in the remainder of the precinct can link. That public space will be accessible from both the Coronation Drive and Archer Street frontages of the site and, as is noted later, the proposal will improve the quality of the streetscape (including by improvements required by conditions). There are, beyond the site, pedestrian crossings at signalised intersections and a pedestrian overpass located to the south of the subject site, which facilitate pedestrian connection. The proposal does all that could reasonably be expected to support this OO. It should be noted that the OO was not one with which conflict was alleged in the appellant’s central provisions or issues, although it was referred to in submissions.

[34] OO(4)(h) provides as follows:

“Development on sites adjoining the Brisbane River ensures the public access to the river, and buildings adjoining riverfront public spaces include a lively blend of retail, commercial, residential and community uses.”

[35] The subject site provides riverfront public spaces which include a blend of uses. For the reasons stated later, that blend of the specified uses is not as rich as might be imagined. The proposal would however, achieve substantial and lively activity on and through the site to the river in public spaces with residential uses, the repurposed Middenbury, an historical information/interpretive centre, café and restaurant associated with it, a sculpture park, pedestrian and cycleway ways, a café closer to the river and open spaces.

[36] OO(3)(1) is also site specific, since it relates to Middenbury. It provides:

“The heritage value of Middenbury House is protected and enhanced, through retention, refurbishment and re-use of its building”.

It is proposed to retain, refurbish and reuse Middenbury. For the reasons discussed later in relation to the heritage issues, the proposal would achieve that overall outcome.

[37] PO11, (and its corresponding acceptable outcomes) specifically relates to the subject site and is as follows:

**“PO11**

Development on the former ABC site as shown in Figure a:

- (a) enhances the pedestrian experience with high-quality building design, streetscape and waterfront amenities providing a direct and tangible linkage between Toowong and the river;
- (b) provides a new public space with supportive uses to encourage activity on and occupation of the river’s edge;
- (c) maintains the natural quality of the waterfront experience for access by the general public;
- (d) reflects the local culture and heritage of Middenbury House;
- (e) provides an arcade between Coronation Drive and Archer Street.

Note – A structure plan prepared in accordance with the Structure planning scheme policy can assist in demonstrating achievement of this outcome.

**AO11**

Development on the former ABC site shown in Figure a has a structure plan which demonstrates:

- (a) provision of a riverside open space area a minimum of 3,000m<sup>2</sup> and with a minimum Brisbane River frontage of 40m;
- (b) retention and re-use of Middenbury House and retention of the heritage-listed trees on Coronation Drive;
- (c) retention of views to the Brisbane River as indicated in Figure b;
- (d) public access to the entire Brisbane River frontage for a minimum width of 12m;
- (e) provision of an arcade to connect to Coronation Drive at Booth Street from Archer Street;

- (f) activation of the ground storeys of buildings fronting public spaces;
- (g) provision of vehicular access to the site that is shared with pedestrian spaces;
- (h) provision of a maximum of 1 vehicular access to the site from Coronation Drive;
- (i) extension of the Bicentennial Bikeway through the site to connect with Archer Street.”

[38] The proposal substantially adopts the acceptable outcomes. It:

- (a) provides more than twice (almost three times) the amount of open space on this riverfront site, including a frontage<sup>18</sup> in excess of 40m;
- (b) involves the retention and reuse of Middenbury and the retention of the heritage listed trees on Coronation Drive;
- (c) retains views to the Brisbane River as indicated in Figure b, being a significant view across the river;
- (d) provides public access to the Brisbane River frontage, and substantially to a minimum width of 12m, although there are incursions;<sup>19</sup>
- (e) provides an arcade to connect to Coronation Drive from Archer Street (an arcade is defined<sup>20</sup> as a privately owned pedestrian pathway that is part of a pedestrian network and is publically accessible during hours of operation);
- (f) does not involve activation of the ground storey of the residential towers which front the public spaces, although it will achieve substantial activity on the site;
- (g) involves both provision of vehicle access and pedestrian spaces;
- (h) has only one vehicular access to the site from Coronation Drive, and
- (i) provides for the extension of the Bicentennial Bikeway through the site to connect with Archer Street.

[39] Accordingly, there is substantial adoption of the acceptable outcomes, although there is some level of departure. That does not in itself create conflict. Consideration needs to be given to the performance outcome.

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<sup>18</sup> Which does not need to be continuous.

<sup>19</sup> Exhibit 6, p 123; T5-70.

<sup>20</sup> Table SC1.2.3.B.

[40] The appellant sought to make a point about the note to the performance outcome and the absence of a structure plan. The note simply states that such a plan can assist in demonstrating achievement of the outcome. A deal of what is, in effect, structure planning, evidently underlies the formulation of the proposal itself and, as Mr Schomburgk (the town planner engaged by the co-respondent) pointed out, was, in effect (if not in name), conducted in the development application process. Further, the extensive analysis of the proposal in the course of the appeal permits an assessment as to whether it achieves the performance outcome.

[41] The matters of controversy in relation to whether the proposal meets the performance objectives are:

- (a) heritage issues;
- (b) whether the proposal involves “high quality building design, streetscape and waterfront amenities”;
- (c) whether it provides “a direct and tangible linkage between Toowong and the River.”
- (d) the extent to which it provides “supportive uses to encourage activity on and occupation of the river’s edge”, and
- (e) whether it maintains the natural quality of the waterfront experience.

Those matters are discussed later. For the reasons given, I am satisfied that the proposal appropriately responds to each of those issues.

[42] It has also been noted that the TANP designates the site both as a landmark site and as a catalyst site. There are 41 landmark sites across the city. They are defined as those:

“Identified in a neighbourhood plan to accommodate buildings or developments that attain citywide prominence through a combination of notable architectural excellence, siting and location.”

[43] For the reasons discussed later, the subject development would, if it proceeded, achieve citywide prominence through a combination of notable architectural excellence, siting and location.

[44] PO6 of the TANP applies to landmark sites in the TANP. It provides that development on such a site provide a prominent visual reference and contribution to the city’s public realm by doing various things, which include exhibiting subtropical

architectural excellence and respecting the prominence of adjoining or nearby heritage places. Whether the proposal exhibits ‘subtropical’ architectural excellence and whether it respects the prominence of Middenbury<sup>21</sup> were controversial. For the reasons discussed later, the proposal satisfies this PO.

[45] There is no definition of a “catalyst site”, but the overall outcomes for the neighbourhood plan area include as follows:

“(3)(s) structure planning of catalyst sites identified in figure a addresses the unique characteristics of these sites ensuring that development integrates with surrounding land, creates an attractive public realm in an urban environment, provides public space and retains and reuses onsite heritage structures.”

[46] The absence of a document called a ‘structure plan’ has already been dealt with. The proposal has obviously been designed to address the unique characteristics of its site and to create an attractive public realm and urban environment. It provides public open space and retains and reuses the heritage building. For the reasons discussed later, there is a limit on the extent to which it can physically integrate with surrounding land, including the appellant’s property. The proposal however, creates a permeable site with visual and pedestrian linkages to the surrounding area. This was not one of the appellant’s central provisions, or indeed a provision in its issues otherwise.

[47] It is evident that, notwithstanding the large number of provisions relied upon by the appellant, there are numerous provisions of the planning scheme or parts of provisions with which the proposal is consistent or which it supports.

### **Centre issues**

[48] It was submitted, for the appellant, that the proposal is contrary to the intent of CP2014 because it:

- (i) includes limited, if any, centre type uses, and
- (ii) fails to integrate with the existing Toowong Centre.

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<sup>21</sup> Which is on the site rather than adjoining or nearby.

(i) Centre activities

[49] It was pointed out, on behalf of the appellant, that:

- the site is included in the Major Centre zone in CP2014;
- under the local plan in force at the time of CP2000, the site was in the residential precinct, which was to be developed predominantly for medium density residential uses and where retail uses were not supported;
- under the TANP however, the site is in the Toowong Centre precinct and not in the Toowong Residential precinct, the latter of which is intended to form the primary residential catchment to the Toowong Centre, and
- the proposal is nevertheless predominantly for residential uses.

[50] Insofar as the appellant's "central provisions" are concerned, reliance was placed on:

- (i) OO(4)(b) of the TANP Code, which provides that the Toowong Centre precinct "contains a range of knowledge-based employment opportunities and takes full advantage of its strong economic ties to the CBD and surrounding suburbs..."
- (ii) OO(4)(c) of the TANP Code, which provides that the Toowong Centre precinct "contains the greatest intensity and mix of land uses in the neighbourhood plan area, providing a focal point for retail, commercial and social activities..."
- (iii) OO(4)(h) of the TANP Code which, as has already been noted, seeks development within the Toowong Centre precinct on sites adjoining the Brisbane River which ensures, amongst other things, a "lively blend of retail, commercial, residential and community uses."<sup>22</sup>
- (iv) OO(5)(a) of the TANP Code which provides that the Toowong Residential Precinct (NPP-002) forms the primary residential catchment to the Toowong Centre.
- (v) PO3 of the TANP Code, which provides that development in centre precincts provides a "balanced mix of residential and non-residential uses and includes a significant component of

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<sup>22</sup> Community use is defined in CP2014 as "premises used for providing artistic, social or cultural facilities and community support services to the public and may include the ancillary preparation and provision of food and drink"

non-residential centre activities to maximise transit oriented development outcomes.”

- (vi) PO11 of the TANP Code which provides that development on the subject site, amongst other things, “provides a new public space with supportive uses to encourage activity on and occupation of the river’s edge.”
- (vii) OO(4)(a) of the MCZC, which provides that “development delivers a highly diverse range of centre activities...”

[51] Reference was also made to AO2.3 of the TANP. That is an acceptable solution to a performance outcome which refers to activation, a matter discussed in the context of design issues.

[52] Whilst the centre is intended to be developed for a mix of land uses, it must also be acknowledged, as was pointed out for the respondent, that the intended mix includes high density residential uses in the centre. In that regard:

- (i) multiple dwellings are one form of centre activity;
- (ii) section 3.7.1(e) of the strategic framework provides that not only are Brisbane’s major centres vibrant, mixed use destinations that support an 18 hour economy, but that they “integrate residential development”;
- (iii) section 3.7.4 contains specific outcome 4 that “major centres comprise<sup>23</sup> integrated residential development” and land use strategy L4 which provides that “higher density residential development is provided for and will complement, but not compromise, the core commercial retail and community functions of the major centre”;
- (iv) section 3.7.9 contains land use strategy L3 which, amongst other things, provides that centres within growth nodes are intensive nodes of not only commercial and retail activities and local services and facilities, but residential activities as well, with a variety of housing types, configurations and sizes;
- (v) the purpose of the MCZC is to provide for a mix of uses and activities, including residential;

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<sup>23</sup> In this context the word “comprise” should be interpreted to mean “include”.

- (vi) OO(4) of the MCZC, upon which the appellant relies, goes on to provide that development for a residential use in the zone should, amongst other things, be high density, not compromise the primary function of the zone as a commercial activity centre, facilitate urban consolidation and the efficient use of physical and social infrastructure, support the creation of a walkable centre, with the potential for residents to live within walking distance of public transport and facilities within the centre and provide a wide range of housing sizes;
- (vii) OO(4)(c) of the TANP Code, goes on from the part extracted above, to provide “A variety of residential uses also exists in the centre and takes advantage of the centre’s proximity to public transport and the amenity provided by new public open space and the Brisbane River”;
- (viii) the “lively blend” referred to in OO(4)(h) expressly includes residential uses, and
- (ix) whilst PO3 of the TANP Code refers to a “balanced mix” of residential uses and non-residential uses, that does not require an even mix or preclude development with a substantial and, indeed, majority residential component. So much is apparent from the acceptable outcome, which refers to a maximum of 80% of floor space in individual buildings being occupied by residential uses. One can therefore expect that a “balanced mix” can be achieved by development of at least up to 80% residential (by adoption of the acceptable outcome) and possibly more, (on a performance based assessment).

[53] There is no basis for excluding development with a substantial and even overwhelming (up to at least 80%) residential component from this part of the centre or for supposing that the proposed development will supplant or overtake the primacy of the Toowong Residential Precinct as the primary residential catchment to the Toowong Centre.

[54] None of the above is to suggest that the planning documents intend that the subject site be developed exclusively for residential purposes, nor is it proposed to be

developed in that way. The issue is as to the appropriateness of the limited amount of non-residential uses proposed.

- [55] It was pointed out, on behalf of the respondent, that:
- (i) consistently with OO(4)(d) of the TANP Code, it is Sherwood Road where the majority of retail, community and lifestyle uses are to be located;
  - (ii) consistently with OO(4)(e) of the TANP Code, it is High Street which is to be the focus for non-residential development, and
  - (iii) the intent for the Woolworths site to be a high quality, high density “mixed use development”, (consistently with PO10 of the TANP Code) is not replicated in PO11 for the subject site. Rather, PO11(b) simply requires provision of new public space, with supportive uses to encourage activity on and occupation of, the river’s edge, which the proposal does.
- [56] It was submitted, for the respondent and for the co-respondent, that the non-residential uses at ground level will form part of a “lively blend” and will encourage activity on and occupation of the river’s edge and is appropriate.
- [57] It is unsurprising that development of the subject site, being the only riverfront site within the centre, is proposed to have a very substantial residential component. The matters referred to by the respondent might justify a non-residential component of somewhat lesser scale than for other sites in the centre. I accept that the proposal includes a blend of residential, food and beverage and community use (Middenbury and the sculpture park). I also accept that the proposed development will indeed encourage activity on, and occupation of, the river’s edge given the substantial, attractive open space to be provided extending down to the river’s edge, in the context of a site design which provides a high level of permeability through the site, combined with the uses and attractions to be provided. The area will be lively<sup>24</sup> but, it is debateable however, whether the limited extent of non-residential uses here proposed fits the description of a “lively blend” in relation to the uses specified in the provision above. Further it is difficult to conclude that it provides a mix which would fairly be described as “balanced” or a component of non-residential centre activities which

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<sup>24</sup>

T5-68 L 44–T5-69 L 5.

would fairly be described as “significant” for the purposes of PO3 of the TANP. I note that Mr McKerrell (the architect called by the co-respondent) thought that PO11(b) contemplates a wider range of supportive uses than proposed<sup>25</sup> and that the proposal does not involve a “lively blend” of uses nor a significant component of non-residential centre activities.<sup>26</sup> The written submissions for the co-respondent acknowledged that the proportion of non-residential centre activities proposed is “modest” and that the proposed blend does not include all of the elements referred to in OO(4)(h).

[58] Mr Schomburgk also agreed that the proposal does not include a significant non-residential component. However, he was of the view that an appropriate balance can nevertheless be achieved across the centre as a whole. That may be so and OO(4)(b) and (c) do refer to the precinct as a whole whilst OO(4)(a) of the MCZC must be read with OO(4)(e) which contemplates development for residential use in the MCZC. OO(4)(h) of the TANP Code however relates to the subject site and PO3 and PO11 of the TANP Code form part of the assessment criteria for particular applications. Mr Schomburgk’s point about the centre as a whole does not avoid a conclusion that there is a level of conflict by reason of the limited provision of a non-residential development in the subject proposal. I find that there is a level of conflict at least with PO3 and, in my view, also with OO(4)(h) although not with PO11(b). My ultimate decision in this matter would not however alter, even if I had concluded that there was a degree of conflict with PO11(b) by reason of there being insufficient supportive uses.

(ii) Integration with the Toowong Centre

[59] The TANP Code contemplates that the subject site will integrate with and be accessible from the Toowong Centre. Insofar as the appellant’s “central provisions” are concerned:

- (a) OO(3)(k) of the TANP Code provides that new development along the river’s edge on the subject site improves public river access, and
- (b) PO11(a) of the TANP Code provides that development on the site “enhances the pedestrian experience with high quality building design,

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<sup>25</sup> T5-7.

<sup>26</sup> T5-9.

streetscape and waterfront amenities providing a direct and tangible linkage between Toowong and the river.”

- [60] The written outline of submissions for the appellant also referred, in this regard to:
- (i) OO(3)(o) of the TANP Code, which speaks of “development encouraging walking, cycling and public transport as attractive options for daily travel for residents, employees and visitors, and improves pedestrian/cycle connections to key destinations;
  - (ii) OO(4)(g) of the TANP Code, extracted and discussed earlier, and
  - (iii) OO(4)(i) of the TANP Code which provides that “...development promotes pedestrian movement to and from public transport and centres”.

None of these provisions however, appear in the appellant’s issues, far less the list of central provisions, but the development does not, in any event, conflict with them.<sup>27</sup>

- [61] In applying the provisions which are in issue to the subject development, it must be recognised that the site is physically separated from the remainder of the precinct by Coronation Drive and the railway line. The proposal cannot undo that. There are, however, signalised pedestrian crossings on Coronation Drive and a pedestrian overbridge located to the south of the subject site. In that context, the site offers an opportunity, taken up by the proposal, to provide a connection through to the river. Insofar as the central provisions referred to above are concerned:

- (a) the proposed development on the subject site does improve public river access. The proposal is to provide access extending to and along the river’s edge, in the context of a development which has been designed to be very permeable (a matter discussed later) and to designate a large part of the site, extending to the river’s edge, for a publicly accessible open space providing high quality pedestrian connections to and through the site from Coronation Drive and Archer Street, and
- (b) PO11(a) focuses upon enhancing the pedestrian experience and providing a direct and tangible linkage between Toowong and the river. For the reasons discussed elsewhere, the pedestrian experience

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<sup>27</sup> The development is well located in relation to walking, cycling and public transport opportunities. OO(4)(g) is discussed earlier.

is not particularly positive at present and there is no linkage between Toowong and the river. The proposal would change that by providing a direct and tangible linkage, through the site, between Toowong and the river, enhancing the pedestrian experience with high quality building design (discussed later), streetscape (also discussed later) and amenities through to the waterfront.

- [62] My ultimate conclusion would not have altered even had I found a degree of conflict by reason of a lack of more extensive waterfront amenities. The amenities and attractions (including the open space areas themselves) throughout the site, down to the waterfront will enhance the pedestrian experience and provide a direct and tangible linkage. The conflict would not be grave.

### **Height**

- [63] The appellant contends that the proposal is in conflict with CP2014 by reason of its height. Central to that contention is A01.1 of the TANP<sup>28</sup>, which provides as follows:

**“A01.1**

Development complies with the number of storeys, building height and minimum site frontage in table 7.2.20.3.3.B.

Note – neighbourhood plans will mostly specify maximum number of storeys where zone outcomes have been varied in relation to building height. Some neighbourhood plans may also specify height in metres. Development must comply with both parameters where maximum number of storeys and height in metres are specified.”

- [64] Table 7.2.20.3.3.B (“the table”) specifies 15 storeys for development of a site of 1500m<sup>2</sup> or more with a minimum frontage of 36m in sub-precinct NPP-001C. All three towers in the proposal substantially exceed that number of storeys (2 x 24

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<sup>28</sup>

The appellant’s central provisions also include PO6 of the MDC which provides that development has a building height that is consistent with the streetscape, local context and intent for the area having regard to, amongst other things, the predominant height of existing or approved buildings in the street, and providing appropriate separation and a sensitive transition between houses and higher scale building forms. The changing face of Toowong, in terms of building height, has been referred to. Transition is dealt with later. The intent for the area is more fully dealt with in the TANP Code. Understandably, it is the provisions of the TANP Code with respect to height which were the focus of this issue. I have found conflict in relation to height. That there is some conflict also with PO6 of the MDC does not add greatly to a consideration of this issue and does not alter my ultimate conclusion that approval is warranted notwithstanding conflict in relation to height.

storeys and 1 x 27 storeys). That does not, of itself, establish conflict, because acceptable outcomes are not mandatory.

[65] The appellant sought to make something of the relatively tall absolute height of the buildings (2 x approximately 105m and 1 x approximately 114m), as being the equivalent of the height of more conventionally designed residential buildings with a greater number of storeys. The absolute heights of the residential towers are increased by the tapered bases up to the first residential storey and by rooftop elements which, as Mr McKerrell (the architect called by the co-respondent) noted, are integral aspects of the architectural design. The TANP Code is however, not one which specifies height in metres. Its concern is for the number of storeys. That leaves scope for the incorporation of elements which achieve a variation in terms of absolute height. Reasonable expectations must include the prospect of such variation and rather than a height limit in absolute terms.

[66] Since the proposal departs from the acceptable outcome, it is necessary to consider whether it nevertheless meets the corresponding performance outcome (P01). That performance outcome relates not just to building height, but scale and form as well (matters discussed later). It provides:

**“P01**

Development is of a height, scale and form that achieves the intended outcome for the precinct, improves the amenity of the neighbourhood plan area, contributes to a cohesive streetscape and built form character and:

- (a) is consistent with the anticipated density and assumed infrastructure demand;
- (b) is aligned to community expectations about the number of storeys to be built;
- (c) is proportionate to and commensurate with the utility of the site area and frontage width;
- (d) is designed to avoid a significant and undue adverse amenity impact to avoid affecting adjoining development;
- (e) is sited to enable existing and future buildings to be well separated from each other and to avoid affecting the development of an adjoining site;

(f) retains the significant views of Mt Coo-tha or the Brisbane River.

Note – development that exceeds the intended number of storeys or building height can place disproportionate pressure on the transport network, public space or community facilities in particular.

Note – development that is over scaled for its site can result in an undesirable dominance of vehicle access, parking and manoeuvring areas that significantly reduce streetscape.”

[67] The first note to that provision refers to pressure on transport network, public space or community facilities. In this regard, OO(3)(m) of the TANP Code provides that:

“Development achieves a height and density that makes efficient use of land, but does not overburden local transport, infrastructure, public space or community facilities”

OO(3)(m) did form part of the appellant’s issues, but was not one of the central provisions. The proposal does achieve a height and density which makes efficient use of the site and, for the reasons discussed later, does so without having an overburdening effect. Indeed, it would make a positive contribution to public space whilst locating residents conveniently relative to the transport network (without the network thereby placed under pressure) and without otherwise overburdening infrastructure.

[68] The concern in the second note is not one which would be realised by the subject development, which has only one vehicular access to each frontage, locates parking in the basement levels, and gives over much of the site, at ground level to publicly accessible open space.

[69] Insofar as height is concerned, attention focused on P01(b) and the identification of community expectations in relation to the number of storeys to be built. It was submitted, for the appellant, that community expectations would largely be informed by reference to the 15 storeys specified in the table which, it was submitted, substantially sets the reasonable expectations of the community.

[70] I accept that community expectations would be at least in part informed by the table,<sup>29</sup> but they cannot necessarily be limited to the height specified in a table referred to

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<sup>29</sup> See *Norfolk Estates Pty Ltd v BCC* [2016] QPEC 009 [33].

only in an acceptable outcome. It would be reasonable to expect development up to the number of storeys specified and possibly something greater on a performance based assessment.<sup>30</sup> Senior counsel for the appellant accepted,<sup>31</sup> in the course of oral submissions, that the “person in the street” would regard some excess above 15 storeys as being a potential, but not the extent of excess here proposed.

