

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Walters & Ors v Brisbane City Council & Anor* [2019] QPEC  
3

PARTIES: **WALTERS & OTHERS**  
(Appellants)

v

**BRISBANE CITY COUNCIL**  
(Respondent)

AND

**AVEO GROUP LIMITED ACN 010 729 950**  
(Co-Respondent)

FILE NO/S: 239 of 2018

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING  
COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 18 February 2019

DELIVERED AT: Brisbane

HEARING DATE: 4, 5, 6 and 7 December 2018 and further written submissions  
on 29 January 2019

JUDGE: Kefford DCJ

ORDER: **It is ordered that:**

- 1. By 4pm on 13 March 2019, the Respondent is to deliver a draft suite of conditions to the other parties.**
- 2. The appeal be listed for review at 9.15 am on 27 March 2019.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where the co-respondent seeks a development permit for material change of use to redevelop its existing retirement facility with a new retirement facility – where the application is impact assessable – whether the Council approved the development application – where local residents oppose the development – whether the proposed development complies with assessment benchmarks with respect to height, bulk, scale and density – whether amendments to City Plan 2014 should be given significant weight – whether proposed amendments to City

Plan are complied with and should be given weight – whether need is a relevant matter that supports approval in this case – whether there are other sound town planning principles that are relevant matters that support approval

- LEGISLATION: *Planning Act 2016* (Qld), s 45, s 59, s 60  
*Planning and Environment Court Act 2016* (Qld), s 45  
*Planning Regulation 2016* (Qld), s 31
- CASES: *Bell v Brisbane City Council & Ors* [2018] QCA 84, distinguished  
*Body Corporate for Kelly’s Beach Resort v Burnett Shire Council & Ors* [2003] QPEC 23; [2003] QPELR 614, approved  
*Gracemere Surveying and Planning Consultants Pty Ltd v Peak Downs Shire Council & Anor* [2009] QCA 237; (2009) 175 LGERA 126, cited  
*Isgro v Gold Coast City Council* [2003] QPEC 2; [2003] QPELR 414, approved  
*Parmac Investments Pty Ltd v Brisbane City Council & Ors* [2018] QPEC 32, cited  
*PMM Group Pty Ltd v Noosa Shire Council* [2005] QPEC 79; [2006] QPELR 144, approved
- COUNSEL: K Wylie for the Appellants  
B Job QC for the Respondent  
C L Hughes QC and M Batty for the Co-Respondent
- SOLICITORS: QuDA for the Appellants  
City Legal – Brisbane City Council for the Respondent  
Cooper Grace Ward for the Co-Respondent

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## Introduction

- [1] Aveo Group Limited (“Aveo”) owns land at 24 Free Street, Newmarket that it presently uses for a retirement village. The current retirement village contains 74 independent living units that are approaching 30 years in age. Aveo seeks to redevelop the subject site with a retirement village containing 255 independent living units and associated facilities.
- [2] On 17 October 2016, to facilitate the redevelopment, Aveo made a development application seeking a development permit for material change of use.

- [3] On 18 December 2017, Brisbane City Council (“*the Council*”) approved the application subject to conditions.
- [4] On 23 January 2018, the Appellants appealed the Council’s decision. The Appellants are residents of the Newmarket area who had each lodged a submission opposing the proposed development. Their fundamental concern relates to the height, bulk, scale and density of the proposed development.

### **The nature of the Appellants’ concerns**

- [5] Mr Wylie articulated the nature and extent of the Appellants’ concerns in his closing address as follows:

“MR WYLIE: Thank you, your Honour. Your Honour, I’ll be relatively brief. The position of my clients has been explained fully within my written outline. **The appellants**, some of whom are here in the rear of the court today, **do not oppose a retirement facility being developed on this site**. In that sense, it’s a bit of an unusual case. It’s not a case of “not in my backyard”, people saying that development of any form should not be allowed to proceed on this site. They’ve lived with a retirement facility on the subject site since 1990. What **they simply say is that this development is too big, and in particular, the manner in which this development presents to Free Street and to Balun Park is too large**.

The case is a simple one, as I indicated. **It’s a good location for a retirement facility**. That’s why there are the number of concessions that have been identified by Mr Craven. Here, they’ve been recited at length, both in his joint report and also in my learned friend’s written submissions. **That’s why there’s no complaint about landscaping or insufficient articulation or screening or setbacks**.

HER HONOUR: **So there’s no complaint about insufficient articulation?**

MR WYLIE: No, your Honour. **There’s no complaint about it. This building could not be more articulated. For the same reason that there’s no issues that relate to hard amenity, such as lighting, privacy, noise and traffic. But none of those things overcome the bulk and scale of this development, your Honour**. The fact is that this development is and remains within the low density residential zone and **the scale of development of this form in this zone is simply [in]appropriate.**”

(emphasis added)

- [6] As was alluded to by Mr Wylie, the Appellants’ position is consistent with that of the only expert they retained, Mr Craven. Mr Craven was the only expert who suggested the proposed development is inappropriate. Despite holding that opinion, Mr Craven made a number of concessions about the acceptability of the proposed development.
- [7] Mr Craven accepted that the proposed development is largely consistent with the Strategic framework in Brisbane City Plan 2014 (“*City Plan*”)<sup>1</sup>. He acknowledged that it is intended that the City provide for a diverse range of housing forms to meet the needs of a growing population, and to cater for people at all stages of their lives. He acknowledged that there is a growing need for retirement facilities to cater for an ageing population.
- [8] Mr Craven considered the subject site suited to a retirement village development. His opinions were informed by the existence of a retirement village on the subject site

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<sup>1</sup> References to City Plan in this judgment are a reference to version 3.01 unless expressly stated otherwise or otherwise required by the context.

presently and the response in the Strategic framework provisions to the need for ageing-in-place accommodation. He agreed with Messrs Perkins and Gaskell, the town planners retained by Aveo and the Council respectively, that the proposed development will provide aged care accommodation that meets the needs of the community and minimises environmental impacts.

