

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *The Planning Place Pty Ltd v Brisbane City Council* [2018] QPEC 62

PARTIES: **THE PLANNING PLACE PTY LTD (ACN 113 440 752)**
(Appellant)

v

BRISBANE CITY COUNCIL
(Respondent)

FILE NO/S: 1675 of 2017

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 21 December 2018

DELIVERED AT: Brisbane

HEARING DATE: 11, 12 and 13 December 2018

JUDGE: Kefford DCJ

ORDER: **It is ordered that:**

- 1. By 4pm on 8 February 2019, the Respondent is to deliver a draft suite of conditions to the Appellant.**
- 2. The appeal be listed for review at 9.15 am on 1 March 2019.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where the appellant seeks a development permit for reconfiguration of one lot into two lots and a development permit for material change of use and preliminary approval for building work for a dwelling house on a small lot and a dwelling house – where the application is code assessable – where the Council refused the development application – whether the proposed development’s height and rear setbacks comply with the assessment benchmarks – whether compliance can be achieved by imposing development conditions – whether the amendments to City Plan 2014 should be given significant weight – whether the court should approve in the event of non-compliance with the benchmarks

LEGISLATION: *Planning Act 2016 (Qld)*, s 45, s 59, s 60
Planning and Environment Court Act 2016 (Qld), s 43, s 45

CASES:	<i>Jakel Pty Ltd v Brisbane City Council & Anor</i> [2018] QPEC 21, cited
	<i>Klinkert v Brisbane City Council</i> [2018] QPEC 30, approved
	<i>Lake Maroona Pty Ltd v Gladstone Regional Council</i> [2017] QPEC 25; (2017) LGERA 166, approved
COUNSEL:	K Wylie for the Appellant
	J Ware for the Respondent
SOLICITORS:	Ronan Fox Lawyers for the Appellant
	Brisbane City Legal Practice for the Respondent

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Introduction

- [1] On 30 June 2017, the Appellant lodged a code assessable development application to facilitate its desire to redevelop a corner block at 19 Rupert Street, Windsor for two dwelling houses, each on its own lot. The application was considered properly made on 12 July 2017.
- [2] On 13 April 2018, Brisbane City Council (“*the Council*”) refused the development application. This appeal is against that decision.

- [3] At the commencement of the hearing, the dispute between the parties related to whether the height and rear setbacks of the proposed development complied with the assessment benchmarks or could be conditioned to comply. The Council's concern with respect to the rear setbacks related to the privacy afforded to the adjoining neighbour at 42 Flower Street. By the end of the hearing, it was conceded that the privacy issue could be addressed by conditions. The only outstanding issue relates to the height of the proposed dwelling houses.¹

The subject site and the surrounding area

- [4] The subject site has an area of 883 square metres. It has a frontage of approximately 19 metres to Rupert Street and a frontage of approximately 39 metres to Flower Street, each of which sit lower in the terrain than the subject site. There is a fall of about seven metres from the northwest corner to the southeast corner of the subject site.
- [5] The subject site currently contains a one to two storey brick dwelling house that sits proud above the adjoining streets on a podium formed by retaining walls.
- [6] The subject site is approximately 250 metres from the dedicated pedestrian access to the bus station that forms part of the northern busway situated on Lutwyche Road.
- [7] The area of Windsor in which the subject site is located is characterised by its undulating terrain.
- [8] Streets in the local area of interest in this case include Flower Street, Rupert Street, Bowser Street and Parsons Street. Parsons Street provides access for pedestrians from Flower Street to Flaherty Street and on to Lutwyche Road and the Truro Street bus station.
- [9] In the immediate vicinity of the subject site, Flower Street and Rupert Street are characterised by the varying slope of each street along its length and the difference in elevation and slope of the land that adjoins each street on its opposite sides.
- [10] Flower Street provides the only means of access to the subject site. It has a defining influence on impressions of the local area's visual character. Existing development on the eastern side of Flower Street is generally set down in the landscape as the terrain falls away to the east, whereas development on the western side is elevated above the road on platforms with retaining walls along the road frontage.
- [11] As is explained by Mr Curtis and was confirmed by the site inspection, the exposed retaining walls along the elevated frontages in Flower Street are particularly prominent and generally accentuate the overall visual bulk of the development on the elevated sites. This is a distinguishing element of the immediate vicinity of the subject site that reinforces its character as a terraced hill.
- [12] Rupert Street is a dead end street that runs off Flower Street to the west. The terrain falls away to the south of Rupert Street.

¹ During the hearing, Mr Buhmann gave evidence that he believed each of the alleged non-compliances with respect to setbacks and privacy impacts could be appropriately dealt with by way of conditions. In its final submissions, the Council indicated that, in light of the evidence of the expert it had retained, Mr Buhmann, it no longer relied on setbacks and impacts on privacy as a ground of refusal.

- [13] Mr Curtis, the visual amenity expert retained by the Appellant, catalogues the built form in the local area and in the immediate vicinity of the subject site. Of particular interest in this appeal is the built form on 12 surrounding dwelling house sites within 35 metres of the subject site frontage.² The town planners also considered the characteristics of these sites and the built form on them.
- [14] Directly adjoining the site to the north, on the western side of Flower Street, is the dwelling house at 42 Flower Street. Although there was some uncertainty as to whether the dwelling house was two or three-storeys as defined by City Plan, there was agreement that it appears as a three-storey dwelling house. It has a building height of approximately 6.9 metres but is elevated above the subject site on a terraced building platform comprised of retaining walls built to the common boundary with the subject site and along the Flower Street frontage. The wall on the Flower Street road frontage presents as a stark, blank wall of considerable height. As Mr Curtis notes, the height and finish of the retaining walls to the building platform complement the form of the dwelling house, resulting in an integrated appearance that accentuates the apparent scale and bulk of that development. There is no apparent stepping down of the built form of 42 Flower Street from its high point adjacent 18 Bowser Street to its low point adjacent the subject site.³
- [15] Further north along Flower Street, at 18 Bowser Street, there is a two-storey dwelling house with a height of eight metres. The house is in close proximity to the frontage. It sits atop a sizeable retaining wall that wraps around the corner from Flower Street into Bowser Street. The retained building platform contains “*basements*”, which are exposed along the Flower Street frontage with garage doors addressing the street. As is explained by Mr Curtis, this results in ambiguity in the apparent height in storeys of the development, as well as exaggerates its overall scale. The topography of 18 Bowser Street falls away from a high point adjacent 42 Flower Street. However, the house on that corner block presents to Flower Street as a house with a similar relative level to that of 42 Flower Street.⁴
- [16] On the eastern and lower side of Flower Street, at 1 and 3 Parsons Street, are character dwelling houses that step down the slope. At 1 Parsons Street, there is a two-storey house of 8 metres in height. It presents to Parsons Street as a one-storey dwelling house but presents as two storeys to its secondary frontage in Flower Street. A high hedge partially screens the house from Flower Street. Next door to it is 3 Parsons Street, which also presents to Parsons Street as a one-storey dwelling house. It is eight metres in height and two-storeys at the rear.
- [17] Travelling further south down Flower Street, at 27 Flower Street, is a multiple dwelling. It is opposite the subject site but is set back approximately 30 metres from the Flower Street frontage, behind an open car park. It is not relevant when considering the prevailing height of dwelling houses in the street and local area.
- [18] Further south still is a large dwelling house located on six underlying parcels, three of which front Flower Street. The house is two storeys and 13.8 metres in height. The dwelling house is set back approximately 21 metres from the Flower Street