- [71] Expectations may also be affected by other existing and approved development in the locality. The area is rapidly transforming with the development of new high-rise development, but there is nothing to which one could point in this case which would support a community expectation of the number of storeys proposed by the co-respondent for this site.
- [72] It was submitted, for the co-respondent, that whilst the table might be the start of an assessment of community expectations, it is far from the end of the matter. It was pointed out that the 15 storey height specified in the table applies to all land in the sub-precinct. It was submitted that community expectations as to height must also be informed by the designation of this particular site both as a landmark site and as a catalyst site, which, it was contended, “conveys something above the ordinary, particularly when coupled with the major centre zoning.” It was further submitted that, in practical terms, to achieve visual prominence, as a landmark site, in this locality and having regard to other existing, approved and likely future development in the area, development on the subject land will need to exceed 15 storeys and that, as a consequence, it is “unrealistic for the community to expect that the height of development on the subject land would be limited to 15 storeys.”
- [73] The height of the proposed development may, in context, assist in enhancing it as a landmark (a matter discussed later) but, as was pointed out for the appellant, there is nothing in the provisions relating to the landmark site designation, the catalyst site designation or the major centre zoning, which gives rise to an expectation of development on this site being to the number of storeys proposed. Indeed, as was pointed out for the appellant, there are other neighbourhood plans which provide for some specified increase in maximum height for landmark sites, but that is not the case with respect to the TANP Code. That does not mean that landmark sites can never exceed the height specified in a table referenced in an acceptable outcome, but neither

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<sup>30</sup> *Quintenon Pty Ltd v Brisbane City Council* [2016] QPEC 64.

<sup>31</sup> T12-17.

the landmark site nor the catalyst site designations in this case provide the basis for an expectation of development to the height of this proposal.

- [74] Expectations, insofar as they are affected by the table, would also take into account what it specifies for other sub-precincts of NPP-001. Whilst 15 storeys is the greatest height specified in the NPP-001c sub-precinct applicable to the subject site, there are greater heights specified for other sub-precincts of NPP-001. In particular, for sub-precinct NPP-001b, a height of up to 20 storeys is specified, and for NPP-001a up to 25 storeys. Further, the overall outcomes for NPP-001 include that “Sherwood Road accommodates the tallest buildings in the precinct.” Hence the height of the subject proposal is not only substantially greater than specified in the table for the sub-precinct within which it falls, but it is also significantly greater than is provided for in the table for sub-precinct NP-001b, and it also rivals the likely height of buildings for that part of the precinct which is intended to accommodate the tallest buildings.
- [75] It was pointed out, for both the respondent and the co-respondent, that the heights specified for the other sub-precincts in the table are not inviolate, must be read with OO(3)(h) (discussed later) and do not prohibit tall buildings elsewhere. That may be so, but the specified heights for those sub-precincts sit uncomfortably with the notion of a reasonable expectation of buildings up to the number of storeys here proposed in sub-precinct NPP-001c.
- [76] Even if reasonable expectations are not limited to 15 storeys, I do not consider that the height of this particular proposal is aligned to community expectations about the number of storeys to be built. It therefore does not meet P01 in relation to height.
- [77] That is not however, the end of the matter. CP2014 permits compliance to be achieved by meeting the purpose and overall outcomes of the code. Relevantly to height, OO(3)(h) of the TANP provides:
- “Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development.”
- [78] That provision admits of the prospect of development occurring, consistently with the overall outcome, where it exceeds a height which is consistent with community

expectations, provided there is both a community need and an economic need for the development. Need is considered later in these reasons, but three things should be noted about this provision.

[79] First, it requires a community and economic need “for the development” rather than specifically for the amount by which the number of storeys exceeds community expectations. Secondly, demonstration of a community and economic need does not entitle an applicant to approval. There is a residual discretion. As was submitted for the Council:

- (a) if it can be demonstrated that both a community need and an economic need are present for the development, that then permits a balancing consideration to take place;
- (b) the community need and economic need do not have to be specifically demonstrated for the amount which is not “consistent” with the amenity and character, community expectations and infrastructure assumptions for the relevant precinct, sub-precinct or site;
- (c) nor does the community need and economic need have to be specifically demonstrated for the amount which, for example in the case of building height, the proposed development exceeds the building height specified in an acceptable outcome;
- (d) community need and economic need must be for “the development” – meaning the totality of what is proposed;
- (e) the balancing consideration that a demonstration of both community and economic need opens up, is a balancing not just of the community need and economic need against amenity impacts – it is a balancing consideration of all positive and negative attributes of the proposed development (for example, particular community benefits might weigh in favour of approval even where a proposal is not consistent with the community expectations);
- (f) it is not correct to construe the overall outcome as meaning that if community need and economic need are established, a development that is not “consistent” should or will then be approved – there is no presumption – establishing community need and economic need simply enlivens a balancing exercise as described above; and
- (g) there is a wide discretion.

[80] The proposal’s relative merits (apart from need) are otherwise discussed in the course of these reasons and in my view warrant the exercise of discretion favourably to the proposal.

[81] Thirdly, whilst the provision states that a site will “only” be developed at a greater height, scale and form where there is community and economic need, such provisions of a planning scheme, whilst deserving attention,<sup>32</sup> cannot render nugatory the statutory discretion to approve notwithstanding conflict with the provisions of a planning scheme. Senior counsel for the appellant accepted as much.<sup>33</sup> The matters relevant to that discretion are discussed later in these reasons. Even if there were a conflict with OO(3)(h), this is, in my view, an exceptional case in which the proposal warrants approval notwithstanding.

**Bulk and Scale**

[82] There are a number of provisions pleaded by the appellant which assert that the bulk and scale of the proposed development would be unacceptable. Of those provisions, the appellant submitted that the most significant is PO19 of the Centre or Mixed Use Code (CMUC).

[83] PO19, and AO19, provide:

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| <p><b>PO19</b><br/>Development ensures that the building bulk and scale is consistent with the intended form and character of the centre, mixed use or local area considering:</p> <ul style="list-style-type: none"> <li>(a) existing buildings to be retained;</li> <li>(b) existing significant vegetation;</li> <li>(c) significant infrastructure constraints;</li> <li>(d) adjoining existing and proposed building heights;</li> <li>(e) adjoining existing and proposed building setbacks and separation of building necessary to ensure impacts on amenity and privacy are minimised;</li> </ul> | <p><b>AO19</b><br/>Development is contained within the building envelope for the site by applying:</p> <ul style="list-style-type: none"> <li>(a) the maximum building height;</li> <li>(b) building height transition requirements, where required;</li> <li>(c) front, rear and side setback requirements;</li> <li>(d) building separation requirements;</li> <li>(e) car parking setback requirements;</li> <li>(f) active frontage requirements for stand-alone shopping centres or shop or for development in traditional strip centres or corridors.</li> </ul> |
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<sup>32</sup> *Stradbroke Island Management Organisation Inc. v Redland Shire Council* (2002) 121 LGERA 390.  
<sup>33</sup> T12-35, 36.

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| (f) building height transitions where required. |  |
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[84] The proposed development departs from AO19, and so it is necessary to consider the development against PO19. It was submitted, for the appellant, that the proposal conflicts with the provisions for the following reasons:

- (i) the bulk and scale of the proposed development is wholly inconsistent with the bulk and scale of Middenbury;
- (ii) inconsistency with the height of the appellant's house and the approved adjoining multi storey dwelling at 20 Archer Street;
- (iii) inappropriate setbacks and building separation both internal and external to the site, and
- (iv) disregard for building height transition, particularly in respect of Archer Street.

As is apparent, the appellant's arguments on bulk and scale overlap with its case about height.

[85] It is obvious that the proposed towers are much larger and taller than Middenbury, the appellant's residence and the approved multi-storey development at 20 Archer Street. That does not necessarily mean however, that the proposal conflicts with PO19. As was submitted for the council, PO19 does not require development to be consistent with the existing buildings to be retained or adjoining existing building heights. Rather, it requires building bulk and scale to be consistent with the "intended form and character of the centre...considering" the things in (a) to (f).

[86] The intended form and character of the centre and, in particular, that part containing the subject site, is as provided for in the provisions of CP2014, most specifically in the TANP. It was contended, for the co-respondent, both during the development application stage and in the course of the appeal, that a greater number of units, across 5 buildings, could be developed on the site in a code assessable application. None of the hypothetical scenarios put forward however, were sufficiently resolved to demonstrate that they met all acceptable outcomes of all relevant codes. I have not placed weight upon those particular scenarios. It is evident however, given the size of the site, the development parameters (even as provided for in the various acceptable outcomes) including as to maximum building height and maximum tower site cover

(50%) and the intentions of the Scheme for the site as otherwise set out in the TANP, that development of this site, as intended by the planning scheme, will be substantial, and indeed, of a substantially greater scale than the appellant's residence or Middenbury or the approved multi-unit development at 20 Archer Street. Further, as to the bulk of the towers, it should be noted that the horizontal dimensions of the towers (which range from between 31.6m and 32m) are comfortably within the 40m figure specified in AO1.4 of the TANP.

[87] The height of the proposed towers does not speak of over-development in the sense of trying to fit too much development on the site. Rather, when regard is had in particular to the very low site cover,<sup>34</sup> it speaks of a proposal which arranges development in a more vertical form, with a building height that would not reasonably have been expected, rather than too much development or development which is otherwise too bulky in its form.

[88] That is not to say that existing and proposed development is to be ignored for the purposes of PO19. It is to be considered, but for the purpose of ensuring that building bulk and scale is consistent with the intended form and character of the centre. That is considered later, as are the matters of setbacks, building separation and height transitions. I accept that there is a level of conflict with PO19, not least by reason of height, but for the reasons stated herein, I am satisfied that the level of conflict is not accompanied by any undue impact.

[89] Scale and form are also dealt with in PO1 of the TANP. It refers to the intended outcome for the precinct and seeks development of scale and form which, amongst other things:

- is proportionate to and commensurate with the utility of the site area and frontage width;
- is designed to avoid a significant and undue adverse amenity impact to adjoining development, and
- is sited to enable existing and future buildings to be well separated from each other and to avoid affecting the development of an adjoining site.

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<sup>34</sup> T5-76. Note also the relatively low plot ratio relative to recent approvals in the Toowong Centre. See exhibit 75 and exhibit 6, para 5.5.3(i).

[90] The proposal takes advantage of its generous site area and frontage width. Building separation and amenity impact are considered later and I am satisfied that the building separation is adequate and results in no undue impacts.

**Building separation**

[91] Building separation is dealt with in PO25 of the CMUC and PO8 of the multiple dwelling code (MDC). Of those, only the former is included in the appellant’s central provisions. The provisions are in very similar terms. PO25 of the CMUC (together with the relevant AO) provides as follows.

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| <p><b>PO25</b><br/>Development ensures that the separation of buildings within a site and to an adjoining existing or future building which includes a residential dwelling:</p> <ul style="list-style-type: none"> <li>(a) is consistent with the form and character intent for the local area;</li> <li>(b) is located to provide residential amenity including access to natural light, sunlight and breeze;</li> <li>(c) provides a degree of visual privacy via site planning and design without a reliance on fixed screening;</li> <li>(d) reasonably addresses and considers the amenity of adjoining residents and future development potential.</li> </ul> | <p><b>AO25.1</b><br/>Development ensures that the building separation within a site and to adjoining buildings is in compliance with Table 9.3.3.3.E.</p> <p><b>AO 25.2</b><br/>Development ensures that the building separation to an adjoining residential building:</p> <ul style="list-style-type: none"> <li>(a) complies with Table 9.3.3.3.E; or</li> <li>(b) positions the primary balcony or private open space to street or rear;</li> <li>(c) offsets balconies or habitable rooms so they are positioned outside the cone of vision of existing or approved habitable rooms or outdoor spaces; or</li> <li>(d) uses moveable or adjustable screening to regulate privacy between lots or dwellings which do not exceed balcony screening acceptable outcomes.</li> </ul> |
|--|--|

[92] Table 9-3.3.3.E provides:

| Building height (storeys and m) | Minimum building separation (m)                  |   |   |
|---------------------------------|--|---|---|
|                                 | Facing habitable rooms with windows or balconies | Habitable rooms or balconies facing non-habitable rooms with windows or blank walls | Non-habitable rooms with windows or blank walls |

|                         |  |     |   |
|-------------------------|--|-----|---|
| Ground to 4.5m          | 3  | 1.5 | 0 if blank with no windows<br>1.5 if non-inhabitable with windows |
| 2 storey to 7.5m        | 9  | 6   | 0 if blank with no windows<br>3 if non-inhabitable with windows   |
| 3 to 5 storeys          | 12   | 9   | 0 if blank with no windows<br>6 if non-inhabitable with windows   |
| 6 to 8 storeys          | 18   | 12  | 9   |
| 9+ storeys              | 24   | 18  | 12  |
| Podium or roof terraces | Located to achieve separation in accordance with the relative level of the podium or roof location as above, along with design elements to ensure the privacy and amenity of residents within the site and on adjoining or adjacent sites. |     |   |

[93] PO8 (and its acceptable outcome) of the MDC proceeds as follows:

|  |  |
|--|--|
| <p><b>PO8</b><br/>Development separates buildings from existing or future buildings within a site or an adjoining site to:</p> <ul style="list-style-type: none"> <li>(a) be consistent with the form and character intent for the local area;</li> <li>(b) protect residential amenity including access to natural light, sunlight and breeze;</li> <li>(c) provide visual privacy to reduce the need for fixed screening.</li> </ul> | <p><b>AO8.1</b><br/>Development provides building placement and design that:</p> <ul style="list-style-type: none"> <li>(a) complies with Table 9.3.14.3.F; or</li> <li>(b) positions the primary balcony or private open space to face the street frontage or rear boundary or adjoining public open space;</li> <li>(c) offsets balconies or habitable rooms so that they are positioned outside the cone of vision of existing or approved habitable rooms or outdoor spaces.</li> </ul> <p>Refer to Figure g and Figure h.</p> <p>Note – This is demonstrated by a site context plan that includes adjoining and adjacent buildings and strategies to address separation issues.</p> <p>Note – Considered site planning and design and strategies such as offsetting balconies, the location of private space, selective screening or other design elements can reduce building separation requirements.</p> |
|  | <p><b>AO8.2</b></p>  |

|  |  |
|--|--|
|  | Development with a secondary private open space or balcony used for drying or services is located to the side boundary with fixed screens. |
|--|--|

[94] Table 9.3.14.3F is as follows:

| Building height          | Minimum building separation (m)   |  |  |
|--------------------------|---|--|--|
|                          | Facing habitable rooms or balconies   | Habitable rooms or balconies facing non-habitable rooms or blank walls | Non-habitable rooms or blank walls                     |
| Ground and up to 4.5m    | 3   | 1.5  | 1.5m or where built to boundary walls permitted – 0.0m |
| 2 storeys and up to 7.5m | 9   | 6  | 3  |
| 3 to 5 storeys           | 12  | 9  | 6  |
| 6 to 8 storeys           | 18  | 12   | 9  |
| 9+ storeys               | 24  | 18   | 12   |
| Podium or roof terraces  | Located to achieve separation in accordance with the relative level of the podium or roof location as above, along with design elements to ensure the privacy and amenity of residents within the site and adjoining or adjacent sites is not negatively impacted |  |  |

Note – Separation distances are intended to protect amenity and provide for private open spaces on upper levels that do not require screening for privacy.

Note – Considered site planning and design and strategies such as offsetting balconies, the location of private space, selective screening or other design elements can reduce building separation requirements.

[95] Mr Richards (the architect engaged by the appellant) approached the matter on the basis that, since the proposed towers exceed 9 storeys they must, in order to meet the acceptable outcomes, have a separation, at all levels, of at least 24m. As Mr Peabody (the architect engaged by the respondent) pointed out, adoption of the acceptable outcome, particularly construed in that way, would severely reduce the development potential of many in-fill sites. Reference to Drawing JER 02A, prepared by Mr Richards, shows that adoption of a 24 m separation (and allowing for retention of the view corridor between Middenbury and the river) would leave a relatively small proportion of the site remaining. Mr Richards accepted that on his approach, the area

left for development of, say, a 15 storey development, would be very severely constrained<sup>35</sup> and that application of the 24m creates what he described as an “onerous” constraint on development.<sup>36</sup> That is difficult to reconcile with the intent of the planning scheme concerning the efficient use of land. I note that the high-rise Aspect development does not provide separation distances on the land as envisaged by Mr Richards’ approach.

[96] AO8.1 of the MDC directs reference to Figures g and h. Figure g is as follows:

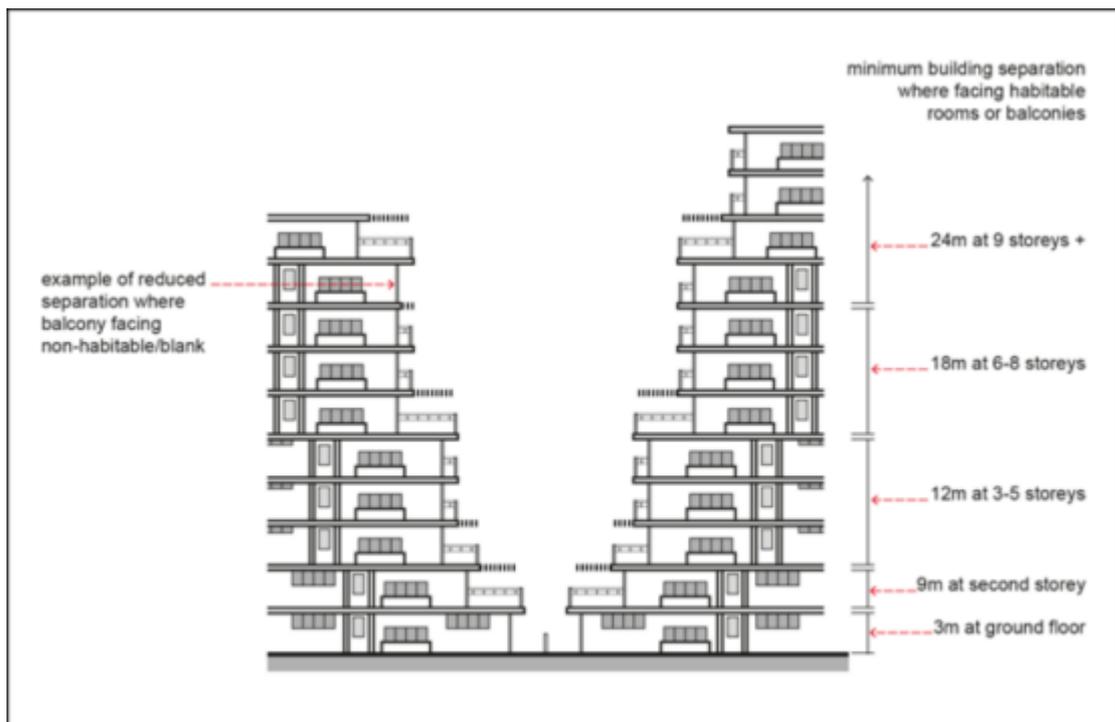


Figure g—Building separation requirements

It suggests that table 9.3.14.3F is to be applied in a staggered, or ‘wedding cake’ configuration. That is, the 24 metre does not apply until level 9. A reduced separation is envisaged below that. Table 9-3.3.3.15 should be applied in a harmonious way.

[97] To the extent that the acceptable outcome is not adopted, attention turns to the performance objective. The appellant relied upon the evidence of Mr Richards to the effect that the building separations would cause amenity impacts for residents both internal to the site and on adjoining land.

<sup>35</sup> T6-7 L 18, T6-9 L 24.

<sup>36</sup> T6-9 L 38.

[98] The 3 towers proposed on the site are reasonably well separated. The separation between Towers A and B is 34.6m at the narrowest part of the towers and 21.5m at the widest part of the towers. Whilst the same dimensions are 35.1m and 21.5m respectively in the case of Towers A and C,<sup>37</sup> Mr McKerrell described the separation as generous. Mr Peabody's assessment, which I accept, is that:

“I consider there is an acceptable distance between the 3 towers elements to afford visual privacy between apartments in different towers which is not dissimilar to the relationships of other tower development in Brisbane.”

[99] Mr Chenoweth also did not consider the proposed buildings to be unacceptably close to each other.<sup>38</sup> There was no significant concern raised about access to light, sunlight and breezes for units within the proposed development. I consider that Mr Richards' concerns for amenity of residents on the site reflect an overly conservative assessment.

[100] Insofar as separation from buildings on adjoining properties are concerned, a note to table 9.3.14.3 states that considered site planning and design can reduce building separation requirements. In this case the tapered design of the towers and the incorporation of a foyer means that the base of the towers are further separated from buildings on adjoining sites and there will be no units of the towers which directly face habitable rooms or balconies of existing or approved development from level 9 and above. The lowest habitable levels in the towers are well above the roof of the appellant's property. They are vertically as well as horizontally separated.<sup>39</sup> Only some units on a few levels in tower A will face the approved development at 20 Archer Street and those are well below the 9th storey.<sup>40</sup>

[101] A note to table 9.3.14.3F states that the separation distances are intended to protect amenity and provide for private open space on upper levels that do not require screening for privacy. There would be no need for screening for privacy on the upper levels of the proposal. The potential impact upon the amenity of adjoining residents, particularly the appellants, is considered later and would not, in my view, be undue. Consistency with the form and character intent for the local area is considered later

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<sup>37</sup> Exhibit 7, p 10.

<sup>38</sup> T2-69.

<sup>39</sup> T2-63, 64, 67 (Chenoweth).

<sup>40</sup> I note that the council's approval package contained some provisions about screening (Condition 18) which could be varied or augmented in other conditions imposed by the Court if it were thought appropriate.

in the context of the design issues and, in my view, is established. The performance objectives are met.

### Setbacks

[102] There are a number of provisions of CP2014 which relate to setbacks. The appellant relies upon PO2 and AO1.2 of the TANP Code as part of its central provisions. Another “central provision” is OO(3)(k) which speaks of “appropriate” building design using, amongst other things, setback.

[103] Reference was made to Table 7.2.20.3.3.C. of the TANP Code which sets out minimum side building setbacks within the centre zones as follows:

|                             |                 |    |   |
|-----------------------------|-----------------|----|---|
| Any development in the zone | Up to 8 storeys | 0m | 3m for non-residential<br>3m for residential (5m if windows of habitable rooms are orientated towards the boundary)     |
|                             | Podium          | 0m | 0m (5m if the windows of habitable rooms are orientated towards the boundary)   |
|                             | Tower           | 5m | 5m (8m if the windows are orientated towards the boundary)<br>10m where adjoining a low-medium density residential zone |

[104] If the 8m setback were applied to Tower B then the area of encroachment is some 19-26m<sup>2</sup> on each level between 5 and 22 (there is a variation because the building is shaped). Application of the 10m setback to Tower A would yield an encroachment area of 41-65m<sup>2</sup>. In both cases the encroachment is for a length of approximately 10.5m. The setbacks are greater below level 5. The tapered base of the towers achieves a much greater setback at ground level. By comparison, reference to the

table reveals that the podium of a tower-over-podium design approval could have a 0m or 5m setback depending on whether it had windows of habitable rooms orientated towards the boundary.<sup>41</sup>

[105] Two things should be noted in relation to the table. First, it is referenced in an acceptable outcome. Despite the reference to “minimum” setbacks, the non-adoption of a setback referred in an acceptable solution does not amount to conflict with the planning scheme.

[106] Secondly, the table has a note which provides:

“Setbacks on catalyst sites as identified in Figure a are to be determined through a structure planning process.”

[107] Accordingly, even the table, read in isolation, does not apply the stipulated minimum to the subject site.

[108] Turning to the performance outcome,<sup>42</sup> it was submitted, for the appellant, that the proposal is in conflict because of its impact on amenity. That is considered later and, for the reasons given, I do not consider that there would be a significant and undue impact associated with the setbacks. The performance outcome is achieved.

### **Infrastructure**

[109] Infrastructure is referred to in OO(3)(h) of the TANP Code, extracted earlier when discussing height, and in the following 2 provisions of the TANP Code:

“OO(3)(m) Development achieves a height and density that makes efficient use of land, but does not overburden local transport, infrastructure, public space or community facilities.”

“P01 Development is of height, scale and form that achieves the intended outcome for the precinct, improves the amenity of the neighbourhood plan area, contributes to a cohesive streetscape and built form character and:

(a) is consistent with the anticipated density and assumed infrastructure demand...”

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<sup>41</sup> See exhibit 6, pp 124, 138.

<sup>42</sup> PO1 of the TANP Code.

[110] OO(3)(m) seeks to avoid overburdening infrastructure. It formed part of the appellant's issues, but not its central provisions. The uncontradicted evidence of Dr Johnson (the only expert to report on infrastructure) is to the effect that the proposal would not cause any overburdening effect on water supply or sewerage (subject to Queensland Urban Utilities requiring some relatively minor upgrades) and that there is no problem with respect to the management of stormwater. I accept that evidence. The traffic engineers did not raise any concern about the capacity of the surrounding road network to accommodate traffic associated with the development.

[111] It was pointed out, for the appellant, that OO(3)(h) and P01 refer to "infrastructure assumptions" and "assumed infrastructure demand" respectively. It was submitted that the co-respondent had not established consistency with the relevant assumptions.

[112] S4.2.2 of CP2014 provides as follows:

#### **4.2.2 Development inconsistent with assumptions about future development**

Development is inconsistent with the assumptions about:

- (a) the type and location of development, if:
  - (i) for premises completely or partly outside the priority infrastructure area; or
  - (ii) for premises wholly within the priority infrastructure area, where the type of development of the premises as stated in section 4.3.7 (Development categories and planning scheme uses) is not planned to occur in that location under the planning scheme identified in section 4.1.3 (Relationship to planning scheme) and Map A1 Priority Infrastructure Area; or
- (b) the scale of development, if the density and demand of the development of the premises exceeds the planned density and demand for the development of the premises as stated in section 4.3.10 (Assumed scale of development) and section 4.3.15 (Planned demand); or
- (c) the timing of development, if the development results in trunk infrastructure being supplied earlier than planned for in the schedule of works for trunk infrastructure in section 4.6.2 (Schedule of works)

[113] It was submitted, for the respondent, that the court need not examine ss 4.3.10 or 4.3.15 of CP2014, as the appellant had not alleged conflict with the provisions of Part

4 of CP2014. PO1 and OO(3)(h) were however, in issue. The assumed scale of development for precinct NPP-001c of the TANP was traversed in Dr Johnson's report. The rates in table 4.3.10.1 are not allotment specific. Dr Johnson calculated that the proposed development would generate a demand of about 1093 equivalent persons (including a 10% contingency) which is greater than his calculated proportionate development density for the site (by reference to the assumed scale of development) of 704 equivalent persons. As he explained, those areas where the predominant land use is residential exert higher demands than areas of retail and commercial. Dr Johnson's report however, shows that the proposed development will not exert unacceptable impacts on the existing municipal networks.

- [114] Mr Schomburgk, in the joint report of the town planners,<sup>43</sup> pointed out that the proposed development seeks to take up less than one third of the assumed multiple dwelling development in the Major Centre zoned land within the TANP, in circumstances where the vast majority of land in that zone in Toowong is developed for commercial uses, with little or no multiple dwellings.
- [115] The obvious purpose of provisions of this kind is to ensure that development is not beyond reasonable infrastructure demands and does not prejudice the planned use of infrastructure for existing and planned development in the area. Accepting some inconsistency with the assumptions, the evidence satisfies me that the proposal will not, in fact, be an unreasonable burden on infrastructure. Further, insofar as OO(3)(h) is concerned, I have, for the reasons given elsewhere, found that there is both a community need and an economic need for the development and that the discretion to approve should be exercised. I am satisfied that the gravity of any conflict in this regard is relatively slight and is overwhelmed by the merits of the proposal otherwise.

## **Heritage issues**

### **(i) Introduction**

- [116] It has already been observed that the TANP contains provisions for the heritage value of Middenbury to be protected and enhanced, through the retention, refurbishment and reuse of the building.<sup>44</sup> The heritage overlay map in CP2014 maps the whole of

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<sup>43</sup> Exhibit 5, para 274.

<sup>44</sup> OO(3)(1).

the site as a local heritage place. Part of the site, being the State-listed trees, Middenbury and a view corridor between Middenbury and the river, are a State heritage place.

[117] The *Heritage Overlay Code* is an applicable code. The overall outcomes of that Code include:

“(a) Development on or adjoining a heritage place does not detract from the cultural heritage significance of that heritage place...”

[118] The relevant performance outcomes include as follows:

“PO1 Development provides for the future protection of the heritage place and does not damage or diminish its cultural heritage significance.

Note– where necessary, a heritage impact assessment report is prepared verifying the proposal is in accordance with the Australian ICOMOS Burra Charter.

PO2 Development is based on and takes account of all aspects of cultural significance of the heritage place.

Note– where necessary, a heritage impact assessment report is prepared verifying the proposal is in accordance with the guidelines to the Burra Charter – Cultural Significance.

PO3 Development protects the fabric and setting of the heritage place while providing for its use, interpretation and management.

Note– where necessary, a heritage impact assessment report is prepared verifying the proposal has been prepared in accordance with the guidelines to the Burra Charter – Conservation Policy.

PO4 Development is based on the issues relevant to the conservation of the heritage place.

Note– where necessary, a heritage impact assessment report is prepared verifying the proposal is in accordance with the guidelines to the Burra Charter – Procedures for Undertaking Studies and Reports.”

[119] There are no acceptable outcomes prescribed in relation to those performance outcomes. The appellant alleges conflict with each of those provisions of the *Heritage Overlay Code*.

[120] In addition to its inclusion within the *Heritage Overlay Code* in CP2014, part of the site is on the Queensland Heritage Register. The Chief Executive administering the

*Sustainable Planning Act 2009* was a concurrence agency for the application. The Chief Executive was required to undertake the referral agency assessment, having regard and giving the weight the Chief Executive was satisfied was appropriate, to the relevant provisions of the State Development Assessment provisions that were in effect when the application was properly made, namely the State Development Assessment Provisions Version 1.4 (effective 20 June 2014) and Module 9 of the *Queensland Heritage State Place Code* (QHSPC). That code included the following performance outcome:

“PO1 Development does not destroy or substantially reduce the cultural heritage significance of a state heritage place unless there is no prudent and feasible alternative to carry out the development.”

[121] The Chief Executive’s referral agency response was supportive of approval of the development subject to the imposition of conditions. It maintains that position in the appeal.

[122] There was a deal of argument as to whether the appellant’s appeal rights extend to issues with respect to:

- (a) Compliance with provisions of the *Queensland Heritage Regulation 2003 Schedule 2*, *Queensland Heritage Regulation 2015 Schedule 2* and *Queensland Heritage Place State Code*; and
- (b) The adequacy of the assessment by the Chief Executive.

[123] Ultimately, the appellant did not pursue the submission that the *Queensland Heritage Regulation 2003* (QHR 2003) and the *Queensland Heritage Regulation 2005* (QHR 2005) are applicable to impact assessment, but maintained that P01 of the QHSPC was relevant and that, in considering it, some regard can be had to QHR 2003 and QHR 2005, particularly S5 and P5 which provide as follows:

S5 Development does not adversely affect the character, setting or appearance of the local heritage place.

P5 The scale, location and design of the development is compatible with the character, setting and appearance of the local heritage place.

The development is unobtrusive and cannot be readily seen from the surrounding streets or other public places.

- [124] It is unnecessary for me to resolve that debate. The Chief Executive accepts that, pursuant to s 495(4)(a) of SPA, this court is not prevented from considering and making a decision about those grounds of appeal that relate to cultural heritage significance merely because the Council was obliged to impose conditions contained in the Chief Executive's concurrence agency response. Further, it acknowledges that this court is entitled to consider the impact of the proposed development on cultural heritage significance at least on those grounds of appeal which relate to the *Heritage Overlay Code* under CP2014. It was common ground that, from a practical perspective, there was ultimately little difference between the parties in relation to matters of principle.
- [125] Middenbury is an 1865 villa residence occupying part of the subject site. Although the subject land has had a long history of occupation and use, it was occupied solely by Middenbury for a period of only 17 years until 1882, when the adjoining Sidney House was built. Sidney House was demolished in 1958 to make way for new buildings for the ABC. The ABC then constructed a number of buildings that were unsympathetic to the architecture of Middenbury and obscured it from view, but which remained in place until recently demolished by the co-respondent.
- [126] As was pointed out for the co-respondent, whilst Middenbury has been preserved from demolition, it has, for much of its recent history, not been enhanced by its surroundings. The proposed development seeks to change that not only by protecting Middenbury from demolition but also by refurbishing it, enhancing its setting and making Middenbury available to the public. It also proposes the adaptive reuse of Middenbury. Adaptive reuse assists in assuring the preservation of a heritage site by giving the site an active use so as to avoid the possibility of a building falling into disrepair through underutilisation and neglect. In the present case, the adaptive reuse will also provide the further benefit of enabling full public access to Middenbury. The proposed adaptive reuses are as follows:
- (i) café;
  - (ii) restaurant, and
  - (iii) community facilities which will display historical information relevant to the subject land and its previous

uses and provide an interpretive facility for the sculpture park otherwise proposed on the subject site.

(ii) Mapping

[127] There was a debate amongst the heritage experts as to whether the inclusion of the whole of the subject site as a local heritage place on the heritage overlay in CP2014 is a mistake. The Council had a Heritage Register Planning Scheme Policy under City Plan 2000. Immediately prior to the commencement of City Plan 2014, the register had an entry for “Residence Middenbury” which was described as “part” of Lot 13 on RP 104400. The Council file contained a map that showed the Queensland Heritage Register boundary. There is no Council document which indicates that the site is considered to have any heritage significance beyond that described in the Queensland Heritage Register entry or which otherwise gives an explanation for including the whole of the site within the overlay.

[128] It is ultimately unnecessary to pursue the circumstances as to how the mapping came to be as it is. All three heritage experts accepted that the Brisbane City Council has not produced a separate heritage citation for Middenbury and that the council generally relies on the Queensland Heritage Register entry to the extent that it is also relevant to the assessment criteria under CP2014. Consequently, it was agreed that the Queensland Heritage Register statement of significance for Middenbury can be adopted as the statement of significance at a local threshold of significance for Middenbury. In short, the content of the cultural heritage significance of Middenbury is not in issue.

[129] It would be somewhat surprising if there were any local heritage significance attached to any part of the site beyond that shown as within the boundary on the State Register, which is intended to protect the heritage significance, the same statement of which underlies both the State and local mapping. It was pointed out however, that there are other examples of where the mapping of a local heritage place is more extensive than the state mapping. In any event, Mr Elliott’s (the heritage expert called by the correspondent) opinion, which I accept, is that the heritage significance of the site will be appropriately protected and enhanced by the proposed development regardless of the extent of the overlay mapping.<sup>45</sup>

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<sup>45</sup> T3-78; exhibit 14, para 34.

[130] Accepting that the whole of the site is mapped as a local heritage place does not lead to the conclusion that the whole of the place should be left undeveloped (to form the setting of Middenbury). The provisions of CP2014, when viewed as a whole, evidence an intention for the site (and indeed the centre of which it forms part) to be the subject of substantial new development, albeit development which pays due regard to matters of heritage significance. Further, it does not follow that every square metre of the site is of equal significance. I accept Mr Elliott’s assessment that

*“a walk over the subject site confirms that any heritage values relate to Middenbury and its relevant surrounds rather than every part of the subject site which contained, until recently, many buildings used by the ABC which substantially obscured views to Middenbury and were unsympathetic in their design.”*

[131] It is the statement of significance and the assessment of the proposal’s impact upon matters of significance upon which attention should ultimately focus.

(iii) Statement of Significance

[132] The statement of significance for Middenbury is as follows:

“Criterion A

Middenbury, erected in 1865, is important in demonstrating the evolution of residential housing and pattern of settlement in Queensland, in particular the early establishment of villa residences on the suburban periphery of Brisbane in the 1860s. Through its form, materials, location and setting on the Brisbane River, Middenbury makes an important contribution to our understanding of residential and social hierarchies in early Brisbane.

Middenbury is also important for its association with Australian Broadcasting Corporation (ABC), as a component of its Queensland television and radio production facilities from 1957-2007.

Criterion D

Middenbury is important in demonstrating the principal characteristics of an 1860s villa residence in Queensland, through its surviving formal plan, consisting of an

entrance vestibule, large reception rooms, generously sized bedrooms, rear timber service wings and the high quality workmanship and materials used in its construction, including fine cedar joinery. Consciously sited in an elevated location, the brick core with slate roof is surrounded on three sides by timber verandas accessed by French doors, providing a generous space for entertaining and enjoying the views to the Brisbane River and CBD.

#### Criterion E

Middenbury is important for its aesthetic value as an elegant and well-composed villa residence designed to take advantage of its elevated position on the bank of the Brisbane River. Encircled by verandas on three sides and orientated to capture surrounding views, the house demonstrates picturesque qualities, standing out from its surroundings when viewed from the river and the opposite bank at West End.

Two large fig trees, the only surviving elements of Middenbury's former gardens, are a landmark feature along Coronation Drive and make a significant contribution to the streetscape.”

[133] With respect to those matters of significance, if the proposal proceeds;

- (i) Middenbury will be retained and will continue to be an example of a villa residence established on the suburban periphery of Brisbane in the 1860s.
- (ii) Middenbury will retain those aspects of the form, or formal plan, that are important for demonstrating ‘*the evolution of residential housing*’, ‘*the principal characteristics of an 1860s villa residence in Queensland*’, ‘*its aesthetic value as an elegant and well-composed villa residence*’ and its ‘*picturesque qualities*’ and that contribute to ‘*our understanding of residential and social hierarchies in early Brisbane*’ namely:
  - the entrance vestibule;<sup>46</sup>
  - large reception rooms;<sup>47</sup>

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<sup>46</sup> T4-34 ll 29-37.

<sup>47</sup> T4-34 ll 39-40.

- generously sized bedrooms;<sup>48</sup>
  - timber verandas on three sides;<sup>49</sup> and
  - French doors accessing the timber verandas.<sup>50</sup>
- (iii) Middenbury will retain those aspects of the materials that are important for demonstrating ‘*the evolution of residential housing*’, ‘*the principal characteristics of an 1860s villa residence in Queensland*’, ‘*its aesthetic value as an elegant and well-composed villa residence*’<sup>51</sup> and its ‘*picturesque qualities*’, namely:
- (i) fine cedar joinery with high quality workmanship;<sup>52</sup>
  - (ii) a brick core;<sup>53</sup>
  - (iii) a slate roof;<sup>54</sup> and
  - (iv) timber verandas.<sup>55</sup>
- (iv) Middenbury will continue to occupy its elevated location on the site;<sup>56</sup>
- (v) Middenbury will have a setting that involves a generous space (greater than that protected by the boundary of the State listing) for entertaining and enjoying the views to the Brisbane River and CBD;
- (vi) Middenbury will be a house with picturesque qualities that stands out from the modern buildings that surround it (and are proposed to surround it) when viewed from the river and the opposite bank at West End;
- (vii) the two large fig trees will be retained as a landmark feature along Coronation Drive that make a significant contribution to the streetscape, and

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<sup>48</sup> T4-34 ll 42-43.

<sup>49</sup> T4-35 ll 1-3.

<sup>50</sup> T4-35 ll 5.

<sup>51</sup> T4-35 ll 41-43.

<sup>52</sup> T4-36 ll 12.

<sup>53</sup> T4-36 ll 14.

<sup>54</sup> T4-36 ll 16.

<sup>55</sup> T4-36 ll 22-27.

<sup>56</sup> T4-34 ll 45-46.

- (viii) the proposed use of Middenbury will allow the general public to experience Middenbury as a useable building suitably re-purposed.

[134] The proposed development does involve the demolition of the rear timber service wing, but Mr McDonald (the heritage expert called by the appellant) conceded that there was no unacceptable reduction of cultural heritage significance of Middenbury as a consequence of that change.<sup>57</sup>

(iv) Areas of Contention

[135] Notwithstanding the above, Mr McDonald was opposed to the proposed development for the following 5 reasons:

- (a) the significant fabric of Middenbury is likely to be damaged by the proposal;
- (b) the significant fig trees are likely to be damaged and their future survival threatened;
- (c) the proposed towers will not provide an adequate and appropriate setting for Middenbury;
- (d) views between Middenbury and the Brisbane River and West End and between Middenbury and Coronation Drive will be impaired by the proposal, and
- (e) the proposed rear addition to Middenbury is an unsympathetic and inappropriate form of development that will detract from the appearance and expression of Middenbury as an 1860s villa residence.

(v) Witnesses and their credit/experience

[136] In considering the heritage issues, the court had the benefit of the evidence of three heritage experts namely Mr McDonald, Mr Elliott (called by the co-respondent) and Mr Lynch (called by the co-respondent by election). Each was accepted as an expert, but there were challenges to the credibility of Mr McDonald and to the extent of Mr Lynch's experience.

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<sup>57</sup> T4-34 ll 45-46.

[137] Mr Lynch is an architect with not insignificant experience in heritage matters and has sufficient expertise to give opinion evidence. It was pointed out, for the appellant, that he had never written a heritage impact report or an expert conservation management plan and was neither familiar with, nor a member of, the International Council of Monuments and Sites. He may not be as experienced as the other witnesses, but it was not suggested he was not qualified to give opinions. Ultimately it is the consideration of the cogency of the content of his evidence which is of greatest importance.

[138] Mr McDonald was criticised on at least two bases. First was his less than entirely fair visual representation of the presentation of the gap between two of the residential towers which provides a view corridor to the river from Middenbury. The second was his less than completely convincing explanation as to why he saw the proposed towers as unduly impacting upon the cultural heritage significance of Middenbury, when he was supportive of a recently approved tall building adjacent to Customs House in the CBD. It is unnecessary for me to say more about either of those matters however. I am not prepared to draw a conclusion that Mr McDonald was doing anything other than expressing his honestly held views in relation to the subject matter. It is, again, the cogency of those views upon which I have ultimately focused.

(vi) Damage to Middenbury

[139] It is proposed that Middenbury sit over a newly constructed 4 level basement carpark. It was agreed, in the joint report of the heritage experts, that there is a risk of damage to Middenbury's significant building fabric in constructing that basement, but there was disagreement about the magnitude of the risk. Mr Elliott, with whom Mr Lynch agreed, expressed the opinion that the risk resulting from the proposed suspension of Middenbury above the basement excavation and construction can be appropriately mitigated through the preparation and execution of appropriate structural support and dilapidation monitoring strategies. He pointed to the recent successful implementation of such strategies on a masonry heritage building known as Collins Place in South Brisbane. Mr Lynch gave evidence of his involvement in another project where engineering techniques were used to preserve the façade of the building at 333 Ann Street, which had been propped up and retained for approximately 15 years in anticipation of redevelopment. Mr McDonald however retained concerns,

on the basis that Middenbury is a face brick building and, in his view, more prone to cracking in a way which produces irreparable damage.

[140] In order to deal with those concerns, the co-respondent called a structural engineer, Mr Simovic, whose firm was involved in the Collins Place project and has provided a quote to suspend Middenbury to facilitate the proposed construction of the basement carpark. His evidence was that the process utilised for the underpinning, supporting and stabilisation of Collins Place:

- (a) is not an untested development method in the construction industry;
- (b) is well understood by structural engineers, and
- (c) is able to be utilised in the development of the former ABC site to ensure that the heritage building Middenbury is not damaged.

[141] Further, his evidence was that Middenbury can be successfully supported and stabilised during construction of the proposed development to ensure it is not damaged by construction activity either adjacent or below. While there may be a number of possible options for construction of the basement building below Middenbury, one of the options is using a methodology set out in his statement, which he believes would be successful because:

- (a) Middenbury's construction is similar to that of Collins Place, with both structures possessing brick walls and a lightweight veranda;
- (b) Middenbury is a one-storey house, whereas Collins Place is a complex two-and-a-half storey building;
- (c) the construction methodology mitigates the risk of any damage to the brick façade of Middenbury;
- (d) the scope of works includes the restoration of any penetrations in the brick façade which may be required to enable installation of temporary structural steel elements, and
- (e) the construction methodology can be modified to suit the differences between the buildings and respond to the different specifications of the sites, however the basic principles will still apply.

[142] He regarded the suspension of Middenbury as a less complex task than was the case for Collins Place because Middenbury:

- is lighter;
- has a more simple rectangular shape;

- is only one storey, and
- will have more room about it.

He does not consider that there are any unacceptable risks in the case of Middenbury.<sup>58</sup>

[143] It was pointed out, in the course of cross-examination, that Middenbury has a slate roof, rather than an iron roof as was the case at Collins Place. Mr Simovic fairly conceded that involved a higher risk, but not one which unduly concerned him given that, in the case of Collins Place, deformation of the supports of the building was limited to 1mm to 2mm.<sup>59</sup>

[144] As to Middenbury having a face brick exterior, Mr Simovic explained that it is the mortar that gives the brick wall its strength and that the rendered finish, as in Collins Place, is more brittle and would show up cracks more readily. He did not consider that this was an issue of concern.

[145] Mr Simovic acknowledged that the two chimneys at Middenbury would be brittle but attested that, as was the case at Collins Place, they can be appropriately supported in place by steel bracing.

[146] Mr Simovic has not yet investigated the footings of Middenbury, but that did not give him any concern.

[147] The suspension of Middenbury would obviously involve some degree of risk but I am satisfied, on the basis of Mr Simovic's evidence, that the risk is manageable and acceptable. The detail design of the process for suspending Middenbury is, understandably, yet to be done, but I am satisfied that it is capable of being done. Here, before any building work can occur, it will be necessary to obtain a building permit, and the Chief Executive will be a concurrence agency for that application. As part of that application process, it can be expected that detail design will be provided. Mr Simovic confirmed that such a process was followed for Collins Place, with input from heritage architects in the proposed construction process. Further, there could be conditions of any approval of the subject application which ensure that an appropriate plan for the works is formulated and executed.

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<sup>58</sup> T10-22.

<sup>59</sup> T10-24.

[148] It was also submitted, for the appellant, that the exercise of suspending Middenbury during construction involves “butchering” the building in an unacceptable way. The building will be interfered with to some extent in the process. Middenbury will be lifted and placed on temporary piers for some months while its current footings are removed and the soil below excavated and the basement levels constructed before it is then placed on its new slab, in lieu of its existing footings. During the process, the walls of the building will be left in place. The flooring will be removed so that trusses can be inserted through the walls, to the extent that they extend below the level of the floor. The flooring can then be reinstated. The temporary removal of verandas is an option, but Mr Simovic’s evidence is that that is not necessary. There is nothing in the citation which suggests that the heritage significance of Middenbury is related to its footings. None of the work in order to temporarily suspend Middenbury amounts to a “butchering” and would not, I am satisfied, significantly detract from the heritage significance of Middenbury, particularly once the works are completed.

(vii) Damage to the Fig Trees

[149] It is common ground that the fig trees have significance and should be retained. There is an existing retaining wall between the fig trees and Coronation Drive. The co-respondent does not propose to remove the fig trees. The conditions of approval require their retention. The concern raised about the trees results from what the co-respondent contends is a tension between the conditions which require retention of the trees and another condition, which requires land dedication to facilitate a possible future road widening in Coronation Drive. An amended traffic and access plan, which had been disclosed by the co-respondent, contemplated a change to the existing retaining wall in a way which would reduce the setback to the trees.