² A note in a number of the relevant performance outcomes refer to this metric.

³ This is confirmed by the relative levels in the survey appended to the Supplementary Joint Experts Report Town Planning.

⁴ This is confirmed by the relative levels in the survey appended to the Supplementary Joint Experts Report Town Planning.

frontage. It is set behind landscaped gardens that partially screen it from the Flower Street frontage. Most of the built form is located on the three rear lots.

- [19] As is observed by Mr Curtis, these properties on the eastern side of Flower Street create an open character. That is an abrupt spatial contrast to the existing development on the western side of Flower Street, which is elevated above the street on retaining walls and has a “*walling effect*” to the street’s spatial character.
- [20] Crossing to the western side of Flower Street again and travelling two lots to the south of the subject site is 10 Flower Street. It adjoins 4 Rupert Street. An existing contemporary dwelling house on an elevated building platform improves it. It has a height of 8.5 metres and appears as a two-storey dwelling house with a projecting basement. As is explained by Mr Curtis, the site falls to the south, exposing the “*basement*” as a storey.
- [21] On the southwest corner of Flower Street and Rupert Street is a vacant lot. This lot, being 4 Rupert Street, has the benefit of two different development approvals for a dwelling house. The 2016 approval presents to both Rupert Street and Flower Street as a three-storey dwelling house. The more recent approval, granted on 12 July 2018, is for a dwelling house that presents as two storeys to Rupert Street but as three storeys to Flower Street due to a partial protrusion of a basement more than one metre above natural ground level. It is more than 9.5 metres in height. The most recently approved dwelling house design, like other existing dwelling houses on the western side of Flower Street, provides a terraced building platform that includes a car park.
- [22] To the west of 4 Rupert Street, at 8 Rupert Street, is a two-storey dwelling house of 7.5 metres height. It presents to Rupert Street as a single storey.
- [23] Further along Rupert Street, on the southern side, is 10 and 12 Rupert Street where two dwelling houses are currently under construction. They are 8.9 and 9.3 metres in height respectively. They are each three storeys, but due to the steep topography present as two storeys to Rupert Street.
- [24] Moving to the end of the cul-de-sac on the northern side of Rupert Street, at 28 Rupert Street is a two-storey dwelling house with a height of less than 7.5 metres. It presents to Rupert Street as a single storey house with secondary structures including a garage. The garage dominates the frontage, but a high wall largely screens the house from view.
- [25] Immediately adjoining the subject site to the west and north-west, at 23 Rupert Street, is the hilltop heritage place “*Kirkston*”. It is a large two-storey masonry residence of about 13.5 metres in height. The heritage site also contains a small freestanding structure in its northeast corner. Adjacent the southern frontage is a recently constructed secondary dwelling, swimming pool and small carport. Mature vegetation on the heritage site screens “*Kirkston*” from the subject site and the southern Rupert Street frontage.
- [26] Mr Curtis aptly describes the existing streetscapes visible along Rupert Street and Flower Street as characterised by the following attributes:
- (a) the varying slope of each street along its length;

- (b) the difference in elevation and slope of the land that adjoins each street on its opposite sides;
- (c) the height of the adjoining retaining walls built to the property frontages along the western side of Flower Street and along the subject site's frontage to Rupert Street;
- (d) the approximate 65 metre "gap" in the built form's edge to the streetscape along the eastern side of Flower Street opposite the subject site. The gap extends from the house on the southern corner of Flower Street and Parsons Street. This gap is accentuated by the visual contrast to the retaining walls on the opposite western side of the street;
- (e) the variation in width of the existing frontage setbacks and the extent of landscaping within the setback;
- (f) the variation in the existing frontage widths and lot sizes;
- (g) the variation in the existing building heights, which appear to range from approximately 7 metres to almost 14 metres; and
- (h) the effect of the sloping terrain upon the apparent heights of buildings when viewed from the street.

The proposed development

- [27] The Appellant seeks a development permit for reconfiguration of the existing lot into two proposed lots. Proposed lot 1 will adjoin the heritage place on the western side of the subject site and have an area of approximately 357 square metres. Proposed lot 2 will be located on the corner of Rupert Street and Flower Street. It will have an approximate site area of 508 square metres.
- [28] The Appellant also seeks a development permit for a material change of use and a preliminary approval for building work to facilitate a small lot dwelling house on proposed lot 1 and a dwelling house on proposed lot 2.
- [29] The focus of the appeal was that aspect of the development application that sought a development permit for a material change of use.
- [30] Each dwelling house will be a three-storey building above a basement carpark partially excavated into the slope. The basements will be visible along the Rupert Street frontage. The basement of proposed lot 2 will also be partially visible along the Flower Street frontage due to the slope of the subject site.
- [31] The proposed dwelling houses are of a similar size and share a similar contemporary geometric appearance with a flat roof form. Each will be setback 1 metre from their common adjoining boundary.
- [32] Both dwelling houses have façades addressing Rupert Street. Lot 2 has a second longer façade addressing Flower Street.
- [33] As Mr Curtis described, and the 3D renderings show, the dwelling houses will each present to Rupert Street as a podium or base supporting a two-storey dwelling house above. The podium form on proposed lot 2 will wrap the corner and be part of the

streetscape that extends along Flower Street to the north, where high podium retaining walls are a defining feature. However, unlike those podiums to the north along the western side of Flower Street, the built form on proposed lot 2 will contain differentiations that separate the podium component from the two storeys above, fragmenting the form so it does not read as a singular mass.