[150] The appellants were permitted to tender a report from an arborist which expressed a concern about the incursion of a new retaining wall within the root zone of the trees. As was submitted for the other parties however, the risk is not one which arises because of the subject proposal. Rather it is one which might arise depending upon future decisions by the council as the road authority.

[151] The council has three competing priorities that may impact upon the location of any retaining wall near the root base of the fig trees:

- (a) the first is a desire to preserve full-width separated pathways for pedestrians and cyclists along the Coronation Drive frontage of the site;
- (b) the second is a desire to preserve the heritage listed fig trees, and
- (c) the third priority is a long term desire to widen Coronation Drive which impacts upon the available verge width to provide a segregated pedestrian and cyclist path and, in turn, a location where retaining wall supporting the root base of the fig trees.

[152] The council will ultimately decide how that balance is to be struck. The risk to the trees is not a *fait accompli*. It only arises should the council elect, at some time in the future, to add an extra through lane in Coronation Drive and to reconfigure the pedestrian and cyclist path in a way that requires removal of the existing retaining wall. Whether such a road widening will even be necessary will depend upon a number of things, including what happens on the other side of Coronation Drive and the wider traffic scheme that the council elects to adopt.

[153] No change to the retaining wall is required by the subject proposal. The council does not submit that any change to the retaining wall is necessary for traffic reasons. The conditions of any approval ought not mandate or authorise such a change. Further, the evidence demonstrates that it is possible to provide the dedication sought by council conditions, retain the existing retaining wall proximate to the fig trees and provide suitable pedestrian and cyclist paths.<sup>60</sup>

[154] In the circumstances, the potential future risk to the fig trees is not a sound basis for refusing the subject application.

(viii) The Setting of Middenbury

[155] Mr McDonald's view is that the proposed towers do not provide an adequate and appropriate setting for Middenbury. In this context, he saw the site as currently providing a generosity of space around the building, which he saw as an important aspect of an 1860s suburban villa residence. It was submitted, for the appellant, that the height, bulk and scale of the proposed development will overwhelm Middenbury

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<sup>60</sup> See evidence of Douglas.

and reduce it to a minor and insubstantial element of the site, with consequent adverse heritage impacts.

- [156] There can be no doubt that the proposal will affect the setting within which Middenbury sits on the subject land. The issue is whether that results in a significant and unacceptable impact on the cultural heritage significance of Middenbury.
- [157] There are a number of things which should be noted in relation to the setting of Middenbury. First, the setting within which Middenbury sits on the subject site has been an evolving one over the course of history. As has already been observed, prior to the recent demolition of the ABC buildings, it had only been the principal building on the site for some 17 years in its approximately 150 year history.
- [158] Secondly, the context beyond the subject site in which Middenbury is set has evolved and is rapidly changing, with substantial existing and likely future development.
- [159] Thirdly, the heritage provisions of CP2014 could not sensibly be read or applied as if directed to retaining the site or its surrounds to the way they were in the 19<sup>th</sup> century. As the heritage experts agreed in their joint report, the current planning controls facilitate tall buildings generally within the precinct. That includes on the subject site, where buildings of at least up to 15 storeys can be expected. In that context, Mr McDonald's observations that "high-rise towers generally form no part of a historic villa setting" and that conservation management plans done in 1984 and 2009 recommended only medium-rise (up to 5 storeys) buildings on the site, do not take appropriate account of the contemporary planning context.
- [160] The evolution in the physical setting and the planning context was, on the other hand, acknowledged by Mr Elliott and Mr Lynch. Mr Elliott conceded that Middenbury no longer looks like a 1860s villa on a hill on an estate with nothing about it, but pointed out that "quite a lot of water [has] passed under the bridge" and its setting will be different from what it was in 1860.<sup>61</sup> He referred to a 'natural tension' between heritage provisions and the development intentions of CP2014. In responding to the contention that the new buildings will dominate and the cultural heritage significance of Middenbury would thereby be overpowered, Mr Lynch said as follows:<sup>62</sup>

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<sup>61</sup> T3-69.

<sup>62</sup> T3-95.

“They’ll be dominant buildings from a distance. I – I really am quite impressed, however, the way Middenbury has now been in this development given its own standalone setting again. It’s given a – a – an extremely large piece of the site. It looks to my eye to be – without measuring it, inaccurately – somewhere around a-third of the site, with – with – with road curtilage and pathways around it, so that – Middenbury could not expect, in my view, in 2016 to have prominence in terms of viewing to it from any great distance. You’d have to get close, because it’s a single-storey building. But once you do get close to it, it’s going to be extremely prominent”

“...I absolutely don’t see how – how they impact upon its cultural heritage. They – they have some impact upon the appearance of its setting; and obviously the setting is changed considerably by – by tall towers now framing it. It will be framed with tall towers on the other side of Coronation Drive, and – and as you’re seeing, up Archer Street there’ll also be code-assessable 15-storey buildings which will also be around Middenbury. So I think that is simply the reality of – of – of – of where Middenbury finds itself in – in 2016. But even this view – if you were walking down the street, sure, the big towers – you know, are going to attract your eye; but – but Middenbury is given a – a very prominent position on that site.”

- [161] There is no doubt that the proposed residential towers would constitute a very prominent landmark, and be much taller than Middenbury, but it does not follow that Middenbury will necessarily be overwhelmed in a way which negatively impacts upon its heritage significance. The proposal is, as Mr Elliott and Mr Lynch concluded, quite respectful of Middenbury.
- [162] The proposal maintains Middenbury’s historical location and orientation and sets it within a generous area of publicly accessible open space on an elevated part of the site. The towers are both sensitively placed and have tapered bases. The result will, as Mr Elliott said, be that Middenbury “remains a significant feature on the subject site and a focal point of the proposed development within the publicly accessible riverside recreation space”. Similarly, Mr Peabody described the proposal as celebrating the retention of Middenbury, by surrounding it with open space.<sup>63</sup> It will, of course, be of a completely different scale from that of the residential towers but, as Mr Elliott said, “the careful siting and tapered built form at the base of the proposed towers will serve to visually highlight the retained heritage building within its original riverside setting and frame views towards Middenbury both from the river and West End”. Indeed, Middenbury will, as Mr Lynch said, have prominence restored and, as

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<sup>63</sup> Exhibit 6, para 5.3.3(i).

Mr Elliott attested,<sup>64</sup> it and the towers will both have prominence, but for different reasons. Further, as Mr Chenoweth (the visual expert retained by the co-respondent) attested<sup>65</sup> the contrast of the towers draws attention to the relatively small charming heritage building that is Middenbury. He said:

“...Your Honour, this is a subjective area but I think that if you – the proposed extension and the sculptural forms of the building here to me don’t compete with the heritage building. They’re quite different in terms of the colour – the white versus the red – the roof form, the small scale of everything with the Middenbury building including the chimneys and the post-supported awnings. Everything about that building, to me, in this context indicates it’s being treated respectfully. I use the word “a little gem.” It’s being treated as if it’s something very important and it’s drawing attention to it through the contrasting colours, contrasting in form and scale but all – at the same time it gives plenty of space around it for people to see it and appreciate it. Now, that’s the view from Archer Street. If one has a look at the previous page – 107 – you can see there that in fact Middenbury will be on a hill and you walk – as it is now – so it will have its own setting on its own hill and the framing by the three towers will be set back from it. But it will relate to it because it’ll have this cultural extension. There’s an outdoor café like a skirt around it. So I think they – again, it’s a very elegant solution how they’ve designed here to draw attention to the building and I don’t think it’ll be subsumed at all.<sup>66</sup>”

[163] As Mr Elliott attested,<sup>67</sup> the proposed new buildings, being a landmark piece of architecture by an internationally renowned architect, are quite different from Middenbury, but both have merit and will each have particular points of interest and each will be prominent for different reasons.<sup>68</sup>

[164] I prefer and accept the evidence of Mr Elliott and Mr Lynch that the proposal would not impact upon the setting of Middenbury in any way which has a significant undue impact upon its heritage significance.

(ix) Views to and from Middenbury

[165] Mr McDonald expressed the opinion that views between Middenbury and the Brisbane River and West End and between Middenbury and Coronation Drive will be unacceptably impaired by the proposal.

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<sup>64</sup> T3-65.

<sup>65</sup> T2-14, 16, 21.

<sup>66</sup> T2-21.

<sup>67</sup> T3-61.

<sup>68</sup> T3-65.

- [166] So far as views to and from the Brisbane River and West End are concerned, the proposed development provides a viewing corridor to the river and West End which is wider than that required by the State Heritage listing and also provides an additional corridor for views north to the CBD. It should be noted that figure b of the TANP also showed one significant view corridor generally from Middenbury to the river and that OO(r) sought the retention of that.<sup>69</sup> The precise location of the corridor and its width cannot be discerned from the TANP, but the corridor to be provided by the co-respondent, I am satisfied, is sufficient and that the OO is met.
- [167] Mr McDonald's evidence focused upon inclusion of the whole of the subject site within the heritage overlay in CP2014 and on his view that "both historically and currently, the site allows expansive views to and from the Brisbane River which Towers A & B of the proposal will not retain but will substantially restrict".
- [168] There is nothing in the statement of significance in the heritage citation which requires provision or retention of expansive views to and from the Brisbane River. The citation does refer to the setting of Middenbury on the Brisbane River and to the fact that the timber verandas accessed by French doors provide a generous space for, amongst other things, enjoying views to the Brisbane River and CBD, but that is not to say that the heritage significance of Middenbury requires unrestricted panoramic views.
- [169] Insofar as what could be seen from Middenbury, Mr McDonald placed considerable emphasis on a 1933 photograph which he later acknowledged was not illustrative of the views that were available from Middenbury.<sup>70</sup> Further, his analysis ignored the significant quantity of vegetation that historically existed between Middenbury and the river.<sup>71</sup> As a consequence, even in the years prior to the ABC buildings, the view of the river from Middenbury would not have been an unrestricted panoramic view.
- [170] Insofar as views to and from Middenbury generally are concerned, Mr McDonald considered that Middenbury has recently "retrieved its lost visual prominence". He tended to dismiss the former ABC buildings on the site as a "relatively small piece of a continuum of history". As earlier noted however, there was only ever a short period of time during which Middenbury was the principal building on the site. Within 17

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<sup>69</sup> See also AO1.6.

<sup>70</sup> T4-43,44

<sup>71</sup> T2-23 (Chenoweth).

years of it being built, Sidney House was built on the site. Sidney House remained on the site for 76 years, at which time it was demolished to make way for the new ABC buildings, which remained on the site for 51 years. Further, as has already been noted, the evident intent of CP2014, of which the heritage overlay forms part, is for the subject site to be the subject of significant development as part of a major centre. The retention of Middenbury's cultural heritage significance is intended to be achieved in the context of that further development of the site. In such circumstances, it is unsurprising that there would be some interruption of views to and from Middenbury compared to a hypothetical situation in which Middenbury remained as the only building on the site. Further, it is unsurprising that there would be some interruption of view, as between Middenbury and the river, compared to that notional scenario, given that Middenbury is located on an elevated part of the site which is removed from the Brisbane River's edge and closer to Coronation Drive.

[171] I am satisfied that the proposed development appropriately respects and preserves views to and from Middenbury. It both complies with the view corridor requirements of the state listing and utilises sensitive design and treatment, including the tapered base of the towers. Further, as has been noted, the proposal retains Middenbury in its current location on an elevated part of the site and places it within a generous publicly accessible open space which will facilitate views to and from Coronation Drive. Some issue was taken with the proposed extension of Middenbury as viewed from Coronation Drive. That is discussed below.

[172] The overall result will be that Middenbury will retain a river location and setting and continue to enjoy views of the Brisbane River and CBD. I am satisfied, consistently with the evidence of Mr Elliott and Mr Lynch, that to the extent that the development impacts upon views to and from Middenbury, it does not do so in a way which significantly detracts from its cultural heritage significance.

(x) The Proposed Addition to Middenbury

[173] The proposed development involves the construction of an addition to the rear of Middenbury. The addition is of a modern design, which is sympathetic to the modern design of the proposed towers, and is unlike the form or architecture of Middenbury otherwise. It is of substantial size. It would not obstruct views of Middenbury to/from

the river, West End or the CBD, but would have some restricting effect on views to/from Coronation Drive. Mr McDonald's view is, in effect, that the extension is too large and too modern and will unacceptably diminish the cultural heritage significance of Middenbury.

[174] Article 22 of the Burra Charter 2013 provides guidance on how additions ought to be approached so as to ensure they do not unacceptably diminish the cultural heritage significance of a building. It states:

22.1 New work such as additions or other changes to the place may be acceptable where it respects and does not distort or obscure the cultural significance of the place, or detract from its interpretation and appreciation.

22.2 New work should be readily identifiable as such, but must respect and have minimal impact upon the cultural significance of the place.

[175] As Mr McDonald acknowledged,<sup>72</sup> notwithstanding its scale, the proposed extension would be readily identifiable as an addition, lightly attached, and reversible. Further, even with the addition in place one will still be able to appreciate those aspects of Middenbury which give it significance as described in the statement of significance.

[176] I prefer and accept the evidence of Mr Elliott that the visual contrast between the "old" and the "new" work does not diminish the cultural heritage significance of Middenbury, but rather helps to draw attention to the considerable heritage and aesthetic values of Middenbury and would be a "talking point" that will assist the public in appreciating the evolution of the site.<sup>73</sup> I am satisfied that the proposed addition:

- (a) does not distort or obscure the cultural significance of the place, or detract from its interpretation and appreciation;
- (b) is readily identifiable as such, and respects and has minimal impact upon the cultural significance of the place, and
- (c) does not substantially reduce the cultural heritage significance of the heritage place as identified in the statement of significance, or unacceptably reduce the ability for that significance to be appreciated.

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<sup>72</sup> T4-49, 50.

<sup>73</sup> Exhibit 14, para 36.

(xi) Compliance with the Heritage Provisions

[177] For the reasons discussed, I prefer the evidence of Mr Elliott and Mr Lynch to that of Mr McDonald. Insofar as the various provisions relating to heritage are concerned, I find as follows:

1. The proposal would achieve OO(3)(l) of the TANP because the heritage value of Middenbury would be protected and enhanced, through retention, refurbishment and re-use of the building.
2. The proposal is consistent with OO(3)(r) of the TANP by retaining a significant view of vista identified in figure b from Middenbury.
3. The proposal is consistent with PO6(d) of the TANP in that it respects the prominence of Middenbury.
4. As to PO11 and the corresponding acceptable solutions, the proposal:
  - (i) retains and reuses Middenbury and retains the heritage listed trees on Coronation Drive (AO11(b));
  - (ii) retains a view from Middenbury to the river, as shown in figure b (AO11(c)), and
  - (iii) reflects the local culture and heritage of Middenbury. Whilst the new building and structure are of a different and modern design, the development includes the refurbishment and adaptive re-use of Middenbury. Further, the more modern components of the development do not, for the reasons given, detract from Middenbury's cultural heritage significance.
5. The proposal achieves the purpose of the HOC that:
  - (i) development on or adjoining a heritage place does not detract from the cultural heritage significance of a local heritage place, and
  - (ii) re-use of a heritage place is compatible with its cultural heritage significance.
6. The proposal is consistent with PO1, PO2, PO3 and PO4 of the HOC.
7. The proposal is consistent with PO1 of the QHPSC because it does not detract or substantially reduce the cultural heritage significance of Middenbury.

## Traffic

### (i) Introduction

[178] The site's primary frontage is to Coronation Drive, a heavily trafficked arterial road. To the north lies the signalised intersection of Coronation Drive and Booth Street. To the south lies the unsignalised intersection with Archer Street (to which the subject site also has a frontage). Further to the south lies a signalised intersection with High Street.

[179] The proposal, insofar as concerns vehicular, cycle and pedestrian access, is as follows:

- (i) a single left in, left out vehicular access point for the subject development to Coronation Drive;
- (ii) a single access point for the subject development to Archer Street;
- (iii) works in Coronation Drive to construct a deceleration lane leading to the proposed new site access;
- (iv) further works on Coronation Drive to provide a dedicated turning lane for vehicles travelling outbound on Coronation Drive seeking to turn left into Archer Street;
- (v) the construction of a public cycle way and pedestrian path through the development site, linking between Archer Street and Coronation Drive, and
- (vi) the provision of onsite car parking.

[180] No issue was taken with the Archer Street vehicular access. Further, it was common ground that:

- the proposed improvements for vehicles decelerating to turn into Archer Street would represent an improvement over the current situation,<sup>74</sup> and
- the section of cycle way/pedestrian path through the site is appropriate from a traffic engineering perspective.<sup>75</sup>

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<sup>74</sup> T7-73.

<sup>75</sup> T7-93.

[181] The joint report of the traffic engineers featured criticisms of the original proposal by both Mr Holland (who was retained by the appellant) and Mr Beard (who was retained by the Council). Mr Douglas (the traffic engineer retained by the co-respondent) thereafter produced an amended plan in order to address some of those issues.

[182] The remaining areas of dispute may be summarised as relating to:

- (a) whether any vehicular access should be permitted from Coronation Drive;
- (b) if so, whether an acceptable access has been proposed, or could be required by way of condition;
- (c) issues relating to the bikeway/pedestrian path. In particular:
  - (i) the safety of the access points;
  - (ii) whether it cuts across the Council's bikeway planning, and
  - (iii) whether it precludes plans for a cross river bikeway, and
- (d) whether the internal design and layout of the carpark is satisfactory.

(ii) Vehicular access from Coronation Drive

[183] It was submitted for the appellant, consistently with the evidence of Mr Holland, that the proposal's reliance on vehicular access to Coronation Drive makes it unacceptable. That was said to be so notwithstanding that AO11(h) of the TANP contemplates vehicular access to the site from Coronation Drive. In this respect it was submitted, for the appellant, that such contemplation should yield to the provisions of the Road Hierarchy Overlay Code ("RHOC"). It has already been noted that, pursuant to the hierarchy of assessment criteria under City Plan 2014, overlays prevail over other components of the scheme (other than the Strategic Framework and state-wide codes) to the extent of inconsistency.

[184] The only provision of the RHOC which forms part of the appellant's central provisions is overall outcome 2(b) which provides as follows:

"Development accessing roads is consistent with and does not compromise the Road Hierarchy in its use, function, flow, or capacity by buses, pedestrian and cyclists".

[185] That provision does not contain a prohibition on access to an arterial road, but rather focuses upon whether development would be inconsistent or would compromise the things referred to.

[186] The appellant's outline of submissions placed reliance upon AO4 of the RHOC, even though it is not one of the central provisions or issues. That acceptable outcome provides that that development protects a planned infrastructure corridor identified on an infrastructure corridor plan in accordance with the infrastructure design Planning Scheme policy. That policy, in turn, specifies that direct lot access to an arterial road is not permitted. AO4 is, however, only an acceptable solution. The non-adoption of it does not amount to a conflict with the Code. The corresponding performance outcome (which is also not formally in issue) is that the development protects a planned infrastructure corridor on an infrastructure corridor plan. It is open to the applicant to demonstrate that its development meets the performance outcome, even if it does not do so in accordance with the policy referred to in the acceptable outcome.

[187] The appellant's central provisions include provisions of the Transport Access Parking and Servicing Code ("TAPS Code"). The Neighbourhood Plan Code prevails over that Code to the extent of any inconsistencies. The appellant relies upon OO(2)(e) of the TAPS Code which provides as follows:

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

That overall outcome does not contain any express prohibition upon access to arterial roads.

[188] Similarly, the appellant's central provisions include OO(5)(g) of the MCZC (which also yields to the TANP to the extent of inconsistency) which provides:

"development provides vehicular access arrangements that minimize impacts on surrounding land and protect the functionality of both local and higher order road networks."

That also does not contain any express prohibition on access to an arterial road.

[189] The appellant also relied upon PO1 of the TAPS Code which provides that:

"Development is designed:

- (a) to include a technically competent and accurate response to the transport and traffic elements of the development;

- (b) in accordance with the standards in the transport, access, parking and servicing planning scheme policy;
- (c) to ensure the efficient operation and safety of the development and its surrounds.”

[190] The policy referred to in PO1 provides that if a site has more than one road frontage, the major access should be from the minor road rather than the major road, although that preference is subject to a number of qualifications including where traffic generated by the development would compromise the amenity of the minor road and where access cannot satisfactorily be taken from the minor road. It was submitted, for the co-respondent, that it would be at least difficult for a service vehicle to access the subject land via Archer Street because of topography and otherwise it would seem both inefficient and inequitable to load all the traffic onto Archer Street in circumstances where the TANP contemplated some access from Coronation Drive. It may be noted that the appellant’s case otherwise raised an issue about the impact of traffic noise on Archer Street (discussed later), which the access to Coronation Drive serves to reduce. It was pointed out that the policy contemplates access from a major road and provides that such access should be restricted to left in left out, which is what is proposed here.

[191] Whilst there is some force in the co-respondent’s contentions in this regard, they fall short of demonstrating no conflict. Further, the policy contains a table (Table 2.2.4B) which, in terms, provides that direct lot access to an arterial road is precluded.

[192] There is some tension between those parts of the TAPS Code and the fact that the TANP Code contemplates, via an acceptable solution, that there may be an access to Coronation Drive. For the reasons which follow however, any conflict in this respect is not accompanied by a significant adverse consequence and the relevant overall outcomes are not prejudiced.

[193] As Mr Holland conceded, the proposed access to Coronation Drive would have no adverse impact on public transport or the capacity of Coronation Drive.<sup>76</sup> Leaving to one side, for the moment, the form of the access itself (discussed later), the only safety issue raised by Mr Holland with respect to an access to Coronation Drive related to the potential for vehicles exiting the subject site to move from the left hand lane to

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<sup>76</sup> T7-88.

the right hand land in order to execute a right hand turn at the intersection of Coronation Drive and High Street. In particular, he was concerned that the right hand turn flows freely and at speed in circumstances where the driver would move into the path of a vehicle that may not be seen.

[194] Whilst Mr Holland's concern is understandable, it must be acknowledged that the very same manoeuvre already occurs where vehicles exit Archer Street and/or private properties located to the south of Archer Street. There is no data to suggest that this manoeuvre is currently causing significant safety issues.<sup>77</sup> Access from the subject development site represents a safer arrangement, because the manoeuvre would occur significantly further away from the High Street intersection.

[195] It should also be noted that residents and visitors to the subject land would have also had the opportunity to use the Archer Street egress and drive to the intersection at the southern end of Glen Road and take a traffic signal controlled right hand turn onto Benson Street before driving inbound and turning left to High Street instead.

[196] In the circumstances, I prefer the evidence of Mr Beard and Mr Douglas to the effect that the issue raised by Mr Holland does not represent an undue risk.

[197] Mr Holland was also concerned that the efficiency of Coronation Drive would be affected by vehicles slowing in the through lane heading south to access the deceleration line. When pushed in cross-examination about this however, he stopped short of expressing a view as to its significance.<sup>78</sup> As was submitted for the co-respondent, the reality is that motorists who utilise Coronation Drive at present, travelling in a southerly direction, already need to make provision for, and accommodate, vehicles slowing to enter Archer Street and private properties to the south of Archer Street. The subject proposal represents an improvement to the efficiency of Coronation Drive in that it will provide for two deceleration lanes clear of through movements on Coronation Drive.