City Plan 2014

- [34] Under Brisbane City Plan 2014 (“*City Plan*”), the starting point for the determination of the relevant category of development assessment is the zone or zone precinct that applies to the premises.⁵ However, a precinct of a zone, a neighbourhood plan or an overlay can change the category of development assessment.
- [35] The subject site is included in the Low-medium density residential zone. The making of a material change of use for a dwelling house is accepted development in that zone.
- [36] In the Low-medium density residential zone, land may be included in one of three precincts, namely the 2 storey mix zone precinct, the 2 or 3 storey mix zone precinct and the up to 3 storeys zone precinct. The subject site is in the 2 or 3 storey mix zone precinct. The inclusion of the land in that precinct does not change the applicable level of assessment for the making of a material change of use.
- [37] The subject site is also included in the Lutwyche Road corridor neighbourhood plan area. It is not within a relevant precinct or sub-precinct of the Lutwyche Road corridor neighbourhood plan. As such, the inclusion of the land in the Lutwyche Road corridor neighbourhood plan area does not change the category of development assessment in this case.
- [38] The subject site is also subject to the Dwelling house character overlay. It is this overlay that required the development application be subject to code assessment. The requirement is triggered because the material change of use aspect of the development application involves a new dwelling house in the Low-medium density residential zone that does not comply with all acceptable outcomes in the Dwelling house (small lot) code and the Dwelling house code.
- [39] The relevant assessment benchmarks for that aspect of the development application that sought a material change of use include the Dwelling house (small lot) code, the Dwelling house code, the Low-medium density residential zone code and the Lutwyche Road corridor neighbourhood plan code.

The decision framework

- [40] The appeal was filed on 9 May 2018, after the commencement of the *Planning Act 2016* (Qld). As such, the applicable statutory assessment regime is that under the *Planning Act 2016*.⁶
- [41] The appeal proceeds by way of hearing anew⁷ and it is for the Appellant to establish that the appeal should be upheld.⁸

⁵ See s 5.3.1 of City Plan.

⁶ See analysis in *Jakel Pty Ltd v Brisbane City Council & Anor* [2018] QPEC 21, [16] – [89].

⁷ *Planning and Environment Court Act 2016* (Qld), s 43.

⁸ *Planning and Environment Court Act 2016* (Qld), s 45.

- [42] Section 45(3) of the *Planning Act 2016* requires that code assessment must be carried out only:
- (a) against the assessment benchmarks in a categorising instrument for the development; and
 - (b) having regard to any matters prescribed by regulation.
- [43] Section 45(6) of the *Planning Act 2016* stipulates that the assessment is to be carried out against the assessment benchmark in effect when the application was properly made. However, s 46 of the *Planning and Environment Court Act 2016* and s 45(7) of the *Planning Act 2016* permits the court to give the weight it considers appropriate, in the circumstances, to an amendment to the assessment benchmarks.
- [44] The matters prescribed by the *Planning Regulation 2016* include any development approval for, and any lawful use of, the premises or adjacent premises and the common material. The common material is defined to include all the material received by the assessment manager before the application is decided, including submissions it has accepted, regardless of whether they are properly made or not, and any advice or comment about the application a person gives to the assessment manager.
- [45] The decision must be based on that assessment.⁹ Pursuant to s 60 of the *Planning Act 2016*, after carrying out the assessment, this court:
- (a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development;
 - (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks;
 - (c) may impose development conditions on an approval; and
 - (d) may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance cannot be achieved by imposing development conditions.
- [46] At the time the development application was properly made, version 7.0/2016 of City Plan applied. Since then, the Council has amended City Plan. It seeks to rely on some of its amendments to the Low-medium density residential zone code, the Dwelling house (small lot) code and the Dwelling house code. The relevant amendments were introduced in version 8.0/2016 of City Plan and continue to have effect in the current version.

⁹ *Planning Act 2016*, s 59(3).

The issues in dispute

- [47] In accordance with paragraph 24 of Practice Direction No. 1 of 2018, an agreed list of disputed issues was tendered on the first morning of the hearing. It raises the following two matters for determination by this court.
- (a) Do the proposed dwelling houses comply with, or can they be conditioned to comply with, applicable assessment benchmarks in force at the date the development application was properly made?
 - (b) If the proposed dwelling houses do not comply with the applicable assessment benchmarks, what weight, if any, is to be given to the amendments to City Plan and should the discretion conferred by s 60(2)(b) of the *Planning Act 2016* be exercised in the Appellant's favour?
- [48] In the event that I am satisfied that the proposed dwelling houses comply with, or can be conditioned to comply with, applicable assessment benchmarks in force at the date the development application was properly made, both parties accept that the application must be approved. In this respect, although the findings of His Honour Judge Williamson QC's decision in *Klinkert v Brisbane City Council* [2018] QPEC 30 at [79] to [97] about the operation of s 60 of the *Planning Act 2016* are not binding, the Council confirmed that it does not suggest that His Honour was wrong. I have considered His Honour's comprehensive analysis. I agree with it.
- [49] During the hearing, the parties also confirmed that there are no allegations of non-compliance with any of the applicable assessment benchmarks with respect to that part of the application that seeks a development permit for reconfiguration of a lot. Accordingly, this court must approve the application to the extent it seeks the reconfiguration of a lot approval. The issues in dispute only affect the outcome for the proposed material change of use and building work.

Does the development comply with the applicable assessment benchmarks?

- [50] The benchmarks that the Council relies on to support a finding of unacceptable development height are:
- (a) overall outcome (3)(j) of the Lutwyche Road corridor neighbourhood plan code;
 - (b) overall outcomes (5)(a), (5)(b) and (7)(d) of the Low-medium density residential zone code;
 - (c) performance outcome PO2 of the Dwelling house (small lot) code; and
 - (d) performance outcome PO2(a) of the Dwelling house code.
- [51] The Council's case with respect to the alleged non-compliances with the Low-medium density residential zone code and the Lutwyche Road corridor neighbourhood plan code are premised on its contention that the three-storey height of the proposed dwelling houses on proposed lots 1 and 2 do not comply with the Dwelling house (small lot) code and the Dwelling house code respectively. It is therefore convenient to consider those provisions first.

Does the development comply with the Dwelling house (small lot) code and the Dwelling house code?

[52] Performance outcome PO2 of the Dwelling house (small lot) code states:

Performance outcomes	Acceptable outcomes
<p>PO2 Development is of a bulk and scale that: (a) is consistent with and complements the built form and front boundary setbacks prevailing in the street and local area; (b) does not create overbearing development for adjoining dwelling houses and their private open space; (c) does not impact on the amenity and privacy of residents in adjoining dwelling houses; (d) does not result in the loss of significant views or outlook of adjoining residents; (e) provides for natural light, sunlight and breezes.</p> <p>Note—In interpreting the building height elements of built form in PO2(a) ‘prevailing in the street and local area’ means the building height of more than 50% of the dwelling houses in the same zone as the subject site and within 35m of any point of the street frontage of the subject site.</p>	<p>AO2.1 Development is contained within the building envelope for the site, created by applying: (a) the acceptable outcome for maximum building height; (b) the acceptable outcome for front, rear and side boundary setbacks; (c) acceptable outcomes for built to boundary walls in so far as these determine the building envelope. Refer to <u>Figure a</u> for examples of the building envelope for a dwelling house on a small lot.</p> <p>Note—The building envelope is not the developable area or building extent, but a three-dimensional envelope that limits the extent of a building in any direction.</p> <p>Note—This acceptable outcome can be demonstrated by preparing a building envelope plan, elevations and sections.</p> <p>AO2.2 Development in the: (a) Low density residential zone, Character residential zone, 2 storey mix zone precinct of the Low-medium density residential zone, 2 or 3 storey mix zone precinct of the Low-medium density residential zone, Rural residential zone, Environmental management zone, Rural zone or Emerging community zone results in a maximum building height of 7.5m above ground level at side and rear walls, increasing at no more than 30 degrees to a maximum building height of 9.5m above ground level and: (i) 2 storeys; or (ii) 1 storey if the development also includes a space that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above that contains only a bathroom, shower room, laundry, water closet, or other sanitary compartment; (b) ...</p> <p>Note—The lowest point forming part of the maximum building height identified in AO2.2(a) being 7.5m or AO2.4(b) being 9.5m is determined by the applicable setback identified in AO2.4(a) or AO2.4(c), but not AO2.4(b) in this code.</p> <p>Editor’s note—For example, the point at which the maximum building height of 7.5m above ground (as per AO2.2(a) provides) is determined to be setback 1m if the adjoining lot has a dwelling house with habitable spaces setback from the shared boundary. If the same adjoining dwelling had a built to the side boundary non-habitable garage (as provided for by AO2.4(b)), the point at which the maximum building height of 7.5m above ground is measured from would remain 1m.</p>

	Editor's note—In interpretation of what maximum building height is provided for by AO2.2(a) or (b), the width of a subject lot will determine the maximum building height by way of the point either where 30° planes rising from opposite boundaries meet or the maximum building height identified in AO2.2 (a) or (b), whichever is the lesser is the maximum building height.
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(emphasis added to reflect the allegation of non-compliance)

[53] Performance outcome PO2(a) of the Dwelling house code states:

Performance outcomes	Acceptable outcomes
<p>PO2 Development has a building height that: (a) is consistent with the building height of dwelling houses prevailing in the immediate vicinity; (b) does not unduly overshadow adjoining dwelling houses and their associated private open space in terms of access to sunlight and daylight.</p> <p>Note—In interpreting PO2, the term 'prevailing in the immediate vicinity' means the building height of more than 50% of the dwelling houses in the same zone as the subject site and within 35m of any point of the street frontage of the subject site.</p>	<p>AO2 Development in the: (a) Low density residential zone, Character residential zone, 2 storey mix zone precinct of the Low-medium density residential zone, 2 or 3 storey mix zone precinct of the Low-medium density residential zone, Rural residential zone, Environmental management zone, Rural zone or Emerging community zone results in a maximum building height of 9.5m and: (i) 2 storeys; or (ii) 1 storey if the development also includes a space that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above that contains only a bathroom, shower room, laundry, water closet, or other sanitary compartment; (b) ...</p> <p>Editor's note—This acceptable outcome is only for the maximum building height. Side boundary setbacks are provided in accordance with the Queensland Development Code; which vary according to the height of the building.</p>

(emphasis added to reflect the allegation of non-compliance)

[54] As is noted by the Council, AO2.2 of the Dwelling house (small lot) code and AO2 of the Dwelling house code refer to dwelling houses in a range of zones, including the Low-medium density residential zone and, more particularly, the 2 or 3 storey mix zone precinct. It sets a measurable standard for dwelling houses in those zones and precincts.

[55] There is no dispute that the height of the proposed lot 1 dwelling house does not comply with acceptable outcome AO2.1 or AO2.2 of the Dwelling house (small lot) code. A significant proportion of the proposed dwelling house exceeds the maximum height of 7.5 metres at side and rear walls. It is also a three-storey building.

[56] The proposed lot 2 dwelling house is less than 9.5 metres but is three storeys. It does not comply with acceptable outcome AO2 of the Dwelling house code.

[57] The failure to comply with the respective measurable standards in the acceptable outcomes is not determinative. Compliance with the respective codes can be achieved by complying with the purpose, overall outcomes and performance outcomes of the

code.¹⁰ In each case, compliance with the code is dependent on compliance with performance outcome PO2.

- [58] Performance outcome PO2 of the Dwelling house (small lot) code relevantly requires that the bulk and scale of the proposed lot 1 dwelling house be of a bulk and scale that is consistent with the built form prevailing in the street and local area. Performance outcome PO2 of the Dwelling house code is similar but focuses only on the height of the dwelling houses prevailing in the immediate vicinity, not their bulk and scale and overall built form.

What is the prevailing building height?