[198] To the extent that having an access point in Coronation Drive results in any conflict with the planning scheme provisions, I am satisfied that it is a conflict which is not accompanied by any significant adverse effect and would not prejudice the overall outcomes of MCZC, RHOC or the TAPS Code.

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<sup>77</sup> Although some lay statements refer to some incidents.

<sup>78</sup> T7-87.

(iii) The form of the access

- [199] The dispute among the traffic engineers about the form of the access centred upon two issues: firstly, the length of the deceleration line and secondly, whether the access should be in the form of a driveway or an intersection.
- [200] Initially, the proposal showed a 27 metre deceleration lane. All traffic engineers agreed that was too short. There was disagreement about whether an AUL (55 metres) or an AULS (40 metres) standard was appropriate. In AULS the “S” stands for “short”. Implicit in the concept of an AULS is that 20 percent the deceleration occurs in the through lane before a motorists enters the deceleration lane itself. A deceleration lane of 55 metres permits “quite comfortable” braking.<sup>79</sup>
- [201] The TAPS policy and City Plan 2014 are silent about the appropriate lengths of such lanes, deferring to Austroads. Mr Douglas relied on the road planning and design manual supplement which he thought overruled Austroads. The dispute about the hierarchy of the documents (i.e. the conceptual justification for various length deceleration lanes) assumed lesser importance than the opinions of the engineers about the safety considerations that were site specific.
- [202] Mr Holland contended that a 55 metre deceleration lane was required. He said that anything shorter should not occur where there was, he thought, reduced visibility to the turn treatment.<sup>80</sup> Mr Holland’s 55 metre standard is one that cannot be achieved given the fixed location of the Booth Street lights and heritage listed fig trees, neither of which can be relocated. It is, in the circumstances, necessary to consider the acceptability of a shorter deceleration lane.
- [203] As to sight distances, there was some initial disagreement amongst traffic engineers about what the sight distance was and where it was measured from. Mr Holland however accepted that if an access driveway was relocated 12 metres further south, he would be content in relation to sight distance.<sup>81</sup>

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<sup>79</sup> T6-69.

<sup>80</sup> Exhibit 11, para 3.61 at p 6.

<sup>81</sup> T7-77.

- [204] Further, Mr Holland's concerns were based on the notion that traffic on Coronation Drive, at the commencement of the deceleration lane, would be travelling at the speed limit (60 km/hr). At the time of any significant turning movements however, Coronation Drive is likely to be a low speed environment. Further, the lights at Booth Street will themselves slow vehicle movements at peak hours (when the pedestrian demand to cross Coronation Drive is likely to be high). In the circumstances, I prefer the evidence of Mr Beard and Mr Douglas that a 55 metre site distance is not required.
- [205] Mr Beard considered that a 40 metre deceleration lane would be acceptable, based on his preferred layout. Mr Beard's acceptance was dependent upon the deceleration lane being measured from the start of the taper to the start of the turn – and no less. His evidence was that if a vehicle was travelling at 50 km/hr (rather than 60 km/hr), a 40 metre deceleration lane permits all of the deceleration to be complete within the lane.<sup>82</sup> His evidence, which I accept, was that the actual speed environment on Coronation Drive meant that whilst there were occasions when vehicles would be travelling 60 km/hr, speeds would be very low (and frequently stopped) during the afternoon peak.<sup>83</sup>
- [206] Ultimately, Mr Douglas did not differ greatly from Mr Beard in relation to deceleration lane lengths. The deceleration lane proposed by him is slightly shorter than that suggested by Mr Beard because of the different approach of the two engineers to the design of the access. Mr Douglas could not accommodate the 40 metre deceleration lane because to do so would involve moving the intersection proposed by him further to the south and therefore into the tree zone.<sup>84</sup>
- [207] The debate between Mr Holland and Mr Beard on the one hand and Mr Douglas on the other as to the appropriate form of the access related to matters of pedestrian and cyclist safety. In short, there was a debate about which form of access would minimise the potential for conflict between vehicles using the access and pedestrians and cyclists proceeding along the bikeway in Coronation Drive.
- [208] Mr Douglas proposes the site access to be constructed as an intersection, reinforced by give way signs if necessary, so that pedestrians and cyclists yield to motorists coming off Coronation Drive into the access. He pointed out that cyclists currently

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<sup>82</sup> T6-94.

<sup>83</sup> T6-93.

<sup>84</sup> T6-94.

negotiate the intersection at Archer Street, which has a similar arrangement and considered that a consistent approach would avoid confusion and achieve an appropriate degree of safety. He pointed to a lack of evidence of any significant difficulties at the Archer Street intersection<sup>85</sup> and the fact that, with a cycleway proposed through the site, the proportion of cyclists using the Coronation Drive frontage to the site should reduce.

- [209] Mr Beard and Mr Holland, on the other hand, considered that a (narrower) driveway access should be preferred with the result that motorists would need to slow, negotiate the physical geometry of the driveway and give way to any pedestrian or cyclist. They did not consider that it would introduce confusion, since it is not uncommon for private apartment developments to have driveway-style accesses and such accesses are well understood. Indeed they saw potential confusion in reversing the priority which would ordinarily apply at a driveway. As Mr Beard attested:<sup>86</sup>

“I’ve always tried really hard not to introduce confusion in this sort of situation. So when you’ve got a traffic regulation that says that the cars have to give way to the cyclists and pedestrians to enter and leave private property, most people know that rule so when you try to interfere with that rule I think that’s precisely when you create confusion... I think the entry volume during the pm peak is more likely 80 or 100 vehicles an hour. But 80, 100 vehicles per hour, you want to be careful with it and I would be adopting the most cautious approach which is to reinforce the natural priority; don’t try to reverse it.”

- [210] Mr Douglas was also concerned that, with an access driveway, service vehicles may have difficulty turning into and out of the driveway at the same time (because of the narrower configuration of an access driveway). As Mr Beard attested however, in such circumstances the truck entering would only have to wait for a moment out in the deceleration lane for the existing vehicle to depart. Cars could turn in and out of the driveway simultaneously. Further, a vehicle pausing to turn left into the site on Coronation Drive is most unlikely to cause queuing outside of the deceleration lane.
- [211] The difference among the traffic engineers, in this respect, comes down to a matter of traffic engineering judgement. Whilst the basis for Mr Douglas’ opinion is understandable, ultimately I prefer the approach of Mr Holland and Mr Beard in this respect. It seems to me that, consistently with their evidence, the safety of pedestrians

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<sup>85</sup> Although some of the lay witnesses spoke of some incidents.

<sup>86</sup> T6-99.

and cyclists is best protected by adopting a form of access which puts the onus upon motorists to give way to the cyclists and pedestrians. Any approval should be subject to a condition requiring Mr Beard's preferred access, which also achieves a slightly longer deceleration lane compared with Mr Douglas' proposal.

(iv) Archer Street cycleway access

- [212] It has already been noted that the TANP promotes the continuation of the Bicentennial Bikeway through the subject site. Mr Holland had no difficulty with the form of that cycleway within the subject site or with its connection point to Coronation Drive, subject to the design being "tidied up" adjacent to the Booth Street traffic signals, which, Mr Holland conceded, was something which could be conditioned.<sup>87</sup> The remaining area of contention focused upon the cycle access to Archer Street. The proposal is for cyclists heading towards the subject site on the western side of Archer Street to cross to the eastern side of Archer Street before it turns left at the "elbow" and then to proceed to the cycleway on the subject site. Mr Holland's concern is that, rather than cross at that point, cyclists would instead cross at the point of the elbow, which creates a danger because of sight distance.
- [213] As Mr Beard and Mr Douglas pointed out, conditions could be imposed requiring the treatment of the road at that elbow with a double centre line and rumble strips to discourage crossing at that point. Mr Holland maintained a residual concern based upon his view that cyclists would act in disregard of their own safety and attempt to turn, at speed, over the double centre line and over the rumble strips and into a driveway intended for vehicles, rather than use the marked bike path. He acknowledged that he was not prepared to give cyclists "any credit for having any road sense at all."<sup>88</sup> Whilst one should adopt a conservative approach when it comes to safety, in my view Mr Holland's approach was overly conservative in this regard. The proposals suggested by Mr Beard and Mr Douglas adequately deal with the risk and should be part of the conditions of any approval.

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<sup>87</sup> T7-92.

<sup>88</sup> T7-69.

[214] The appellant belatedly made some point about the fact that the proposal envisages that a cycle path will be constructed within land to be dedicated on a neighbouring site (20 Archer Street). The co-respondent owns the neighbouring site. Whilst that site was not included in the subject application, it is not unlawful for the court to impose a condition stating that the proposed development should not commence until that cycle path has been dedicated and constructed. The appellant stopped short of contending to the contrary. The co-respondent is willing to accept such a condition.<sup>89</sup>

(v) Council's bikeway planning

[215] CP2014 includes a bicycle network overlay code. The acceptable solutions to that code refer to a bicycle network overlay map. That map shows the existing bikeway along the Coronation Drive frontage of the site as a "primary cycle route subcategory" and also shows a "secondary cycle route subcategory" intended to be provided over the subject site. The appellant suggested that the proposed cycle route provided across the subject site would be inconsistent with that map because it would likely become the primary cycle route.

[216] The reality is that cyclists will make a choice as to which route they wish to use. If the majority of cyclists choose to cross the subject site rather than continue along Coronation Drive, then they will do so because the new pathway is seen as being more attractive, more efficient and perhaps safer. If that occurs the Council may well choose to change the priorities in its bicycle network overlay map. In any event, the map is referenced in the acceptable outcomes to PO1 of the bicycle network overlay code. That performance outcome is that "development contributes to the safe and efficient provision and operation of the bicycle network." I am satisfied that the proposal will do that even if its popularity results in it performing the role of a primary cycle route.

(vi) The cross-river bikeway

[217] The bicycle network overlay map also shows a potential future primary cycle route crossing the river and entering the site to join up with the primary and secondary cycle

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<sup>89</sup> Exhibit 21B.

routes. The proposal does not make any express provision for that potential future project. The other traffic engineers asked Mr Beard to enquire as to the intentions for that project. His hearsay evidence was that there is no current intention to proceed with the cross-river link. There is no evident progress towards it. In any event however, Mr Beard's evidence<sup>90</sup> was that the proposed development does not preclude provision of such a project should it ever proceed. Even the appellant's submissions state that "such an issue of itself may not be sufficient for the proposed development to be refused." In truth it has no significant merit. The submission that the Council's attitude in relation to this issue "again emphasises the win at all costs attitude adopted by the BCC, to the detriment of the community at large" is unjustified and unfortunate.

(vii) Carpark layout

[218] The appellant's outline of submissions addressed PO15 of the TAPS Code, even though it is not a central provision or a formal issue. PO15 of the TAPS Code provides as follows:

"Development provides a carpark layout which allows for onsite vehicle parking that:

- (a) is clearly defined, safe and easily accessible;
- (b) is designed to contain potential adverse impacts within the site;
- (c) does not detract from the aesthetics or amenity of an area;
- (d) discourages on street parking if parking has an adverse traffic management, safety or amenity impact;
- (e) is consistent with safe and convenient pedestrian cyclist movement."

[219] The acceptable outcome references the standards in the Transport Access Parking and Servicing Planning Scheme Policy ("TAPS Policy"). Whilst some point was made about the need for design changes to the circulation system,<sup>91</sup> the primary point was that the residents' car parking bays in the proposal, at 2.4m wide, are narrower than the 2.6m width referred to in the policy.

[220] There are a number of things which should be noted about this issue.

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<sup>90</sup> T7-56.

<sup>91</sup> Exhibit 11, para 3.87. This is a matter that can be left to the conditions stage.

- [221] First, it involves a departure from the acceptable solution. It is still open to the applicant to demonstrate compliance otherwise with the performance outcome.
- [222] Secondly, it is an issue of convenience rather than safety.
- [223] Thirdly, it relates only to the residents' car parking bays. The visitors' spaces are to be provided at 2.6m in width.
- [224] Fourthly, neither the performance outcome nor the acceptable outcome feature in the central provisions upon which the appellant relies.
- [225] Fifthly, in terms of convenience, there is a balance to be struck, in terms of convenience, between the width of the spaces and the number of spaces provided. In this case, whilst the width of the spaces is narrower, the proposal is to provide well in excess of the number of carparks which will be required. That is an understandable approach in an environment where on street parking is obviously quite limited.
- [226] Sixthly, even Mr Beard, who would prefer the 2.6m wide spaces, accepted that there was a balance to be struck, and did not contend that the co-respondent's proposal was unacceptable.
- [227] Seventhly, even if wider carparks were required, Mr Beard's evidence was that that could be done simply by slightly reducing the available number of carparks provided, given the substantial excess. Alternatively, the basement could be required to be made larger to accommodate the increased width with the same number of carparks. Ultimately then, it is a question which goes to conditions rather than approval/refusal.
- [228] On balance, I consider that, given the paucity of on-street parking, the proposal of the developer to provide a greater number of carparks than is required by the policy is of greater benefit than requiring 2.6m wide parking widths.

(viii) Conclusion on traffic

- [229] There are no traffic issues which, in my view, call for refusal of the development application. To the extent that there is any conflict with provisions of CP2014, they are not accompanied by any undue consequences and their gravity is overcome by the merits of the proposal.

## **Amenity**

### (i) The appellant's property

[230] PO1(d) of the TANP Code refers to development which “is designed to avoid a significant and undue adverse amenity impact avoid affecting to adjoining development”. OO(5)(j) of the MCZC is that development is sensitively designed and operated to avoid or mitigate any potential adverse impacts on an adjoining use. Other provisions of CP2014 discussed in these reasons also relate to amenity.

[231] The appellant claims that the proposal would have an undue adverse effect on her amenity. The appellant's property is composed of six contiguous parcels of land, five of which enjoy direct river frontage. Five of the lots were purchased by the Bells in May 2006 with a further (non-riverfront) adjoining lot purchased in May of 2013. Although the land is included in the High Density Residential Zone and designated for development up to 15 storeys, the appellant's family has, instead, elected to develop the land for their architecturally designed residence.

[232] The appellant's house is a one storey dwelling featuring an open plan layout. It is located towards the south western corner of the site, close to the adjoining boundary with the subject site. It is orientated north and east taking advantage, as one would expect, of the river and city views. It is also oriented towards generous recreational areas which feature grassed open space, a tennis court, a pool and a further building. Accordingly, the house, although proximate to the boundary of the subject site to the south, effectively turns its back on that site and orientates itself in other directions over the recreation areas. Further, the back of the house, proximate to the boundary with the subject site, has been dug in to its site and backs onto a retaining wall. The house is therefore at a lower elevation than the subject site. There is no current visual connection to speak of between those in the appellant's house and the subject site.

[233] The appellant's claim that one of the key factors which weighed heavily in favour of purchasing the property was its high level of privacy and her claim that she has a concern about overlooking from the subject site must be placed in context in relation to the situation of the site and reasonable expectations concerning future development.

[234] Although the appellant described the site of her family residence as a “hidden oasis”, the reality is that it has a high level of exposure to the east, including to the Brisbane

River (which is obviously a key contributor to the appellant's high level of amenity). As the appellant conceded in cross-examination, her property can readily be seen by those travelling on the CityCat service for example, although she took some comfort from the fact that they were "fleeting" views.<sup>92</sup> Further, reasonable expectations would include that the subject site (which the Bells unsuccessfully sought to purchase before it was acquired by the co-respondent), would likely be redeveloped in the future for substantial development including development with the potential to overlook the appellant's property. The reasonable expectation, consistent with CP2014, is that such development could involve development up to 15 storeys in height and possibly higher (subject to impact assessment). Further, any development of any significant height on the subject site would be expected to take advantage, as the appellants have done, of the river and city views. The sweep of such views from the subject site extends over the appellant's property.

[235] That is not to say that development of the subject site should be insensitive to privacy for its neighbour. The appellant's central provisions include PO58 of the CMUC, which provides that:

"Development minimises direct overlooking between buildings and to adjoining residential uses not located within the centre or mixed use area through site planning, building design, screening and landscaping."

[236] The fact that the proposed buildings are taller than would reasonably be expected does not necessarily mean that there are a greater number of units which would look out across the appellant's property than could potentially be achieved by a 15 storey development. That would depend upon the design and orientation of the particular proposal.

[237] The towers on the subject site are not orientated exclusively in one direction. The towers express themselves in all directions, with the consequence that there are units on each floor which are not orientated towards the appellant's property. The units in the proposed towers are well above the roof level of the appellant's house and those from which occupants could possibly be overlooking, offer attractive views to the river and city.

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<sup>92</sup> T10-58.

- [238] To overlook the appellant's property, it would require a resident of one of those units with the potential to overlook the appellant's property to choose to lean over their balcony and look down on the appellant's property, rather than out over it, to the river, city or other places. It is possible that a resident may do that from time to time, although they could also do so from a 15 storey building.
- [239] As Mr Chenoweth<sup>93</sup> and Mr Peabody pointed out, contrary to the fears of the appellant,<sup>94</sup> residents of the higher floors are less likely to look directly down upon the appellant's property than residents of lower floors. As Mr Peabody said:<sup>95</sup>
- “Whilst I acknowledge that there is an opportunity from any room or balcony in a building to have a potential to view into an adjoining property, it is my opinion that the potential for more invasive overlooking is greater at the lower levels of the building where an individual is in close proximity to the adjoining property and the foreground is within their general cone of vision. At higher levels of the building, it is my opinion that there is a tendency to look out towards the horizon and borrowed landscape, which is within an individual's general cone of vision, rather than look downwards.”
- [240] There are a number of matters of relevance to privacy at the lower levels of the development. Reference has already been made to the height differential between the appellant's house and the subject site. Further, the tapered nature of the base of the towers means that the base of the towers is set further back from the appellant's property. There is also a significant height differential between the appellant's house and the first level of units in the towers. Further there is landscaping to be provided to the common boundary and, depending on the noise protection option adopted,<sup>96</sup> acoustic barriers to manage noise impacts which, if required for privacy, can be opaque. There is no privacy issue with the villas.
- [241] In the circumstances there is, as Mr Richards conceded,<sup>97</sup> no potential for overlooking from people in the proposed units into the appellant's house. The only potential for overlooking relates to those in the towers overlooking the recreation areas which, as have been observed, could reasonably expect to be overlooked to some extent in any event by development on the subject site. I do not consider that the extent of overlooking from the subject proposal is undue having regard to reasonable

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<sup>93</sup> T2-52, 53.

<sup>94</sup> T10-63.

<sup>95</sup> Exhibit 6, para 6.1.27.4(f)

<sup>96</sup> Discussed later.

<sup>97</sup> T6-22.

expectations and, with the features of the design including those which prevent overlooking into the appellant's house and overlooking from the lower levels of the development, the proposal minimises direct overlooking. I am satisfied that PO58 of the CMUC is satisfied.<sup>98</sup>

[242] Insofar as overshadowing is concerned, it would also be unreasonable to exclude from reasonable expectations that development, as envisaged by CP2014, may cast some shadow on at least part of the appellant's property at some time. The evidence of Mr McKerrell and Mr Peabody was that the shadows which would be cast by the subject proposal are acceptable. Mr Richards disagreed.

[243] Mr Richards prepared shadow diagrams to compare the shadows which would be cast by the subject proposal for what he described as a "code compliant" alternative. His alternative was not however fully code compliant, nor did it assume development to the full extent of the acceptable outcomes.<sup>99</sup>

[244] Mr Richards' scenario takes the footprints of the proposed Towers A and B and pushes them closer together, so as to achieve a building separation of 24m to the northern boundary, notwithstanding that, in doing so, he prejudices the viewing corridor for Middenbury. By taking the building footprint of the subject proposal and moving it so that it is entirely beyond the 24m separation distance, he has ignored the "wedding cake" approach to the application of the separation distances and has not had any regard to whether the particular levels directly face any habitable rooms. By adopting the building footprint of the proposed towers, he has not considered towers to the full width of 40m provided for in AO1.3 (which could cast wider shadows than the subject towers). In addition, he has not adopted a tower-above-podium approach, for which he otherwise advocates and which, consistently with the TANP, could see a 4 storey podium located closer to the appellant's property.<sup>100</sup> Even putting those matters to one side however, I accept Mr Peabody's evidence to the effect that the comparison which Mr Richards made does not warrant a conclusion of unacceptable overshadowing.

[245] On 23 June at 9.00am the proposal would not cast any shadow on the appellant's property. At 3.00pm, as Mr Richards conceded, Towers A & B would have no impact

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<sup>98</sup> T10-17, 58 (Perkins).

<sup>99</sup> T6-17.

<sup>100</sup> See exhibit 6, p 138.

upon the appellant's property whilst Tower C would have only a minimal impact over and above his comparison.<sup>101</sup>

[246] As for 23 December, Mr Richards did not suggest that the proposal would have any undue impact prior to 2.00pm in the afternoon. Thereafter, Tower C, which complies with boundary setbacks, would cast a greater shadow than if it were pushed back so as to achieve a 24m building separation from the appellant's house. The effect would be to extend the shadow onto a part of their generous private recreation area which would otherwise not be in shadow.

[247] Moreover, the analysis shows that even if Mr Richard's comparison were accepted, there is, in effect, no difference in the winter months, whilst the difference in the summer months is limited to some additional overshadowing to a part of the otherwise generous recreation space in the later part of the afternoon by reason of one of the towers only. In the course of cross-examination even Mr Richards was slow to express the view that that was unacceptable.<sup>102</sup> I am satisfied that it is not. I am satisfied that the proposal will not have an unacceptable impact of overshadowing, having regard also to the conservative nature of Mr Richard's comparison.

[248] The proposal will, in terms of its height, bulk and scale, dominate the Bell residence, but that would be the case with any potential high-rise development up to 15 storeys on the subject site. Because their single storey home is on land within the high-density residential zone and adjoining land in a major centre, the appellants should reasonably expect that nearby development, including on the subject site, will be of a much greater height, scale and bulk than their own.

[249] Concern was initially raised in relation to acoustic impacts. As the first report of the acoustic experts records, the subject site and surrounding uses are located in a highly urbanised environment with existing noise from traffic, principally from Coronation Drive, activities on the Brisbane River (including ferries, boats and other river related activities) and overflying aircraft. The noise monitoring revealed that the locality, including the subject site and the Bell property, is highly noise-affected by traffic on Coronation Drive.<sup>103</sup> The joint expert report of the acoustic engineers records their agreement that the proposed development will not result in unacceptable acoustic

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<sup>101</sup> T6-19.

<sup>102</sup> T6-20,21

<sup>103</sup> T8-58.

impacts at the appellant's property subject to the imposition of appropriate conditions, which include shielding the appellant's property from potential groups of people in the eastern open space areas by either:

- construction of a 3m high acoustic barrier above the finished ground level of the open space area between the outdoor use area and the appellant's property; or
- using that area for landscaping purposes only rather than as an area available for public use.

[250] It was submitted, for the appellant, that the Bells would suffer from a loss of perceived amenity because, for example, of the fear of being overlooked. Perceptions of amenity are of relevance,<sup>104</sup> but are not necessarily given determinative weight.<sup>105</sup> They do not require rejection of a development simply because an existing resident is implacably opposed to it or harbours a fear of a particular amenity impact. In this case, the nature of the component of the development which is of concern (high-rise residential dwelling units) is of a kind which could reasonably be expected and the specific amenity impacts relating to its height and form (including as to privacy) have been the subject of assessment and, in my view, are not unreasonable. Visual amenity and character issues are considered later and I am satisfied that the proposal would also not have an undue impact in that regard. I would not be minded to refuse the development on the basis of the appellant's perception that her amenity will be unduly affected.

[251] I am satisfied that the proposal would have no undue impact upon the amenity of the appellant's property.

(ii) 20 Archer Street

[252] Mr Richards did not express any concern about overshadowing for the approved development at 20 Archer Street. Tower A, which is closest to the approved development at 20 Archer Street, is set back further from the river and does not prevent future residents of that development from enjoying river views. It has already been observed that the tapered base of the towers means that the lower sections are set further back from 20 Archer Street and that there will be no units in the subject development facing the units in the lower levels of 20 Archer Street. It has already

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<sup>104</sup> *Broad v Brisbane City Council & anor* [1986] 2 Qd R 317.

<sup>105</sup> *Ibid* 325 (de Jersey J).

been noted that the design of the towers is such that not all units on each floor orientated towards any direction. Direct overlooking opportunities will be limited to some units on a small number of floors well below the 9<sup>th</sup> storey.<sup>106</sup> The proposal's impact upon 20 Archer Street has been minimised. I note that the co-respondent owns the site of that approved development and future residents would, of course, purchase in the knowledge of the subject proposal. I am satisfied that the proposal would have no undue impact upon the amenity of 20 Archer Street.

(iii) Traffic noise

- [253] The only unresolved issue at the time of the joint expert report on acoustics was the impact of additional traffic noise in Archer Street and Glen Road. That was due to uncertainty about traffic volumes.
- [254] For the purpose of the hearing, Ms Richardson prepared a report in which she concluded that the traffic noise levels generated on Archer Street and Glen Road by reason of the subject development would be less than by the previous longstanding use of the site by the ABC. That remained the case, notwithstanding an upward revision of the numbers at trial. The appellant challenged the relevance of comparisons with levels associated with a use that has long ceased and I have not put weight on that.
- [255] Ms Richardson was cross-examined about whether appropriate noise criteria would be exceeded if Mr Beard's projection of 2000-3000 vehicle trips per day generated by the proposal were to be realised. She acknowledged that the "base criteria" level for the L10 would be exceeded in Archer Street if more than 2000 vehicles per day used Archer Street, but not if the trips were distributed between Coronation Drive and Archer Street,<sup>107</sup> as would be likely in the subject proposal, with its 2 access points.
- [256] Further, the concern for the amenity of Archer Street should be seen in the context of the traffic noise-affected nature of the locality and the inevitability of increases in traffic on Archer Street and Glen Road having regard to development which is occurring, and is likely to occur, in the area consistently with the planning provisions. It may be noted that the appellant's case, whilst attempting to make something of

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<sup>106</sup> Screening conditions could be incorporated if thought appropriate.

<sup>107</sup> T8-60.

traffic noise in Archer Street also contends, for traffic reasons, that there should be no access to Coronation Drive.

[257] Ultimately, even the appellant's written submissions acknowledged that "acoustic issues may not amount to a reason to refuse the proposed development of itself". I am satisfied that there is unlikely to be any undue impact.

(iv) Wind

[258] The appellant's central provisions include PO16 of the MDC which provides as follows:

"Development of a building 8 storeys and over ensures that the design mitigates the impacts of ground-level wind acceleration on pedestrians and building occupants"

[259] There is no specified acceptable outcome for buildings of more than 15 storeys in height. A note calls for a wind impact report by a suitably qualified professional.

[260] This issue was considered by Mr King (for the appellant) and Dr Johnson (for the co-respondent). They agreed that:

- (a) the development application material submitted by the co-respondent contained no specific study or assessment with respect to wind amenity matters; and
- (b) wind amenity matters are an impact that should be assessed by a preparation of an appropriate report to address the requirements of CP2014.

[261] There was disagreement as to whether that should occur before any approval of the subject application has been given, or in the performance of conditions of any approval. Mr King contended for the former, in case measures need to be implemented to deal with wind also affected the assessment of the proposal from another perspective. Dr Johnson contended for the latter.

[262] The experts agreed that wind will be able to be addressed. In that regard they said:

"The experts further agree that it is likely that the development can achieve acceptable outcomes with respect to ground level amenity both on and off the site on the basis of implementation of engineering measures such as

awnings and/or built form or similar physical measures which can include dense vegetated areas forming part of the design and construction of the development.”

[263] Dr Johnson pointed out various features of the development, particularly the “roughness” of the buildings, their symmetry and narrowness relative to height which, in his view, means that it is more likely than not that there will be no need for any measures. He did not, however suggest that a detailed assessment is unnecessary nor did he exclude the possibility of some measure being required. He considered it better to delay such a report for the following reasons:<sup>108</sup>

“So while I undoubtedly agree with Mr King that a wind assessment is necessary on the site, in my opinion it is not necessary to carry out that until there is quite a degree of certainty about the development proceeding. A wind analysis exercise is a reasonably complicated and expensive process. One would want to carry that out on the basis of using the final design of the building so that appropriate measures could be put in place if necessary. The other element that’s affected in that regard is that there’s quite a degree of other development occurring within the vicinity of this particular site. So it would be sensible for a wind analysis to take account of the most up to date information available in terms of potential impacts on wind. In that regard I see no reason why you would carry out an analysis at an earlier stage of the design process. It would be better left until, in fact, perhaps, approval had been granted for the development through this process.”

There is merit, from a practical perspective, in Dr Johnson’s view.

[264] Although one cannot now know with certainty whether any measures would be required and if so precisely what they would be, Dr Johnson gave evidence that the measures which would be required are all, in the present context, “low intensity” relatively minor items to be constructed in and around the buildings by way of additions, without affecting the design of the buildings themselves. He spoke of awnings, walls and vegetation.

[265] In the circumstances it would appear that not only can PO16 be satisfied, but that it is likely to be able to be satisfied consistently with development which is generally in accordance with the plans before the court. That provides a basis for the approach contended by the co-respondent, of imposing a condition to require the assessment to be carried out at the detailed design stage, prior to the issue of a building approval.<sup>109</sup> The better course in my view however, is, if I am otherwise minded to dismiss the

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<sup>108</sup> T10-45 ll 33-44.

<sup>109</sup> *SDW Projects Pty Ltd v Gold Coast City Council* (2007) QPELR 24 [24].

appeal and approve the development application, to indicate that the assessment should be carried out at this time, before a final order is made,<sup>110</sup> to determine the specific measures (if any) which would be required to be incorporated by conditions.

(v) Lay witnesses

[266] The 10 lay witness statements raise a number of issues primarily related to potential amenity impacts and whether such impacts are acceptable. The submitters have properties which are variously within the Major Centre, High Density Residential Zone or Medium Density Residential Zone.

[267] It was submitted, for the co-respondent that:

While the lay statements undoubtedly reflect the honestly held views of the persons who wrote them, the statements:

- (a) highlight the inherently subjective nature of a number of the matters raised in the statements;
- (b) are at odds with the planning intentions for the locality, and
- (c) tend to ignore the reality that (whether that is good or bad) the residential amenity, and the character of Toowong is changing, and will continue to change, in a direct response to the recent planning scheme provisions guiding development in the area.

[268] There are some examples of that and some respects in which the views expressed do not find support in the expert evidence. In other respects however, the statements reflect concerns of relevance to the issues in dispute including with respect to height, scale, bulk, character and the like.

[269] To the extent that the statements raise matters of relevance, those issues have been examined elsewhere herein. The statements do not cause me to conclude that there are any other particular properties which are subject to undue amenity impacts not otherwise considered.

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<sup>110</sup> Cf *Metroplex Management Pty Ltd v Brisbane City Council & Ors* [2010] QCA 333 [15] [100] [105].

**Economic and community need**

- [270] In considering the level of economic and community need for the proposal, the court had the benefit of evidence from three economists, Mr Brown (who was engaged by the appellant), Mr Shimmin (who was engaged by the Council) and Mr Dimasi (who was engaged by the co-respondent).
- [271] As Mr Dimasi pointed out, there is a considerable economic and community need for the subject site to be developed and a significant economic and community disbenefit from the past, and any significant future, delay in realising the site's development potential. He referred to this as an opportunity cost.
- [272] The subject site has been vacant for a decade, having been vacated by the ABC in 2006. It has since stayed effectively derelict notwithstanding that it is, under the current planning provisions, within the centre and both a landmark site and a catalyst site. There is, I accept, a substantial economic and community disbenefit in the site remaining in its current state.
- [273] Further, I accept Mr Dimasi's point that it would be economically inefficient and would impose an economic and community disbenefit if efficient development were to be refused with the consequence of the site remaining vacant until what some might regard as a "perfect" development can be achieved, whatever that might be. That, however, cannot be taken too far. It would be the antithesis of proper planning to allow the "opportunity cost" argument to justify permitting any form of development whatsoever, no matter how unacceptable otherwise, simply in order to get something developed promptly on the site. In this case however, the proposal would not only facilitate the meaningful development of the site, but would do so in a way which addresses economic and community need.
- [274] Need is, as Mr Shimmin and Mr Dimasi pointed out, a broad concept, and extends beyond simply the current market for residential apartments. It connotes the idea that the wellbeing of the community or some part of it can be better or more conveniently served by providing the means for ensuring the provision of the proposed facility.<sup>111</sup> What constitutes a need will vary from case to case.

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<sup>111</sup> *Skateway Pty Ltd v Brisbane City Council* [1980] QPLR 245, 250.

[275] The proposal would result in excess of a thousand residents on a site on the doorstep of the major centre. That would have flow-on benefits for the Toowong major centre, particularly in terms of increasing the population of its catchment, and the level of its activity and vibrancy. Indeed it was a matter of agreement amongst the economists that the high density residential components of an activity centre are important ingredients in achieving vitality insofar as promoting and aiding an 18 hour centre economy and experience.

[276] The proposal would also deliver a significant area of public open space and enable the public freely to access the river as part of the Toowong major centre. Further, it proposes, within that area, a high quality public realm, bike paths and walkways, the retained, rejuvenated and repurposed Middenbury, a café/restaurant associated with that and a café nearer the riverfront. That, together with the additional residents on the subject site, will serve to activate this part of the Toowong centre and improve the wellbeing of the community. As Mr Shimmin and Mr Dimasi concluded in the Joint Report:<sup>112</sup>

“...a need exists if the wellbeing of the community is enhanced, including subsectors of the community at large. In this instance, consideration of the extent to which the wellbeing of the community is enhanced goes beyond the nature of the housing proposed and the development itself, and would include the community benefits associated with the form of development on the subject land (e.g. public realm and access to the river, bike paths etc.), its linkages and synergies with the major centre zone as a whole (i.e. highly complementary), and flow on benefits in terms of viability of service provision (e.g. public transport usage), and the vitality of the centre which it would be part of (i.e. adding vitality to the centre and its prospects as an 18 hour economy).”

[277] Mr Brown expressed a concern that visitors might feel uncomfortable about using the open space. The concern is discussed later and is unfounded.

[278] The planning scheme envisages more than a “stock standard” development for the subject site. It seeks development which, amongst other things, achieves a city-wide prominence and acts as a catalyst. The economic experts rightly agreed that the subject site is strategically important, and that there is a community expectation that a high-quality development with a high level of amenity, particularly public realm, would be established on the site and that there is also an expectation that development

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<sup>112</sup> Para 4.143.

should achieve architectural excellence and attain citywide prominence. The subject development would, I am satisfied, achieve all of those things.

[279] The economic experts also agreed that, as a “catalyst site” the development should lead to or facilitate the setting of new benchmarks for the Toowong centre and its continued renewal and vitality. Mr Shimmin saw the proposal as having value in that regard for the following reasons:

- (i) it will highlight that the Toowong major centre is attracting considerable investment;
- (ii) it will highlight that the Toowong major centre is evolving purposefully as a multifaceted activity centre;
- (iii) it will signal that the endeavours of government and planners to achieve urban consolidation, transport oriented development (“TOD”), and an 18 hour economy and experience, are being successfully realised;
- (iv) it will represent modern, new and regenerative “lifting the bar” in creating a new development benchmark in the Toowong major centre, and indeed in inner Brisbane as well;
- (v) it will provide a population base which will support further employment uses of public transport service in the centre, and
- (vi) it will provide a population base which will support current commercial uses within the centre.

[280] Mr Brown pointed out that Toowong is otherwise attracting considerable investment, is a multifaceted centre and that transport orientated development does not always need to be residential centric. He left the issue of whether the development would create a new development benchmark for others. I am well satisfied that the development would “lift the bar” in terms of setting a quality-of-development benchmark in the Toowong major centre. Whilst the observations of Mr Brown otherwise in this respect have some validity, the subject proposal would serve significantly to highlight the matters to which Mr Shimmin referred.

[281] Mr Brown’s concern in relation to need focused upon what he saw as an inadequate demonstration of need for the extent of residential development proposed to be provided on the subject site and the failure of the proposed development to accommodate what he saw as the need for retail and commercial uses to be

accommodated on the site, given a need, over time, for more such development set against the limited development opportunities within the centre. Mr Dimasi and Mr Shimmin, on the other hand, saw the site as particularly suited to residential development, less so (or not at all) for development focused on non-residential uses and considered that the need for more retail and commercial floor space is relatively modest and can be accommodated otherwise.

[282] The site is obviously attractive for residential development. The economists agreed that key attributes of the site for residential development are that it:

- is located within the Toowong major centre zone;
- is located adjacent to the Brisbane River and on the “northern” side;
- is situated adjacent to the major public and active transport corridor, including rail, ferry and bus and the bicentennial bikeway, and
- has a sufficiently large site to provide a high level of amenity.

[283] Mr Shimmin and Mr Dimasi saw a residential development on the subject site as particularly desirable. Mr Brown did not cavil with the proposition that the subject site is highly attractive for residential development, although he favoured greater retail and commercial components.

[284] As earlier noted, dwelling units are a form of centre activity. It has already been observed that the provisions of CP2014 would facilitate a substantial degree of residential development (and indeed a development the vast majority of which is residential) consistently with AO3 of the TANP Code.

[285] In assessing the need for the proposed residential component of the development on the subject site, Mr Brown focused upon an assessment of supply and demand within the Toowong SA2 area. He pointed to:

- (i) expectations of a modest projected population increase over the next 10-20 years;
- (ii) what he considered to be a disproportionately large part of that demand which would be taken up by the subject development;
- (iii) recent declines in both the total value of unit sales and median sale price of units in Toowong;

- (iv) relatively stable rents (indicating in his view an easing of demands);
- (v) an increase in vacancy rates, and
- (vi) the extent of approvals and potential development otherwise within the Toowong area.

[286] Mr Brown also pointed to concerns about the apartment market in the inner city area of Brisbane in general. In short, his proposition was that there is a level of oversupply in the high-density residential apartment market at present, both in the locality and more broadly inner Brisbane.

[287] Mr Shimmin pointed out that population projections for areas as small as SA2 are notoriously inaccurate for a range of reasons. Mr Dimasi and Mr Shimmin considered that Mr Brown was too narrowly focused upon Toowong SA2. Further, they were critical of Mr Brown in placing too much weight on short-term fluctuations in market conditions and in giving too little weight to the particular advantages of the subject development which would differentiate it in the market.

[288] As Mr Dimasi and Mr Shimmin pointed out, the question of need for the proposed units within the subject site cannot effectively be addressed simply by pointing to population forecasts and the number of high-density residential apartments which are available or approved. Such analysis overlooks the relative scarcity of truly comparable residential developments to the subject, which enjoys the advantages of:

- a waterfront location;
- adjacency to a major centre, with all forms of public transport immediately available;
- a large site with generous open space and a high-quality public realm to be provided, and
- forming part of an iconic architectural statement.

[289] Mr Shimmin reasonably described the proposal as being equivalent to the best high density residential living environments in inner Brisbane and which would be differentiated from the supply of high density residential apartments currently being built or proposed throughout the inner west of Brisbane. He saw an undersupply, or

potential undersupply, of truly comparable development not only in Toowong, but in the inner west and Brisbane's inner sector as a whole.<sup>113</sup>

- [290] The combination of attributes which the subject development offers means that, as Mr Shimmin and Mr Dimasi opined, the residential apartments to be offered on the subject site will have very wide appeal to many segments and will draw from a broad spectrum, including all parts of the Brisbane metropolitan area generally as well as from interstate. Mr Dimasi and Mr Shimmin's evidence is that there has proven to be ready demand for projects elsewhere with some or all of the characteristics which are offered in the proposed development. They consider that the subject proposal would address a need for such development.
- [291] Mr Brown considered that the existing and proposed developments in Toowong already offer a range of choice, but I accept the evidence of Mr Shimmin and Mr Dimasi to the effect that the combination of attributes offered by the subject site offers something which is not truly comparable.
- [292] Mr Shimmin and Mr Dimasi were criticised for relying on a qualitative assessment which lacked a substantial quantitative basis upon which to draw a conclusion of need. As Mr Shimmin opined however,<sup>114</sup> the demand for the type of development proposed tends to be somewhat supply-led.
- [293] On balance, I prefer the opinions of Mr Dimasi and Mr Shimmin to that of Mr Brown with respect to the need for the residential units proposed on the subject site, because the former gave appropriate weight to the particular attributes of the subject development.
- [294] It was submitted for the appellant, on the basis of Mr Brown's evidence, that approval of the proposal would prejudice the need for the subject site to be used for retail and commercial office space purposes. Mr Brown was concerned that there would be a need for further development for such purposes in the future, that there is a limited availability of centre zoned land, and that the subject site and the Woolworths site (in the core of the centre) are the significant redevelopment sites within the centre.

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<sup>113</sup> Exhibit 10, paras 2.6, 2.6

<sup>114</sup> Exhibit 10, para 1.148.

- [295] The level of need for the subject site to be given over to significant commercial office space development is relatively weak notwithstanding that the Toowong Centre has a relatively strong commercial office focus. Mr Brown looked at the employment projections for Toowong SA2 which indicates that over the next 20 years there is predicted to be an additional 1,734 workers in commercial office (or similar) accommodation. Adopting an employment density of 1 worker per 15 m<sup>2</sup> floor space, Mr Brown calculated the need for an additional 26,006 m<sup>2</sup> of floor space over 20 years. Whilst Mr Dimasi considered that the ratio of 1 worker per 12.5 m<sup>2</sup> would have been more reasonable, he pointed out that even adopting Mr Brown's rate, the future office floor space demand, expressed as an annual average would only be around 1,300 m<sup>2</sup>. That does not mean that 1,300 m<sup>2</sup> of space would be developed each and every year. As Mr Brown pointed out, the supply of space can be "lumpy". Mr Dimasi's observations nevertheless point to a relatively modest incremental growth in underlying demand.
- [296] Further, that level of demand may be compared with the extent of existing vacant floor space both in Toowong and at the much larger (in terms of commercial space) centre at Milton. The smaller Toowong office market currently has a vacancy rate of around 10 per cent, with more than 8,000 m<sup>2</sup> of vacant floor space available. The much larger Milton centre has a vacancy rate of about 20 per cent, yielding some 46,000 m<sup>2</sup> of vacant floor space in relatively close proximity to Toowong.
- [297] Mr Dimasi acknowledged that need for commercial office space (as with the need for residential development) cannot be resolved based only on short term considerations, but considered that the available information provides a "much deeper level of understanding than simply short-term market conditions" and suggests that no prudent owner or developer would risk investment capital on the provision of a landmark office building in Toowong at any time in the foreseeable future.<sup>115</sup>
- [298] Given the relatively small size of the Toowong office market, the magnitude of incremental growth in demand and the extent of vacant space, I accept the opinion of Mr Dimasi that the potential achievement of high, let alone premium, office rentals (consistent with a landmark/catalyst development on the subject site) for a

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<sup>115</sup> Exhibit 10, p 99.

commercial office orientated development on the site at any time in the foreseeable future is a “dream”<sup>116</sup> and that:<sup>117</sup>

“The provision of a landmark/catalyst development on the subject site, focused around office uses, given all of these circumstances, is therefore unrealistic, at best. No reasonable developer will be able to, or could afford to, implement an office development on the subject site and reasonably expect to achieve an acceptable level of return on the investment, at any time in the foreseeable future.”

- [299] None of that is to deny that there will be a requirement for additional commercial office floor space in the future but, as Mr Shimmin pointed out, the commercial office demand in Toowong is limited, can absorb vacant space over the next decade and can be accommodated in new developments otherwise.
- [300] I accept the opinions of Mr Shimmin and Mr Dimasi that the demand for office floor space in Toowong is likely to increase only modestly in the foreseeable future, against the background of a market which is already oversupplied, not just in Toowong but also in the nearby and much larger Milton office precinct. Whilst development of the subject site could potentially include some office component, the delivery of suitable landmark/catalyst development on the subject site, which is focused on providing substantial office floor space, is remote and highly unlikely for many years into the future.
- [301] Retail uses within the Toowong major centre are located west of Coronation Drive and the railway line. In particular, they are located within Toowong Village and along High Street and Sherwood Road. The retail floor space provision within the Toowong major centre is little over 40,000 m<sup>2</sup> with retail activities concentrated within Toowong Village, which itself is anchored by the David Jones department store. By comparison, the Indooroopilly major centre comprises in excess of 100,000 m<sup>2</sup> of retail floor space, anchored by two department stores located in the Indooroopilly Shopping Centre.
- [302] As Mr Dimasi pointed out, the main trade area for the Toowong centre is relatively small, particularly in population terms because of:
- the limitation of the trade area to the east by the Brisbane River, and to the west by Mount Coot-tha;

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<sup>116</sup> Exhibit 10, para 5.93.

<sup>117</sup> Exhibit 10, para 5.94.

- the existence, a relatively short distance to the south, of the large regional centre at Indooroopilly, and
- the existence, a short distance to the north-east, of the Brisbane CBD.

[303] Whilst the socio-demographic profile of the trade area population is conducive to above average retail expenditure, even Mr Brown's calculations suggest that there may be a need for only an additional 15,546 m<sup>2</sup> of retail floor space over the next 20 years at an average of 777 m<sup>2</sup> per annum. That indicates a relatively modest demand for additional retail floor space within the Toowong major centre.

[304] As Mr Dimasi and Mr Shimmin pointed out, even if an additional 15,546 m<sup>2</sup> of retail floor space is required over the next 20 years, that space can otherwise be accommodated within the Toowong major centre. It should be noted, in this respect, that the OOs for the Toowong centre precinct in the TANP Code include as follows (emphasis added):

“(4)(d) **Sherwood Road** serves an active frontage – primary function where the **majority of retail**, community and lifestyles uses are located...

(4)(e) **High Street is the focus for non-residential development**, accommodating a mixture of retail and commercial development at ground level and providing a high quality pedestrian experience.”

[305] Obvious candidates for the provision of further retail development include, as Mr Shimmin pointed out, the Toowong Village centre. Mr Dimasi pointed out that it recently underwent a refurbishment and upgrade but the owners did not see fit to add substantial additional retail floor space at this time. The Woolworths site is another obvious candidate. It is a catalyst site intended for a mixed-use development. There are also a range of other smaller sites which could be redeveloped although, as Mr Brown pointed out, the fragmentation of their titles creates some hurdles in that regard.

[306] Moreover, the need for further retail floor space is modest and can be accommodated by development in the core of the centre, west of the railway line, which is where the focus for non-residential development, including the majority of retail development, is intended to be located.