- [59] The note to each performance outcome provides guidance on determining the building height prevailing in the street and local area and the immediate vicinity.
- [60] According to the note in both codes, the relevant sites for comparison purposes are those within 35 metres of any point of the street frontage of the subject site. The town planners identified 15 sites, other than the subject site, that met this criterion.
- [61] Of the 15 relevant sites, one contains a multiple dwelling and another a dual occupancy. They are not relevant to a determination of the prevailing building height. Further, three of the sites contain just one dwelling house. As such, there are 12 dwelling houses that are relevant.
- [62] Building height is a defined term in City Plan. It means:
- (a) the vertical distance, measured in metres, between the ground level of the building and the highest point on the roof of the building, other than a point that is part of an aerial, chimney, flagpole or load bearing antenna; or
 - (b) the number of storeys in the building above ground level.
- [63] City Plan also defines each of ground level and storey. The application of the definitions means the building height as defined does not necessarily accord with the apparent height when viewed from the street.
- [64] With respect to each of the relevant 12 dwelling houses, the Supplementary Joint Expert Report Town Planning recorded the following information:

Address	Number of storeys	Height in metres ¹¹	Relative levels of the highest point
42 Flower Street	3	6.9	55.1
18 Bowser Street	2	8.0	55.0
1 Parsons Street	2	8.0	47.6
3 Parsons Street	2	8.0	46.3
15-23 Flower Street	2	13.8	54.7
10 Flower Street	2	8.5	45.0

¹⁰ See paragraph **Error! Reference source not found.** above.

¹¹ The height in metres was determined by reference to a survey undertaken by Michael Jolly Surveys to ascertain the building roof level of each of the dwellings. This was compared to the natural surface calculated from contours obtained from Brisbane City Council BiMap 2002.

Address	Number of storeys	Height in metres ¹¹	Relative levels of the highest point
4 Rupert Street	3	>9.5 ¹²	
8 Rupert Street	2	7.5	47.1
10 Rupert Street	3	8.9	49.6
12 Rupert Street	3	9.3	49.4
28 Rupert Street	2	<7.5	
23 Rupert Street	2	13.5	63.2

[65] A submission lodged by the owner of 42 Flower Street records that a site survey of their house confirms it to have a height of 6.97 metres above defined ground level. The survey provided shows that the relative level of the highest point of the house is 55.64. The submission says that the house is only two storeys as the existing garage structure was excavated into the natural ground line and does not constitute an additional storey.

[66] It is clear that there is a prevailing building height of two storeys.

[67] In terms of the building height measured in metres, the Council submits that more than 50 per cent of the dwelling houses are lower in vertical height than the proposed development. The Council notes Mr Ovenden's acceptance, during cross-examination, of its assertion that the prevailing building height in the locality is 8.5 metres. It is not apparent how the Council determined that the prevailing building height in metres was 8.5 metres given the disparity in building heights as outlined in the table above.

[68] There is no prevailing building height in metres.

Proposed lot 1 - Is the bulk and scale of the dwelling house consistent with the built form prevailing in the street and local area?

[69] The Council submits there is clear and significant non-compliance with Performance outcome PO2 of the Dwelling house (small lot) code. It submits the proposed lot 1 dwelling house is of a bulk and scale that is not consistent with the built form prevailing in the street and local area.

[70] The Council does not otherwise allege a failure to comply with performance outcome PO2. It accepts that the bulk and scale of the proposed lot 1 dwelling house complies, or could be conditioned to comply, with the requirements to:

- (a) not create overbearing development for adjoining dwelling houses and their private open space;
- (b) not impact on the amenity and privacy of residents in adjoining dwelling houses;
- (c) not result in the loss of significant views or outlook of adjoining residents; and
- (d) provides for natural light, sunlight and breezes.

¹² Measured from approved plans.

- [71] Further, the Council’s complaint about the bulk and scale of the proposed lot 1 dwelling house is limited to its height. It says this is an important dimension relevant to the “*bulk and scale*” of the proposed lot 1 dwelling house.
- [72] I accept that the height of the proposed lot 1 dwelling house is a relevant integer when considering whether the house is of a bulk and scale that is consistent with the built form prevailing in the street and local area.
- [73] The height of the proposed lot 1 dwelling house is 3 storeys and approximately 9.5 metres. It is clear that the proposed dwelling houses exceed the prevailing two-storey building height.
- [74] The Council submits that a building height that exceeds that prevailing in the local area in number of levels and vertical height is not in agreement or accord with the prevailing height. However, in closing addresses, the Council could not articulate how a lack of numerical accord with the prevailing building height in storeys demonstrated that the bulk and scale of the proposed lot 1 dwelling house was not consistent with the built form prevailing in the street and local area.
- [75] The term “*consistent*” in a town planning context was considered by Her Honour Judge Bowskill QC (as she then was) in *Lake Maroona Pty Ltd v Gladstone Regional Council*.¹³ Her Honour observed:¹⁴

“[16] The ordinary meaning of the word “consistency”, as reflected in the Macquarie Dictionary, is “agreement, harmony, or compatibility”. The definition in the Oxford English Dictionary is to the same effect (the “quality, state, or fact of being consistent; agreement, harmony, compatibility (*with* something, *of* things, or *of* one thing *with* another”). “Consistent” is relevantly defined in the former as “agreeing or accordant; compatible; not self-opposed or self-contradictory” and, similarly, in the latter as “agreeing or according in substance or form; congruous, compatible”.

[17] In New South Wales there are two lines of authority as to the meaning of consistent, in the context of planning instruments requiring the opinion by a consent authority that a proposed development be “consistent with the zone objectives”.

[18] One stems from a decision of Pearlman CJ in *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21 at 27 where her Honour said: “The guiding principle, then, is that a development will be generally consistent with the objectives if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.”

[19] The other stems from the decision of Bignold J in *Dem Gillespies v Warringah Council* (2002) 124 LGERA 147 at [65] to [74], in which the phrase was interpreted, in accordance with what was said to be its natural and ordinary meaning, to mean “compatible” or “capable of existing together in harmony”. Bignold J observed that “antipathetic” suggests a much stronger and narrower connotation than “inconsistent” and is thus not a true synonym of the term (at [73]).

¹³ [2017] QPEC 25; (2017) LGERA 166, 171-2 [14]-[26].

¹⁴ At 171

[20] A brief survey of decisions of the New South Wales Land and Environment Court since *Gillespies* indicates different approaches have been taken by different members of that court.