- [307] There was a dispute about the prospects of realising retail development on the subject site and the desirability of doing so. Mr Dimasi and Mr Shimmin were influenced by its location to the east of Coronation Drive and the railway line and so, physically isolated from the core of the centre. As a consequence, Mr Dimasi considered that speciality stores would be highly unlikely to prove successful on the site whilst standalone big box anchor type uses (e.g. free standing supermarket) are very low rent paying uses. In the circumstances Mr Dimasi considered that it would prove extremely difficult to deliver an appropriate retail development on the subject site which could both trade successfully in a development which serves as a landmark/catalyst and also provides the appropriate level and quality of open space and linkage to the Brisbane River that is required for the site.
- [308] Mr Brown's opinion was that, notwithstanding the site's location to the east of Coronation Drive, it may well be able to be developed successfully for some forms of retail development. In particular, he thought that its riverside location would make it conducive to retail uses that have a lifestyle focus or a range of specialty retail uses. He considered that the separation from the remainder of the centre was not fatal and pointed that there are centres which have sub-precincts fulfilling different roles and functions.
- [309] Mr Shimmin did not discount the prospect of riverside retail uses, especially food and beverage outlets, and lifestyle uses in general, but considered that the more those uses were provided on the subject site the more it would fragment the retail component of the Toowong major centre. He considered that the inclusion of retail uses in the core area of the centre, primarily along or adjacent to High Street, which would serve to concentrate activity, enhance the vitality of High Street and facilitate an 18 hour economy and experience is currently a higher priority.
- [310] I accept that there will be a need for further retail development in the centre in the future. I also accept that the subject site would be suitable for some retail uses and I do not discount that a greater retail component could be workable on the subject site, but it is unlikely that a large retail focused catalyst/landmark development would be achieved on the subject site, at least in the short to medium term. There would be public disbenefit in quarantining the subject site in the meantime in the hope that there might be a build-up of demand, over the longer term, to excite such a proposal. The retailing which could realistically occur on the subject site can be accommodated in

the core of the centre and that would be beneficial to the vitality of the centre in a retail sense, and the achievement of the objectives for High Street and Sherwood Road.

- [311] I am comfortably satisfied that there is an economic and community need for the development as a whole, including the residential component. I am satisfied that the need is significant and is not outweighed by any competing need for the site to accommodate substantial retail and commercial development. I am satisfied that refusing the subject development in the hope that a different proposal, with a much more substantial retail and/or commercial focus being put forward, is likely to be to the community disbenefit.

### **Architecture, design, visual amenity and character**

(i) Architectural quality

- [312] The proposal features architecture of the highest quality. The late Dame Zaha Hadid, achieved much in her celebrated career. Her architectural practice is renowned for sophisticated, dynamically articulated and sculptural architectural and urban space solutions. Dame Zaha’s work, as Mr Richards explained, typically has a strong visual style with, amongst other things, tapering forms and curving. Mr McKerrell rightly described the architectural expression and design elements of the residential towers as “exhibiting a high level of design skill and scholarship” and as demonstrating a “very high quality of external architectural expression...”<sup>118</sup> Mr Peabody rightly described the design of the towers as “remarkably excellent” and testified<sup>119</sup> that:

“in my opinion and I – with particularly the design of the towers, they are multi-dimensional towers which I think in itself is fantastic. Now, what I suggest by that is there really is no back end to all three towers. They will be perceived, and rightly so, they are perceived from all various different avenues and aspects from around the city and from the local environment and they don’t necessarily have a back that has a core, you know, the normal sort of blank wall of a lift or a stairwell or the like. So in that regard, they address all aspects as a – and they orientate to all aspects. They – as has been remarked, they are very sculptural in their form, incredibly unique and quite visionary, in my mind, and yet are able to achieve, you know, the open balconies which unfortunately seems to be overlooked on a number of tall

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<sup>118</sup> Exhibit 6, p 19.

<sup>119</sup> T5-54.

buildings in our city at the moment where balconies tend to be enclosed more often than not at the moment which, I think, personally, is a bit of a shame and goes totally against our subtropical design direction for our environment. So the open balconies are embraced in the scheme; they're incorporated into the sculptural structural form that, you know, extends from - effectively, when you perceive it, they extend from below ground and grow up and then encapsulate the plant rim and again, as a tower, the fact that the building envelope extends up and embraces and, you know, encapsulates the plant rim on the top I think is a fantastic gesture to the completeness of the design of the towers."

[313] Mr McKerrell attested that:<sup>120</sup>

"My consideration of these buildings is that I believe them to be striking and bold. I believe that they show a lot of scholarship, your Honour. I think that she's done a good job insofar as creating a new approach to apartment building, and I think that we in Brisbane and Queensland would benefit from that new contribution to the architectural scene, and it would be a pity to see those buildings not built. It is different. It is a – as I mentioned, a fresh approach to the form of an apartment – a high-rise apartment building."

[314] The architectural design will not necessarily be to everybody's personal taste, but it is an example of exceedingly high quality architectural expression by an important and acclaimed architect and will make a positive contribution in an architectural sense.

[315] The appellant's contention, consistently with the evidence of Mr Richards, is that the proposal nevertheless fails to appropriately address its locational and planning contexts. Mr Richards expressed the view that the proposal is more of a strong visual representation of the design vocabulary and style of the architect than a considered response to the context of the site.<sup>121</sup>

(ii) Landmark

[316] It has already been noted that the TANP designates the site as a landmark site and that such sites are defined, in CP2010, as those "identified in a neighbourhood plan to accommodate buildings or developments that attain citywide prominence through a combination of notable architectural excellence, siting and location".

[317] The TANP contains more specific provisions about landmark sites within the neighbourhood plan area. PO6 provides as follows:

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<sup>120</sup> T5-44.

<sup>121</sup> Exhibit 6, p 103.

**“PO6**

Development on a landmark site provides a prominent visual reference and contribution to the city’s public realm by:

- (a) exhibiting sub-tropical architectural excellence through design, treatment and articulation;
- (b) defining the site and its setting through building form, expression, silhouette, scale, materials and landscaping;
- (c) reinforcing a sense of arrival to the neighbourhood plan area, precinct or sub-precinct by marking a node, an intersection or major connection point in the city;
- (d) respecting the prominence of any adjoining or nearby heritage places or local landmarks;
- (e) incorporating public art that is integrated with the development’s design response to the public realm.”

[318] I am comfortably satisfied that the proposal involves “notable architectural excellence” which, in combination with its siting and location, will attain “citywide prominence” and act as a “prominent visual reference”. Not only is the architectural expression of the built form of high quality, but as Mr McKerrell said, it features “striking, bold and attractive architectural forms”. Even Mr Richards described the proposal as both striking and having visual interest, albeit that he thought that it was out of context. The use of high quality, bold and interesting architecture, which Mr McGowan (the visual expert engaged by the respondent) rightly described as “highly recognisable and memorable” will significantly contribute to the achievement of citywide prominence as a prominent visual reference. That will also be assisted by the fact that the architect has adopted an approach of providing three tall, relatively slender towers sited generally towards the northern and eastern parts of the site, which will serve to broaden the area of its visual influence as a prominent visual reference and contribute towards its attainment of citywide prominence. The proposal also satisfies PO6(b) to (d).

[319] It was pointed out, for the appellant, that there are seven landmark sites in the TANP area, at locations with varying topography and visibility from beyond. This, it was submitted, reveals that there is no intention that development of a landmark site is to be visually prominent from the CBD or otherwise from locations well removed from

the site. It was pointed out that the landmark sites are located on corners consistently with the intention, in PO6(c) of the TANP, for them to reinforce a sense of arrival to the neighbourhood plan area and, consistently with PO6(b), to define the site.

[320] I accept that not all landmark sites are intended to be developed for buildings of heights which can be seen from great distances, but it is relevant to have regard to the opportunities presented by a particular site to achieve citywide prominence as a prominent visual reference. In this case, the site is not only a riverfront site, and indeed, the only riverfront site within the centre and at the arrival point to the centre along Coronation Drive but, as Mr Chenoweth pointed out, it is located at the western end of the river's Milton reach. This presents the potential to provide a significant visual reference for the Toowong major centre. The proposal realises that potential by proposing a building with architectural expression, height and siting to enable it to be a significant visual reference in the context of what will be a proliferation of high rise buildings in the area. Further, it does so in a way that, as Mr McGowan pointed out, ties the centre to Coronation Drive and to the river.

[321] It should also be noted that PO6 requires development on a landmark site to provide not just a prominent visual reference, but also a contribution to the city's public realm by, in particular, incorporating public art that is integrated with the development design response to the public realm. As discussed elsewhere, the adoption of a more vertical built form in this case is accompanied by a greater than otherwise reasonably expected contribution of publicly accessible open space which would make a significant contribution to the public realm, including by incorporating public art (the sculpture park) that is integrated with the development's design response to the public realm.

[322] I accept the evidence of Mr McGowan and Mr Chenoweth that the proposal provides an exemplary response to landmarking on the subject site.

(iii) Sub-tropical design

[323] It has already been observed that the development exhibits architectural excellence. It was contended, for the appellant, consistently with Mr Richard's evidence, that it is not an example of "sub-tropical" architectural excellence for the purposes of PO6(a) of the TANP.

- [324] Mr Richards was looking for what might be regarded as a somewhat traditional or “first principles” approach. He was looking for more rectangular, longer, narrower building forms, orientated north/south. Longer sides would face north/south, enabling shorter sides to face east/west with internal spaces orientating to the north and south more than to the east or west, so as to minimise heat loads of low sun angles in the mornings and afternoons. He was also looking for facades with larger windows to the north/south and for horizontal screening on all of the facades where the sun angles are generally higher. On the west and east, he was looking for facades that were more closed with smaller, more vertical windows or vertical screening for lower early morning and especially the hotter late afternoon sun. He was critical of the use of the same façade treatment on every orientation of the proposed towers and the use of full height glazing elements, with no sun shading.
- [325] Insofar as building orientation is concerned, it would be surprising if, on the western side of the river, a development sought to minimise its exposure to the east (towards the river) notwithstanding sun exposure. The plethora of relatively new apartment buildings on the opposite side of the river which are orientated towards the western sun is testament to the attractiveness of views to the river and Mt Coot-tha beyond.
- [326] It is difficult to see how it is in the appellant’s interest to advocate for buildings on the site which are orientated more to the north, when that is the direction of the appellant’s property. By orientating units around the towers, the architect has avoided presenting a visually unattractive traditional “rear” of a building in any direction for the development on this prominent landmark site.
- [327] CP2014 does not define the expression sub-tropical design, and there are a number of measures which are available to address Brisbane’s sub-tropical climate. Insofar as the towers are concerned, that is most obviously done by incorporation of open balconies which are embraced in this scheme but, as Mr Peabody pointed out, not always in residential towers. Each balcony is shaded by the floor above and the glazing to external balconies is set back from the extremity of the facades. The buildings are articulated. They are, as Mr McKerrell pointed out, far from simple glass towers.
- [328] Insofar as Mr Richards’ criticism of the use of glazing, Mr McKerrell rightly pointed out that there are many examples in sub-tropical Brisbane and elsewhere of high rise

apartments with a substantial extent of glazed facades where the type of glazing, the use of screens and blinds as well as air conditioning, deal with the heat load.<sup>122</sup> These could be matters addressed in conditions.<sup>123</sup>

[329] Insofar as the orientation of the building is concerned, Mr McKerrell noted that sun protection must be balanced with desirability of orientating apartments to capture attractive views. Insofar as the uniform presentation of facades is concerned, he opined that, “I do not consider that it is necessary in the design of tall structures to make substantial changes to the facades, except for predominantly blank core walls which would not apply where views are paramount in apartment buildings. To escape the sun’s rays would most likely entail fixed horizontal screening to a substantial portion of the façade which would negate the views and would not be appropriate for apartment design. The use of motorised screens activated with sensors on the outside or inside of the glazed suite is as effective”.

[330] I accept that the towers, as designed can adequately deal with heat loading.

[331] Further, the response of the development to the sub-tropical climate is not limited to that part of the development constituted by the towers. As Mr McKerrell said:<sup>124</sup>

“In my opinion the site planning offers a considerable extent of landscape spaces for vegetation to provide shade. The first habitable floor (RL23.60) is raised above the general landscaped open space without significant loss of views from shade trees. I note that the approved development retains existing vegetation adjacent to the river to capture the natural environment and enhance the riverfront public area. The large fig trees to Coronation Drive further create the sub-tropical appearance of the site.”

[332] Mr Richards accepted that sub-tropical design involves consideration of topography, the diversification of the built environment, its integration with nature, the use of vegetation, the provision of open space, a diversity of open space and the use of that open space. He accepted that the proposal respects the topography of the land, provides diversity in terms of the building environment, provides physical and visual access to the river, provides a significant area of open space within which vegetation

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<sup>122</sup> Exhibit 13, section 3.3.

<sup>123</sup> I note that the council’s approval package contained conditions (19, 86) dealing with the light reflectivity and solar (heat) reflectivity.

<sup>124</sup> Exhibit 13, para 33(e).

will be incorporated, offers a diversity of open space compared with what is presently available and involves a level of use of that area.<sup>125</sup>

[333] Whilst PO6 of the TANP Code is concerned with development on the site, I also note that the council's approval package contains conditions which require streetscape improvement works along the Coronation Drive frontage of the site, which is to be treated as a subtropical boulevard.<sup>126</sup>

[334] I accept Mr McKerrell's testimony<sup>127</sup> that the proposal (appropriately conditioned) meets the description of sub-tropical architectural excellence through design, treatment and articulation. Even if there was thought to be a level of conflict in this regard, the merits of the architecture in assisting to provide a landmark which provides a prominent visual reference, and contributes to the city's public realm and its overall merits are such as to warrant approval notwithstanding a lack of the further sub-tropical design features for which Mr Richards was looking.

(iv) Tower-over-podium v Tower-in-plaza

[335] Mr Richards assessed the proposed development on the premise that the preferred character of built form in the Toowong major centre comprises a podium and tower design. He referred to a number of provisions of CP2014 in that regard.<sup>128</sup> It may be accepted that the TANP envisages and accommodates a tower-over-podium design response and contains provisions which relate to proposals of that kind (see e.g. PO1, AO1.5, PO4 and AO4) but does not, in terms, mandate such a design solution. The proposal is for a "tower-in-plaza" form which must be assessed on its merits.

[336] A tower-over-podium design, whilst perhaps more easily meeting some of CP2014's provisions, would not be without its complications and issues on the subject site. For example, as Mr McKerrell indicated in his evidence:

- (a) podium designs would need to deal with the varying platform levels;
- (b) podiums would need to terminate before reaching Middenbury, which would disconnect the podium from the balance of the centre;

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<sup>125</sup> T6-29, 30

<sup>126</sup> Condition 25.

<sup>127</sup> T5-10. See also T2-58 (Chenoweth); exhibit 15, para 3.2.1(c).

<sup>128</sup> Exhibit 60

- (c) podiums would need to provide openings for access and the bikeway.

[337] The tower-over-podium response is unlikely to provide the same opportunities for the creation of public open space and permeability through the site to the river, that are offered by the tower-in-plaza form. Further, it would appear unlikely that there would be any tower-on-podium development on adjoining land with which such development on the subject site could link as part of a continuous podium.<sup>129</sup>

(v) Streetscape activation

[338] It was submitted for the appellant that, largely as a result of its adoption of the tower-in-plaza design response in preference to a tower-over-podium, the proposal finds itself in conflict with the provisions of CP2014 relating to streetscape activation. Insofar as the central provisions are concerned, the appellant relied particularly on PO2 and PO11(a) if the TANP which provide as follows:

**“PO2**

Development:

- (a) actively contributes to a vibrant and safe streetscape;
- (b) provides a highly active frontage with a high proportion of openings in windows that support their functioning at streets with:
  - (i) high levels of on-street activity;
  - (ii) pedestrian movement and strong integration between the footpath and adjoining ground level spaces;
  - (iii) seamless integration between indoor and outdoor spaces;
  - (iv) a building design that results in sensitive massing and articulation that creates human scale;
- (c) creates safe and enjoyable pedestrian environment to minimise the interruption of vehicular crossovers and entries.”

**“PO11(a)**

Development on the former ABC site as shown in Fig A:

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<sup>129</sup> T5-82, 83, T6-35.

- (d) enhances the pedestrian experience with high quality building design, streetscape and waterfront amenities providing a direct and tangible linkage between Toowong and the river.”

[339] It was submitted, for the appellant, that the proposal fails each of the outcomes because:

- (a) the proposed development does not create any streetscapes;
- (b) there are no windows to support the functioning of streets;
- (c) there is no on-street activity (and therefore neither vibrancy or safety);
- (d) there are no indoor spaces that seamlessly integrate with outdoor spaces;
- (e) the proposed development does not exhibit any sensitive massing and articulation or human scale elements.

[340] It is common ground that the proposal does not adopt the acceptable solutions for these performance criteria. It was acknowledged, on behalf of the co-respondent:<sup>130</sup>

“Put bluntly, however, the innovative, interesting, design proposed here was not necessarily contemplated by the authors of this scheme who anticipated rightly or wrongly, but did not mandate, a more traditional tower on podium design (which, as discussed herein, would not have opened up the site and the river to the public).”

[341] What must be considered is how the proposal responds to the performance outcomes and whether there are grounds to warrant approval notwithstanding any conflict.

[342] PO11(a) has been dealt with earlier.

[343] The existing streetscape at the frontages of the site are not of high quality. As Mr Chenoweth said:<sup>131</sup>

“Apart from the large fig trees, the existing street frontages of Coronation Drive and Archer Street have no particular streetscape character or pattern. The Coronation Drive frontage to the site is not particularly attractive as a streetscape or pedestrian environment and is not ‘activated’ save for the pedestrian and cyclist use of the footpaths.

[344] As Mr McGowan said:<sup>132</sup>

“Coronation Drive in the vicinity of the subject site has a fairly low quality streetscape being dominated by traffic and the fairly inactive

<sup>130</sup> Written submissions on behalf of the co-respondent, para 136.

<sup>131</sup> Exhibit 7, p 6.

<sup>132</sup> Exhibit 7, p 16.

podium levels of the Toowong Village, and having no discernible consistency (in terms of building scale, rhythm or permeability). The subject site as it exists and when it accommodated the ABC headquarters would have made little positive contribution to the streetscape.”

[345] The subject proposal represents a significant improvement. As Mr McGowan went on to say:<sup>133</sup>

“the proposal by contrast will present a highly permeable and attractive frontage which will invite people into the site (and the expansive commons on offer) and will reconnect them with Middenbury and the river, thereby creating a distinct memorable sense of place. While such openness may be somewhat unusual for an inner urban location, it will work in this instance where the scale and significance of the site (and the quality of the proposed public realm) justify deviation from the norm”.

[346] As was submitted for the co-respondent, the proposed development will create its own attractive streetscape, especially in relation to the open space that will incorporate the fig trees adjacent to Coronation Drive. Middenbury will also positively contribute to the streetscape and Middenbury, in its final form, will provide some activation of Archer Street. The proposal will, I accept, positively contribute to the streetscape and its vibrancy and attract activity and pedestrian movement from the street into the site. As has already been noted, the respondent’s approval package contained conditions<sup>134</sup> requiring streetscape works to the road reserve pavements of the site’s frontages to both Coronation Drive and to Archer Street, with the former to be treated as a sub-tropical boulevard. The proposal also features high quality design and amenities including to the waterfront which, together with the streetscape, will provide a direct and tangible linkage between Toowong and the river.

[347] The proposal would, I am satisfied, contribute to a safe streetscape and pedestrian environment. It proposes only 1 vehicular crossover on each street frontage and would provide a pleasant environment which would not only be enjoyable but, for the reasons discussed earlier in the context of the traffic issues, safe as well in relation to the interaction of pedestrians and vehicles. The streetscape improvement works have been referred to. The respondent’s conditions package also required pedestrian lighting for the full street frontage of the development.<sup>135</sup>

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<sup>133</sup> Exhibit 7, para 30.13.

<sup>134</sup> Condition 25.

<sup>135</sup> Condition 24.

[348] The proposal is not consistent with PO2(b), which contemplates a frontage with highly active built form with specified features. It was submitted, for the respondent, that PO2(b) should be understood as referring to activation where buildings are proposed on the streetfront, rather than as requiring such an approach. It seems to me however, that the provision requires activation in a particular way. Whilst the subject proposal does not achieve those things in the way contemplated by PO2(b), as was submitted for the co-respondent:

“In any event, with respect to PO2(b) the subject proposal will provide a highly active frontage to Archer Street and Coronation Drive. It will be active in the sense that the subject land will be activated by significant residential population coming and going, by visitors enjoying the open space and river connection and Middenbury, and by cyclists, pedestrians and runners moving through the subject land. This activation will give the site a vibrant public sense of place. The site with its resident population, bicycle path, footways, public spaces and access to the river will indeed be highly active and this will be obvious from the external street frontages.

There will be significant levels of activity on the proposed bicycle path through the site which will provide a safe and convenient means of access through the subject land for cyclists.

Pedestrian movement through the site will also be safe and convenient providing connection to the Toowong major centre core or, indeed, the open space along the river.

The combination of the pedestrian and cyclist activity will serve to provide a high degree of activation along the internal ‘arcade’ and the frontages of the site.”<sup>136</sup>

[349] The towers are obviously not of human scale, nor are they located on the street frontage. Rather, the street frontage would be relatively open and would not be at all pedestrian unfriendly. It would invite pedestrians to enter the site for the publicly accessible open space, the (human scale) Middenbury and the facilities otherwise to be offered on site.

[350] The proposal does find itself in some level of conflict with PO2, but exhibits significant merit in the way that it addresses the streetscape.

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<sup>136</sup> Exhibit 24, p 5, para 8.

(vi) Building transition

[351] It was submitted, for the appellant, that the proposal finds itself in conflict with CP2014 by making no attempt to step down the height of the towers to provide transition.

[352] Reference was made, in the outline of submissions for the appellant, to PO3 and A03 of MDC. PO3 provides, relevantly, as follows:

“PO3 Development for a large style multiple dwelling contributes to neighbourhood structure and integrates with the existing neighbourhood through:

...

- (e) building height and setback transitions to an adjoining existing dwelling house and areas of lower density residential development.”

[353] The acceptable outcome provides that a development on a site of this size will be in accordance with a structure plan. The issue about the absence of a formal structure plan has already been dealt with.

[354] It may be accepted that the building height of the proposed towers proximate to the appellant’s property do not feature a step-down or transition. It must be remembered however, that a significant height differential is to be expected, given that the appellant’s land, which is within the High Density Residential Zone, adjoins land in the Major Centre Zone and the Toowong Centre Precinct. The potential amenity impacts on the appellant’s land have been examined and found not to be undue. Further, PO3 of the MDC does not form part of the appellant’s central provisions.