[21] However, I note that in *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190 at [45] Biscoe J agreed with the *Gillespies* approach, noting the definition of “consistent” in the Macquarie Dictionary as above. In *Friends of Malua Bay Inc v Perkins* (2014) 203 LGERA 14 Craig J also expressed a preference for the *Gillespies* approach, saying, at [42] to [43]:

“... In *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185 Clarke JA stated that, in the context of the provisions there being considered, the paragraph was intended to prohibit ‘antipathetic development’. Subsequently, that meaning was attributed to provisions of local environmental plans requiring development to be ‘consistent’ with identified objectives (*Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21; *Mackenzie v Warringah Council* [2002] NSWLEC 131 at [98] and the cases there cited). More recently, the ordinary meaning of ‘consistent’ has been applied to such provisions. In *Gillespies v Warringah Council* (2002) 124 LGERA 147, Bignold J considered the meaning of the word in the context of planning instruments requiring the opinion by a consent authority that a proposed development be ‘consistent with the zone objectives’. In that context, his Honour considered at [70] that the word ‘consistent’ should assume its ordinary meaning and should not be confined to the notion of a proposed development that is ‘not antipathetic’ to a zone objective.

According to the *Macquarie Dictionary* (online) that meaning is: ‘1. agreeing or accordant; compatible; not self-opposed or selfcontradictory.’ It seems to me that, in the present context, it is appropriate to regard ‘consistent’ as being synonymous with ‘compatible’ (*Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190 at [45]).”

...

[24] I prefer the approach taken in *Gillespies*, and followed in the cases referred to at paragraph [21] above. I am unable to discern any reason why a narrower meaning, than the natural and ordinary meaning of the word “consistency”, ought to be adopted in construing s 388(1)(a).

[25] It seems to me that meaning is, even if only subtly, different from the notion of “conflict”. In this regard, I respectfully adopt the observation of Sackville J in *Flanagan v Australian Prudential Regulation Authority* (2004) 138 FCR 286 at [47] that “**there is a certain elasticity about the expression**” “**consistency ... with**”.

[26] In my view, the approach to be taken, under s 388(1)(a), in considering the consistency of the approval with current laws and policies, is to consider whether the approved development is compatible with, in the sense of being capable of existing in harmony with, current laws and policies. This may well be a more flexible concept than the concept of whether the development conflicts with the planning scheme, the consideration required in the primary assessment phase. Development may still be compatible, even if at variance with some aspect of the planning scheme.”

(emphasis added, footnotes omitted)

- [76] Although Her Honour Judge Bowskill QC was considering the term “*consistency*” in a different statutory context, the observations are nonetheless applicable and apposite to this appeal.
- [77] In my view, the requirement of performance outcome PO2 of the Dwelling house (small lot) codes will be satisfied if the bulk and scale of the proposed lot 1 dwelling house is “*compatible with, in the sense of being capable of existing in harmony with*” the built form in the street and local area. This is a matter of impression that is not only informed by the height of the building, but also the existing setting and context of a particular area, including its topography and the presentation of the built form.
- [78] Mr Buhmann, the town planner retained by the Council, opined that the heritage buildings at 23 Rupert Street and 15-23 Flower Street are outliers in this exercise. They sit on large allotments, setback from the main viewing corridors of Rupert Street and Flower Street. They are well screened with vegetation. This diminishes their current presence within the streetscape.
- [79] Mr Buhmann also considered the dwelling house at 28 Rupert Street to be of less relevance as it is outside the viewing corridors and lacks a direct relationship with the subject site.
- [80] Mr Buhmann regarded the balance of the allotments in the street and local area as presenting a consistent built form to the streetscape. He considers that all of the dwellings respond to the topography and present as one or two storey dwellings to the street. To the extent that there are three storey houses, he considers they respond to a sloping site, with the third storey being at the rear of the building where it is less imposing within the streetscape.
- [81] Mr Buhmann considered the majority of dwelling houses in the street and local area would be perceived as one or two storey dwelling houses, as compared to the proposed lot 1 dwelling house that he says presents as four storeys to Rupert Street.
- [82] In my view, Mr Buhmann’s analysis ignores important defining attributes of the built form prevailing in the street and local area. As is revealed by the description of the surrounding area in paragraphs [7] to [26] above, while the relevant dwelling houses in the local area are generally of one or two storeys in height, those located on the high side of the street are generally elevated well above the street on retaining walls. The relative levels of the high points of the houses in the table at paragraph [64] above highlights this important contextual matter.
- [83] Mr Buhmann’s description of the bulk and scale of the proposed lot 1 dwelling house also ignores important design details. As I have already noted in paragraph [33] above, the proposed lot 1 dwelling house will present to Rupert Street as a podium or base supporting a two-storey dwelling house above. Further, as is explained by Mr Curtis, the Rupert Street façade has a relatively simple understated appearance comprised of full height glazed walls extending across the full width of each building and setback behind terraces with glazed balustrades. The extensive use of glass provides transparency and depth to the façade, which mitigates its visual mass and solidity. The recess of the garage door beneath the pool terrace mitigates its visual impact and provides increased articulation to the basement along the Rupert Street frontage. The proposed terraced landscaping will also soften the appearance of the basement.

- [84] In addition, as is noted by Mr Ovenden, although the proposed lot 1 dwelling house will appear as 9.5 metres to Rupert Street, with a recessed third storey, most of the properties opposite are of a visually similar built form scale, albeit sitting in their context of a lower part of the landform of the immediate area. Their built form at the lower slope elevation is of similar proportions to that proposed on the subject site.
- [85] The Council submits that the proposed development is not “*consistent with*” the built form in the street and local area, because there is not another site in the street or local area that has two dwelling houses on top of a continuous platform, or where the dwelling house has four tiers, or where the dwelling house leans into the hill as it submits the dwelling house on proposed lot 2 does. The submission is unpersuasive. The criterion does not require the built form to have a built form or a bulk and scale that is the same as that of other dwelling houses. It is sufficient if it is consistent or compatible with the built form prevailing in the street and local area.
- [86] To the extent that performance outcome PO2 does not call for an assessment of the consistency of the proposed development from the streetscape alone, it is relevant that the proposed lot 1 dwelling house will be shielded from Flower Street by the adjoining proposed lot 2 dwelling house. It will also sit below the built form of “*Kirkston*”. Although “*Kirkston*” is currently largely screened behind vegetation on the heritage place, the Rupert Street elevation demonstrates that, should the vegetation be reduced, the proposed development will be subordinate to “*Kirkstone*” in height and scale. A section taken through the adjoining sites records that “*Kirkstone*” sits on a terrace with a relative level of 50.5. In comparison, the relative level of the roof of the proposed development is 54.5 and the top of the third level is 51.8. Accordingly, the proposed lot 1 dwelling house will sit at a much lower profile than the heritage property to the west. I also accept the evidence of Mr Ovenden that the proposed lot 1 dwelling house will appear as two storeys from the adjoining property to the north.
- [87] Accordingly, I am satisfied that the proposed development complies with performance outcome PO2 of the Dwelling house (small lot) code.

Proposed lot 2 - Is the building height of the dwelling house consistent with the building height prevailing in the immediate vicinity?

- [88] The Council submits there is clear and significant non-compliance with performance outcome PO2 of the Dwelling house code. It submits the proposed lot 2 dwelling house is of a building height that is not consistent with the building height prevailing in the immediate vicinity. The Council does not otherwise allege non-compliance with the performance outcome. It accepts that the proposed development complies with the requirement that its building height not unduly overshadow adjoining dwelling houses and their associated private open space in terms of access to sunlight and daylight.
- [89] Paragraphs [59] to [68] above consider the building height prevailing in the immediate vicinity.
- [90] The Council submits that performance outcome PO2 of the Dwelling house code requires consistency with both the prevailing height in metres and the prevailing height in storeys. As is noted in paragraph [62] above, the definition of building height refers to the vertical height or the number of storeys. Section 1.3.3(2) of City Plan provides that the use of punctuation “; *or*” means either or both options apply. In support of its submission the Council also points to the acceptable outcome, which

requires the building height to be no more than 9.5 metres and no more than two storeys. The Council submits this context requires the note to performance outcome PO2 to be read as requiring application of both limbs of the definition of height.

- [91] I do not accept this submission. There is nothing about the context that requires the use of both limbs of the definition. In some areas of Brisbane, the use of both limbs may provide appropriate guidance. However, having regard to the matters outlined in paragraphs [60] to [68] above, in the immediate vicinity of the subject site there is no prevailing building height in metres.
- [92] The height of the proposed lot 2 dwelling house is 3 storeys and approximately 9.5 metres. It is clear that the proposed dwelling house exceeds the prevailing two-storey building height.
- [93] The Council submits that the non-compliance with the performance outcome is clear and significant. This is because the proposed development exceeds the maximum number of storeys by 50 per cent, which it regards as significant numerically. It also submits that the vertical height requirement is not met by a “*not insubstantial*” amount, meaning both metrics of the height definition are not met. It also submits the conflict is significant having regard to the context, where the acceptable outcome specifically sets a two-storey requirement for a dwelling house in the 2 or 3 storey mix zone precinct of the Low-medium density residential zone.
- [94] These submissions ignore that the performance outcome calls for an assessment of the consistency of the building height, which involves a certain elasticity to the consideration. The criterion does not call for a purely numerical or quantitative approach.
- [95] Although the height of the proposed lot 2 dwelling house is three storeys, I consider it to be consistent with the building height prevailing in the area. The relative height of the proposal and the adjoining dwelling house at 42 Flower Street are comparable. It is also comparable to the relative height of the dwelling house at 18 Bowser Street. Those dwelling houses do not appear to step down the slope.
- [96] Further, although the prevailing building height is two storeys, on the high side of the street the houses are elevated above the road on platforms comprised of retaining walls built to the road frontage. These platforms add to the apparent height of the existing dwelling houses on the high side of the street.
- [97] Mr Curtis opines that the differentiation in the appearance of the retaining wall for the proposed lot 2 dwelling house from the two storeys above it also visually separates those two storeys from the base. Towards the southern end of the proposed lot 2 dwelling, level 3 is setback from the corner, creating a stepped silhouette that reflects the slope of the terrain and its increasing elevation towards the hilltop. The setback of level 2, behind the swimming pool and away from the Rupert Street frontage, reinforces the stepped silhouette of the building envelope when viewed from Flower Street and assists to integrate the overall building form into the hilltop topography. Mr Curtis’ explanation is well demonstrated by the street view 3D renderings. I accept his evidence.
- [98] In my view, these features of the design contribute to the consistency or compatibility of the building height with the height of the buildings in the immediate vicinity. The consistency in building height is also aided by the common attributes with 42 Flower

Street that are evident in what Mr Curtis describes as “*the horizontal proportional emphasis of the built form and façade elements*”.

- [99] Having regard to the above reasons, I am satisfied that the proposed development complies with performance outcome PO2 of the Dwelling house code.

Low-medium density residential zone code

- [100] Overall outcomes (5)(a), (5)(b) and (7)(d) of the Low-medium density residential zone code state:

“(5) Development form overall outcomes are:

- (a) **Development for a residential building** occurs on appropriately sized and configured lots and **is of a height**, bulk, scale and form **which is tailored to its specific location and to the characteristics of the site within the Low-medium density residential zone** and the relevant zone precinct and reinforces a distinctive subtropical character of low to low-medium rise buildings with a landscaped streetscape and recreation areas.

- (b) **Development provides for a building to have a building height and bulk that responds to:**

(i) **the nature of adjoining dwellings;**

(ii) **site characteristics, including** the shape, frontage, size, orientation, **slope**, and nature of adjoining dwellings.

(7) 2 or 3 storey mix zone precinct overall outcomes are:

- (d) **Development design, height and setbacks provide a sensitive transition at the edge of the site to an adjoining dwelling house or land in a lower density zone or zone precinct.”**

(emphasis added to reflect the allegation of non-compliance)

- [101] The characteristics of the site are described in paragraphs [4] to [6] above.

- [102] The Council advances four reasons it submits that the proposed dwelling houses are not of a height tailored to the specific location nor of a height that responds to the characteristics of the subject site. First, the Council submits the proposed houses do not respond to the sloping topography by stepping down the hill along either Rupert Street or Flower Street, apart from at the very southern edge of the proposed dwellings. Second, it submits the proposed development makes no attempt to reduce their bulk or height. It submits their apparent height is accentuated due to their prominent position, which is a product of the topography and the corner location of the subject site. Third, the Council submits that the proposed development appears as at least three storeys to Rupert Street, or potentially four, and as three storeys to Flower Street. Fourth, the proposed development would appear as one building apart from when standing directly in front of it in Rupert Street.