[355] PO21 of the CMUC Code, which is one of the appellant’s central provisions provides relevantly, as follows:

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| <p><b>PO 21</b><br/>Development... where sharing a common boundary with... premises in the low-medium density residential zone... provides buildings that are reduced in bulk and form to provide a transitional form of a compatible scale which protects the amenity of lower density residential</p> | <p><b>AO 21.1</b><br/>Development... where sharing a common boundary with premises in the low – medium density residential zone... provides a building height transition which complies with:<br/>...<br/>(b) the following:</p> |
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| <p>areas bordering centre or mixed use areas by:</p> <ul style="list-style-type: none"> <li>(a) stepping down in height and scale;</li> <li>(b) minimising impacts including those from overlooking and visual dominance;</li> <li>(c) maintaining adequate levels of natural ventilation and light penetration to a habitable room, balcony and private open space.</li> </ul> | <ul style="list-style-type: none"> <li>(i) the building height within 10m of the common boundary is no more than 1 storey greater than the maximum acceptable outcome for building height on the adjoining site;</li> <li>(ii) the building height within 20m of the common boundary is no more than 2 storeys greater than the maximum acceptable outcome for building height on the adjoining site;</li> <li>(i) all structures, except adjoining boundary fences, set back a minimum of 4m from the common boundary;</li> <li>(ii) an acoustic and visual screen fence of 2 m height is provided on the common boundary.</li> </ul> |
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[356] Insofar as the subject site is concerned, PO21 applies only to transition to the adjoining property at 20 Archer Street which, unlike the appellant's property, is in the Low-Medium Density Residential (up to 3 storeys) Zone. The tower closest to 20 Archer Street does not step down in height and scale towards the boundary with the adjoining property but that property:

- (i) is owned by the co-respondent;
- (ii) has, notwithstanding its zoning, been approved for a 9 storey development, and
- (iii) will not be unduly affected by the proposal.

[357] The extent of conflict by reason of not adopting building height transition in the towers is not accompanied by an unacceptable adverse amenity impact. The conflict is not grave.<sup>137</sup>

(vii) Centre legibility

[358] It has already been observed that the proposed towers are higher than would reasonably be expected and indeed, would rival the height of development likely to be developed in Sherwood Road, which is intended to accommodate the tallest buildings in the precinct in order to improve legibility, and reinforce the primacy of the centre and its role as a transit oriented centre.

[359] The advantages of adopting a more vertical building form, in terms of providing a landmark and freeing up open space at ground level, have already been referred to. It is relevant to also consider however, the extent to which development of the height proposed on the subject site would affect the purposes for which the TANP provides that Sherwood Road it to accommodate the tallest buildings.

[360] Whilst the three towers on the subject site might rival the height of a particular future building or buildings in Sherwood Road, it must be remembered that it can reasonably be expected that sub precinct (a) generally may be developed, in accordance with the maximum building height table, to 25 storeys on sites of 1500m<sup>2</sup> or greater. It would be reasonable to expect a cluster of tall buildings, reinforcing that sub precinct, within the core of the centre. I accept Mr Chenoweth's evidence to the effect that the proposed development of three residential towers on the banks of the Brisbane River will not detract from the Toowong Centre but will instead reinforce it and act as a marker.<sup>138</sup> Similarly, Mr McGowan said as follows:<sup>139</sup>

“Mr McGowan believes that if and when there is an intensification of taller buildings along Sherwood Road (whether or not they are taller than the proposal) the intensification itself (along with other ques such as architectural expression, streetscape, building grain, activation, etc.) can be employed to establish the primacy of the Sherwood Road and the centre of the precinct. While the proposed development, as a prominent landmark development, will always attract the attention of people travelling through or around the locality, that does not mean it will upset any desired structure for the area. To draw a comparison, it

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<sup>137</sup> T10-16, 17 (Perkins).

<sup>138</sup> Exhibit 15, p 9.

<sup>139</sup> Exhibit 7, p 19.

would be clear that, although there are a number of tall and identifiable buildings around the periphery of the CBD (1 Williams Street, Meriton Towers at Herschel Street (Infinity) and Ivory Street (Soleil)) there is a primary core (Queen Street and Reddacliff Place) that is expressed through visually accessible open space, a legible street hierarchy, a finer grain of built form, architectural expression and so on.”

[361] Mr Schomburgk<sup>140</sup> saw the proposal as consistent with the reasons, stated in OO(4)(d) for the intent that Sherwood Road accommodate the tallest buildings in the precinct (i.e. to improve legibility and reinforce the primacy of the centre and its role as a transit-orientated centre).

[362] I am satisfied that the height of the buildings proposed on the subject site would not undermine the objectives sought to be achieved by the provisions of the TANP which state that Sherwood Road accommodates the tallest buildings in the precinct.

(viii) Quality of the public open space

[363] Although the proportion of the site to be given over to public open space is unquestionably generous, Mr Richards was critical of its quality. In that regard he:

- (i) suggested that the open space would have a private rather than public character;
- (ii) suggested that it featured too little vegetation and shelter and would not maintain the “natural quality” of the waterfront experience, as required by PO11(e) of the TANP Code;
- (iii) took issue with the amount and configuration of open space provided at the river’s edge, and
- (iv) questioned the ease of access, across the site to the river, including by reference to the need to access different levels.

[364] In that regard:

- (i) the contention that the open space would be perceived to be of a private character is, I am satisfied, without substance. The open space is to be retained in private ownership and control, but:

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<sup>140</sup> T9-4.

- A. titling arrangements will not likely be on the minds of those who would otherwise be attracted to use the space;
- B. conditions of any approval will require the area to be publicly accessible. The respondent's approval package included conditions<sup>141</sup> requiring the provision and maintenance of "unimpeded and safe 24-hour public access through the subject site, including urban common areas..." and the installation and management of a suitable system of lighting, to operate from dusk to dawn, within all areas where the public may gain access.;
- C. the nature and extent of the space, its openness, its permeability and its accessibility from the public streets, the public cycleway through the site and the provision of a range of facilities, for the public's use and enjoyment, make it unlikely that potential users would perceive it as having a private character. As Mr McGowan said:<sup>142</sup>

"Further, in response to Mr Richards' concerns about the publicness of the open space, the open spaces designated as public open spaces will, in my view, clearly feel public as they will be associated with the more public aspects of the site (Middenbury and the proposed café, the street edge and the heritage listed fig trees, and the river). Further, the site will be highly activated by the significant residential population coming and going to the site, by visitors enjoying the open space and river connection, and by cyclists, pedestrians and runners moving through the site. This activation will give the site a vibrant public sense of place."

Similarly, as Mr Chenoweth attested<sup>143</sup>

"I think it will be very much a public site given that the – and I think the public open space will

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<sup>141</sup> See Conditions 6, 10, 72 and 77.

<sup>142</sup> Exhibit 24, para 8.

<sup>143</sup> T2-13.

be usable – be usable because it'll have a – it will attract use through having the heritage building, through having cafés and outdoor restaurants. It'll have the river front; it will have a sculpture garden; it will have a bikeway going through it so everything about the areas designated as public open space, I think, will be successfully used by people and successfully distinguished from those areas that are private open space. So I think they've achieved the primary aim of dealing with public open space associated with residential buildings which is getting that demarcation clear as to what's private and what's public and I think they've done that very well here.”

D. Mr Richards' concerns that the relationship of the towers with the open space will lead to confusion as to the public nature of the open space, or make people uncomfortable about its use by, for example, residents of the villas claiming “some dominion” over the open space between their villas and the river is, I am satisfied, unfounded. I accept Mr Peabody's evidence that there is no incompatibility.<sup>144</sup> Mr McGowan's evidence was that the proposal:<sup>145</sup>

“...has generally located private spaces above the public ground plane (on top of the podiums). The mere fact that a residential tower adjoins an open space does not, in my view, confine that open space as private and belonging to the tower, as implied by Mr Richards. In instance where the line between public and private space may be less well defined, the distinction can be made sharper by a range of detailed design responses.”

(ii) the use of predominately hard-surfaced open space should hardly be a surprise given OO(3)(n) of the TANP Code which requires development to enhance the public realm and

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<sup>144</sup> T5-72.

<sup>145</sup> Exhibit 24, para 9,

pedestrian cycle movement with a network of parks, arcades and plazas (e.g. predominately hard surfaced open space used by the general public). In any event, as Mr McGowan pointed out in his further statement of evidence,<sup>146</sup> the proposal incorporates a mix of hard stand plaza areas, turfed park spaces, garden beds, as well as numerous feature trees and screen trees throughout the site. Insofar as the natural quality of the waterfront experience is concerned, the proposal is to protect and enhance the riparian vegetation.<sup>147</sup>

- (iii) It was submitted, for the appellant, that the towers are too close to the riverfront and ought to have left more of that area for open space. As has already been noted, complaint was also made, in the context of the heritage issues, about the alleged lack of respect for Middenbury which is towards the south-western part of the site, further removed from the river's edge. AO11(a) refers to the provision of a "riverside" open space area of a minimum of 3000m<sup>2</sup> and with a minimum Brisbane River frontage of 40m. That is an acceptable outcome only. It is perhaps debatable whether that envisages all of the 3000m<sup>2</sup> to be on the River's edge. I note that AO11(d) by comparison, refers to public access to the entire Brisbane River "frontage" for a minimum width of 12m (into which there is some incursion in the case of the proposal). In any event, so far as the performance outcome is concerned, it is evident that the proposal provides an extensive amount of public open space on this riverside site, including substantial open space adjacent to the river's edge. The public open space otherwise appropriately and beneficially extends to other areas of the site including around the retained, refurbished and repurposed Middenbury and the sculpture park.
- (iv) the design approach deals with the differing levels of the site and would achieve a sense of permeability through the open

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<sup>146</sup> Exhibit 24, p 4.

<sup>147</sup> See exhibit 1, p 109, area 13.

space areas of the site. As was pointed out for the appellant a pedestrian using the north-western access on Coronation Drive, will not see all of the open space at the levels down to the river's edge. Such a person would however, be aware of the location of the river, see the opportunity to walk towards it, using the generous open space and will have a sense of connectivity.<sup>148</sup> Traversing the open space does involve negotiating level changes. The appellant focused on the route from the north-western Coronation Drive access which involves, amongst other things, the use of stairs and a section which is not open air. I accept however, Mr Peabody's evidence that the proposal represents a clever solution which integrates the levels and still brings you from Coronation Drive or Archer Street up to Middenbury and then back down to the river frontage<sup>149</sup> and Mr McGowan's assessment<sup>150</sup> that "despite substantial variation in topography across the site, the design has managed to maintain a sense of openness and connectivity between the variety of open spaces." I also note that the proposal includes equitable access arrangements for those with disabilities.

[365] The appellant made a point that not all of the open space may be able to be traversed (e.g. areas of planting or where there is riparian vegetation to retained) but, as McGowan pointed out,<sup>151</sup> that is not uncommon for areas of public open space.

[366] The public open space is, I am satisfied, generous in terms of quantity and appropriate in terms of configuration and treatment. I accept Mr McGowan's assessment,<sup>152</sup> that the open space contribution would be a significant resource for the Toowong community and that the public access to the river will be a significant attraction to many and effectively enhance the amenity in the entire core precinct, by reconnecting Toowong with the river.

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<sup>148</sup> T5-72, 73.

<sup>149</sup> T5-75.

<sup>150</sup> Exhibit 24, p 9.

<sup>151</sup> T2-99.

<sup>152</sup> Exhibit 24, para 7.

(ix) Visual amenity, character and integration with the centre and surrounding land

- [367] The experts called by the respondent and co-respondent saw benefit in the distinctive, striking, bold and interesting form of the proposal. Mr Richards, on the other hand, saw it as underlining his view that the development does not fit with its context. Further, he saw it as a private residential development beside the centre, rather than an extension of the centre onto the subject site.
- [368] The proposed towers are for residential uses, but the site will not be, and will not be perceived to be, a private residential development divorced from the centre. The ample public open space, with its improvements and facilities, including the repurposed Middenbury, with its café/restaurant and information facilities, the sculpture park, the café closer to the riverfront and the extension of the bicycle way through the subject site will, as Mr McGowan stated, clearly give a public feel to much of the site and achieve vibrancy and activity across the site. The extent to which the development, through its permeability, offers a physical connection between the Toowong Centre and the Brisbane River has already been noted. As Mr McKerrell pointed out however, it will also establish a visual connection with the centre to the Brisbane River, while the towers will provide a visual reference to the other principal sectors of the major centre at High Street and Sherwood Road.<sup>153</sup>
- [369] Insofar as an integration with the surrounding area is concerned, it has already been noted that there is no call for physical integration (such as a shared vehicular access way or the like) with the appellant's property, which is used as a domestic dwelling house, or to physically integrate with any other property. The proposal does however, for the reasons discussed, open up the site and integrate it with the surrounding area in terms of providing visual, cyclist and pedestrian access into and through the site.
- [370] Insofar as the character of the area more generally is concerned, it must be remembered that Toowong is undergoing a rapid transformation consistently with the planning intent for that area. Its built form is increasingly being characterised by high rise contemporary developments. The proposal will have a distinctive design, and be, as Mr McKerrell attested,<sup>154</sup> refreshing in terms of apartment building design, but that does not make it inconsistent with the emerging and intended character of the area.

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<sup>153</sup> T4-93.

<sup>154</sup> T4-44.

In that regard I prefer the opinions of Mr Chenoweth and Mr McGowan to those of Mr McDonald, who gave too little weight to the changing character of the area and the potential for the proposal to fit with that intended and emerging character.

(x) Site planning generally

[371] The merits of the proposal are not limited to the architectural quality of the particular towers. As Mr McKerrell and Mr Peabody emphasised, the proposal involves not only innovative architecture but also meritorious master planning across the site.

[372] The site is one which challenges the designer to respond to a range of opportunities, constraints and town planning aspirations. These include dealing with the site, its topography (including changes of levels), road frontages and context, whilst realising the potential of the site to achieve efficient development and rising to the challenge of the site's landmark and catalyst designations in a way which provides a prominent visual marker of architectural excellence, respects Middenbury and its view corridor to the river, retains the fig trees adjacent to Coronation Drive, does not place an undue burden on infrastructure or create undue traffic impacts offsite, accommodates the onsite vehicular movements and car parking without them dominating the ground level, extends the bicentennial bicycle path through the site, makes a positive contribution to the public realm, connects the centre to the river, provides activity and vibrancy and does not unduly adversely impact on its neighbours.

[373] As Mr Peabody said, the design approach:

- opens up the site to the Coronation Drive and Archer Street frontages, offering a welcome relief to the existing hard edged built form;
- establishes a new connection, both physical and visual, between the Toowong Centre and the Brisbane River;
- establishes a new dynamic public open space;
- provides a landscape context for Middenbury which can be viewed, accessed and enjoyed by the greater community.

[374] In the course of his testimony he said:<sup>155</sup>

“At the ground plain, in my opinion, this is just an outstanding solution to an incredible site. The fact that, as I've noted, you know, approximately 50 per

cent is handed over to public open space. Beforehand - and I've lived in Brisbane for 20 years - but I was not aware Middenbury existed as a building. Obviously, it was enveloped by the ABC site. Obviously the ABC site has been demolished, or the buildings have been demolished and suddenly that Middenbury is there for the public to actually perceive and understand and now participate in and use and that, I think, is an excellent gesture of the site which, I suggest, may not be achievable if you took a podium-and-tower-type approach. I would be concerned that it would become - the site would become more congested whereas, at the moment, it's incredibly permeable. You - standing on Coronation Drive and, your Honour, I understand you would have had a site visit, but standing on Coronation Drive you don't see the river. You see the river if you look north along Coronation Drive and you know the river's there. I think anybody who's in that destination knows that the river's there but what this site offers is an opportunity that there's a sense of permeability and there's a connect with across the river to the bank on the West End. You see through the site. You know that there's a vast distance there and, even when you imagine where the towers will be, that permeability will exist and it leads your eye and it leads your, you know, connectivity to the river and to the river edge and the riverscape which includes the West End and the buildings on the other side and I think that's just a fantastic solution. It's - I described - I'm not too sure who to, but I describe this as almost like a - a gap in your smile, insofar as in a reverse way. This site offers - by being so open, it's actually like a gap along the - the built form edges of Coronation Drive, which, in itself, is - and to the - to the north of the site, you know, you've got the - the fences of the existing residences and the like and to the south you've got, you know, a higher-density sort of podiums building up to the new building that's under construction at the moment, which was referenced to earlier, the Aspect site, and - which is at that node of the - the intersection and so this - the - the - the approach of the design, in my mind, has really offered an opportunity, just a breathing space, a bit of elbow room, and - and to that extent is attributed to by, I guess, the vision of the design to create slender, taller towers and give away a lot more land to open space, public and private open space."

[375] Further, the proposal deals appropriately with its context and its neighbours and indeed, the other matters referred to above. Mr McKerrell's conclusions,<sup>156</sup> which I accept, include:

- (b) the master planning of the site has been skilfully executed with the creation of a substantial landscape to showcase the refurbished Middenbury (with extension) by introducing a conveniently located and accessible bikeway and pedestrian access;
- (c) the master planning has introduced attractive public and private access pathways around the site and to the river's edge to capture important vista;
- (d) the siting of the three residential tower structures is thoughtfully conceived so as to minimise adverse effects from shadowing and overlooking onto the neighbouring properties;

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<sup>156</sup> Exhibit 6, para 10.1.

- (e) the development further showcases the striking tower designs with sculptural organic forms commencing at the ground level and rising to the rooftops with considered and innovative architectural design elements to complete the composition.

I consider that the height of each tower is acceptable and the architectural composition formed by the three towers on the site complimented by the emphasis given to Middenbury and the generous public landscaped areas, visitors and access to the river, to be an exciting and complimentary development which will create considerable interest and support.

...

- (g) the proposal has been thoughtfully planned for residents, visitors and service vehicles so as to remove the parking utility areas from public view.”

[376] In his testimony, Mr McKerrell said:<sup>157</sup>

“Well, your Honour, I think the authors have done an excellent job in developing a scheme for this site – a proposal for the site. I’m really impressed with the way that they’ve handled the master planning, the way that they dealt with those issues I mentioned on Friday such as the access points, the dealing with the access to the river, the sensitivity and the respect for Middenbury, the open space to the site and dealing with the whole concept of the site, and that is not to include a podium but to open it up so it’s a landscaped site to get a greater vision into the site to actually open up Middenbury to the public, to actually invite the public into the site. And then, as well as that, I think they’ve done a very good job with the heights of the buildings and the association back to the major centre. Together with that I think that they’ve set out to do and have done very well putting this site as a landmark development. They have striking buildings; they are prominent buildings and I think that they will stay prominent whilst the Toowong Centre is, as we know it, at the 15-storey mark according to the code. As well as the architecture, as I mentioned before, I was really impressed to see that architecture. It’s a totally different approach to what we had been adopting for apartment buildings and I thought that was refreshing. I thought that was going to be a good catalyst insofar as resurrecting development and making it more exciting to develop in this precinct just outside of the city frame. So I have lots of – I can see lots of merit in the scheme. I think it’s a quality scheme. It’s – I can’t compliment it enough, your Honour. I think it’s been a difficult site to deal with and they’ve done an extremely good job...”

He described the architectural design and site planning response in relative terms as “top of the class”.<sup>158</sup>

<sup>157</sup> T5-46, 47, see also T4-87, 88.

<sup>158</sup> T5-47.

[377] I agree with Mr Peabody and Mr McKerrell that there is substantial merit in the way in which the designers have responded to the diverse opportunities, constraints and aspirations of the site in its context.

The conflict and grounds

[378] There was debate about the nature and extent of any conflict with CP2014. These reasons have discussed the central provisions, alleged conflict with which the appellant relies upon, in the context of the matters to which they relate. It is unnecessary to catalogue the findings which have been made and which are recorded earlier.

[379] I am satisfied that the proposal does not conflict with the Strategic Framework. Indeed, for the reasons given earlier, the proposal supports some aspects of the Strategic Framework.

[380] I am also satisfied that, notwithstanding the large number of provisions with which the appellant alleges conflict, there are many provisions of CP2014 with which the proposal is either consistent or positively supports or achieves. Those provisions have been discussed in the course of these reasons.

[381] I am also satisfied however, for the reasons which have been given, that although the conflict is not as great as was alleged by the appellant, there is a level of conflict with a number of provisions, or parts of provisions of relevance to the assessment of the subject application. The level of conflict is, I accept, significant.

[382] I have found that the proposed towers are of a height which exceeds reasonable expectations,<sup>159</sup> that the built form does not have an active built form edge to the streetscape or at ground level (in the case of the towers) and the development does not contain a balanced mix of uses or include a significant component of non-residential centre activities. It has insufficient non-residential uses in order to avoid a finding of some conflict on that account.

[383] Those matters are influenced by the adoption of a tower-in-plaza design response, rather than the tower-over-podium approach. As was submitted for the respondent

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<sup>159</sup> Although I have also found that there is an economic and community need – see OO(3)(h).

and co-respondent however, the appellant's design response serves useful purposes, in the public interest, in the present context.

[384] The decision to adopt a more vertical (higher and relatively slender) design response does not speak of over-development. Rather it is a different configuration, which results in much greater space at ground level than would otherwise be expected. Site cover is much lower than what would reasonably be expected. Further, the tapered base of the towers has the effect of further opening up the site at ground level, even within the building footprint.

[385] The co-respondent has not only achieved a highly open site at ground level, but proposes to turn much of that to the public benefit, by designating it as public open space, with improvements to be incorporated. This open space:

- (i) is much greater in area than could be expected, given the acceptable outcomes in the TANP;
- (ii) is to be improved with pedestrian and cyclepaths, open spaces, landscaped areas and a sculpture park in what will be an area of high amenity;
- (iii) makes use of the generous public open space to make a substantial positive contribution to the public realm;
- (iv) is to be complemented, at ground level, by the retained, refurbished and repurposed Middenbury (with its publicly accessible interpretive centre, café and restaurant) and a separate café closer to the river's edge, for use by the public;
- (v) will create an attractive and pedestrian friendly environment and a high degree of permeability through the site and to the river's edge, and
- (vi) will be active and vibrant.

[386] Further:

- (i) the relative openness of the proposed development, at ground level, assists in achieving a response to Middenbury which respects its prominence and provides an appropriate setting for that heritage place, and

- (ii) the greater permeability through the site, to the river's edge, assists in extending the centre, physically and visually, to the river.

[387] The adoption of a more vertical built form, in conjunction with the site location, building siting and adoption of a bold, interesting, architectural design of the highest quality by a world renowned architect also capitalises on the potential to achieve city-wide prominence as a visual reference.

[388] For the reasons discussed earlier, it is difficult to see how the community would be substantially advantaged by the provision of substantially more non-residential uses, particularly if those were provided, as the appellant would have it, in a podium spread further across the site. That is only likely to reduce the scope for providing the beneficial public space which is offered by the subject proposal. Further, for the reasons previously discussed:

- (i) The need for further retail or commercial uses at this time is not particularly great and can be accommodated elsewhere, particularly in those parts of the centre which TANP provides should be the focus of such uses.
- (ii) The proposal will otherwise generate activity and vibrancy.
- (iii) The proposal will otherwise improve the streetscape, and produce a pedestrian friendly environment.
- (iv) Would support the transit-orientated nature of the centre, locating a significant resident population within the centre proximate to a range of transport facilities

[389] The respects in which the proposal is otherwise in conflict with the planning scheme have been discussed. Any conflict is not accompanied by an undue effect. The amenity impacts of the co-respondent's proposal have been assessed and found to be acceptable.

[390] Senior counsel for the appellant accepted<sup>160</sup> that the quality of the architecture is relevant, although he submitted that it should not carry the day.

[391] Economic and community need have been discussed earlier. For the reasons given, there is a need for the development potential of the site to be realised and a need for

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<sup>160</sup> T12-36.

the development proposed. The development would also be the instigator of further activity within the centre.

[392] The merits of the proposal generally have been discussed earlier and are substantial.

[393] On balance, I am satisfied that there are sufficient grounds, in the public interest, to approve the proposed development notwithstanding conflict with the planning scheme.