- [103] I do not accept that the proposed houses do not respond to the sloping topography other than at the very southern edge of the proposed dwelling houses, nor do I accept that the proposed development makes no attempt to reduce its bulk or height.

- [104] The corner site increases the visibility of the proposed lot 2 dwelling house. However, it also affords it a more open setting, which assists to mitigate the visual impact of the building bulk.

- [105] Further, in paragraphs [83], [86] and [97] above I describe some of the design features employed to respond to the topography and to reduce the apparent bulk and height of the proposed development. In addition to those features, the wet infinity edge to the swimming pool at level 2 on the corner of Flower Street and Rupert Street will complement the terraced landscaping of the retaining wall to ameliorate its appearance and provide an attractive corner feature. The accommodation of car parking within the elevated platform is also an efficient use of the subject site's terrain that avoids the introduction of excessively steep and long driveways.
- [106] I have already addressed the issue of the apparent height of the building.
- [107] The fourth reason advanced by the Council is also unpersuasive. The appearance of the proposed development as one building from oblique angles is not demonstrative of non-compliance with the Low-medium density residential zone code. It has no apparent relevance to the alleged non-compliances.
- [108] Further, and in any event, the submission should be examined against the background that the Council does not allege non-compliance with overall outcomes (7)(a) or (7)(b) of the Low-medium density residential zone code, which state:
- “(7) 2 or 3 storey mix zone precinct overall outcomes are:
- (a) Development comprises a mix of dwelling types including dwelling houses, 2 to 3 storey low rise multiple dwellings (such as apartments and row houses) and dual occupancy, to provide housing diversity and a sensitive transition both to adjoining sites that contain dwelling houses and between busier roads or centres and lower density residential areas.
- (b) Development of low-medium rise, low-medium density residential buildings:
- (i) are of no more than 2 storeys, or of no more than 3 storeys in height were located within easy walking distance of a public transport node;
- (ii) are located on suitable sites, in accessible locations, near to public transport and larger centres or key destinations.”
- [109] The town planners agreed that the subject site is located within easy distance of a public transport node. It is approximately 250 metres from the dedicated pedestrian access to the bus station that forms part of the northern busway situated on Lutwyche Road.
- [110] As such, the subject site has encouragement from these planning provisions for a two or three storey low-medium rise dual occupancy or multiple dwelling, which one may expect would have the appearance of a single building.
- [111] Accordingly, I am satisfied that the Appellant has demonstrated compliance with overall outcomes (5)(a) and (5)(b)(ii) of the Low-medium density residential zone code.
- [112] Having regard to the matters identified in paragraphs [14], [15], [25] and [33] above and for the reasons explained in paragraphs [86] and [95] to [98] above, I am also satisfied that the Appellant has demonstrated compliance with overall outcomes (5)(b)(i) and (7)(d) of the Low-medium density residential zone code.

- [113] In terms of overall outcome (7)(d), the absence of alleged impacts on privacy and amenity and the Council's acceptance that the proposed development will not be overbearing, involve unacceptable overlooking or involve an inappropriate setback reinforce that the development design, height and setbacks provide a sensitive transition at the edge of the subject site to the adjoining dwelling houses at 42 Flower Street and 23 Rupert Street.
- [114] Having regard to the above reasons, I am satisfied that the Appellant has demonstrated the proposed development complies, or could be conditioned to comply, with the Low-medium density residential zone code.

Lutwyche Road corridor neighbourhood plan code

- [115] Overall outcome (3)(j) of the Lutwyche Road corridor neighbourhood plan code states:

“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.”

(emphasis added to reflect the allegation of non-compliance)

- [116] The purpose of the Lutwyche Road corridor neighbourhood plan code is to provide finer grained planning at a local level. It provides specific guidance regarding the nature and type of development intended within a number of identified precincts and sub-precincts within the plan area. The provisions for each precinct provide guidance on the amenity and character intended for the precincts and sub-precincts and inform the community expectations for development within them.
- [117] The subject site is not within a relevant precinct or sub-precinct of the Lutwyche Road corridor neighbourhood plan. The generally applicable overall outcomes for the Lutwyche Road corridor neighbourhood plan area also provide no guidance on the intended amenity and character and community expectations for the subject site. Performance outcome PO1 is the only generally applicable performance outcome. There is no suggestion that the proposed development does not comply with it.
- [118] As such, whether the development is of a height consistent with the amenity and character and community expectations intended for the site will be informed by other provisions in City Plan.
- [119] During closing addresses the Council accepted that if the proposed development complies with the provisions in issue in the Low-medium density zone code, the Dwelling house (small lot) code and the Dwelling house code, it could fairly be regarded as of a height consistent with the amenity and character and community expectations intended for the site.
- [120] Having regard to the above reasons, I am satisfied that the Appellant has demonstrated the proposed development complies, or could be conditioned to comply, with the Lutwyche Road corridor neighbourhood plan code. It is of a height, scale and form that is consistent with the amenity and character and community expectations intended for the site.

Conclusion regarding compliance with the assessment benchmarks

- [121] I am satisfied that s 60(2)(a) of the *Planning Act 2016* is engaged in the circumstances of this case. The Appellant's application must be approved.

The discretionary considerations

- [122] Although some time was spent during the hearing on the issue of whether weight should be given to the amendments to City Plan, in light of my conclusion as to compliance with City Plan as it applied when the development application was made, it is unnecessary to determine these points. Nor is it necessary to consider whether the development application should be approved on discretionary grounds.

Conclusion

- [123] The Appellant has discharged the onus and the appeal will, in due course, be allowed.

- [124] I will give the parties an opportunity to formulate an agreed suite of conditions of approval and order as follows:

- (a) By 4 pm on 8 February 2019, the Respondent is to deliver a draft suite of conditions to the Appellant.
- (b) The appeal be listed for review at 9.15 am on 1 March 2019 either for the purpose of making final orders in the appeal or, failing agreement between the parties, for the purpose of making directions to facilitate the resolution of any dispute with respect to the suite of conditions of approval.