- [9] Mr Craven agreed with Messrs Perkins and Gaskell that the subject site's size and its proximity to Enoggera Road make it suitable for upgraded, diverse housing forms. He agreed that the proposed development is consistent with expectations created by the Low density residential zone code. The code anticipates the location of retirement facilities on appropriate sites. He accepted that the subject site's size and current use for a retirement village makes it eminently suited to such development.
- [10] Mr Craven candidly acknowledged many of the positive attributes of the proposed development. He accepted that the interface between the proposed development and residential development along the northern and eastern boundaries, including the Free Street frontage, includes landscaping and some lower rise buildings to provide for a transition in building height. He acknowledged that the transition to the Goring Street properties immediately north was largely well managed. This is achieved by a transition from two storeys nearest the shared boundary to three storeys about 20 metres away.
- [11] Mr Craven opined that the subject site is suited to development associated with an existing retirement village, and its redevelopment is within expectations created by City Plan. He accepted that an increase in density over and above that of the current retirement village is within expectations.
- [12] Mr Craven accepted that the physical amenity impacts of the proposed development could be managed. He acknowledged that the proposed development was unlikely to create unreasonable amenity impacts in terms of loss of views and shadowing.
- [13] With respect to contemporary planning, Mr Craven accepted that the proposed amendments to City Plan acknowledge the need for a more streamlined approach to extending or upgrading residential care and retirement facilities and catering for new facilities. The proposed amendments to City Plan recognise the need for such facilities.
- [14] In light of all these concessions, it is unsurprising that Mr Craven acknowledged that the subject site's attributes create an opportunity for more intensive development, and perhaps taller buildings, than clearly enabled in the Low density residential zone. Mr Craven opined that sections of the subject site towards its centre, and some sections along the park boundary, may be able to accommodate three storey buildings.

### **The subject site and the locality**

- [15] The subject site has an area of approximately 23 520 square metres. It has a frontage of 132 metres to Free Street and a frontage of 15 metres to Pine Street.
- [16] Along the northern boundary, the subject site directly adjoins four residences. Each is a high set weatherboard clad dwelling house with a corrugated iron roof. The dwelling houses are two storeys in height. A pathway and roadway separate the subject site from residential development to the east. Balun Park flanks the subject site's western and southern boundaries.

- [17] The subject site is part of a discrete area bounded by Enoggera Road to the east, and Enoggera Creek to the north, west and south. It adjoins a cul-de-sac at the end of Free Street. The area contains a range of residential zoned land, including land within the Low-medium density residential (2 or 3 storey mix) zone, the Low density residential zone and the Character residential zone.
- [18] Access to this discrete area can be obtained via an all turns signalised intersection at Davidson Street and Enoggera Road. There is also left-in left-out access into Thurlow Street from Enoggera Road.
- [19] More broadly, the subject site is located within five kilometres of the Brisbane CBD. It is within 350 metres of Kelvin Grove Road and approximately 750 metres from the closest shopping facilities, being Aldi at Kelvin Grove. There is a range of public transport options within approximately 650 metres of the subject site.
- [20] The area is not one with a homogenous residential character. Entering the area from Davidson Street, one is immediately struck by the presence of Saint Ambrose's school on the north-eastern corner of Davidson Street and Enoggera Road. It is zoned Community facilities. In addition, at the end of Thurlow Street, on the north-eastern corner of Free Street and Goring Street, is an aged care facility. The area also contains a significant amount of low-medium density zoned land. Having regard to the existence and configuration of institutional uses and multiple dwellings as well as detached dwellings, I accept the opinion of Mr Powell that the area has a mixed character.
- [21] Proximate the subject site, the locality's character is influenced by the existing use of the subject site for a dated retirement village containing 74 independent living units. Access to this village is currently via Free Street. The buildings within the village are of a brick and tile style of construction. They turn their back on the adjacent streets and the park, instead addressing the internal road network. The most extensive external presentation of the existing use is along the Free Street frontage.
- [22] On the first day of the hearing, I was taken on an inspection of the subject site and its surrounds. The inspection affirmed impressions I gained from photographic evidence that the existing retirement village presents to Free Street as an unsympathetic length of metal fencing over which one can observe little more than a seemingly continuous length of terracotta roof tiles. In combination, the built form layout, brick and tile style of construction and the unsympathetic metal fencing bears no resemblance to adjacent character housing. It does not meet contemporary standards for subtropical design.

### **The proposed development**

- [23] At the outset of the hearing, in an attempt to address concerns held by the Appellants, Aveo sought an order to permit the appeal to proceed on the basis of a minor change to its development application. There was no opposition to the order. I granted the order as I was satisfied that the proposed change was a minor change.

### The proposed use

- [24] The proposed development now seeks a development permit for a material change of use to facilitate a retirement facility with 225 independent living units and ancillary uses and facilities for its residents.

- [25] The ancillary uses and facilities include a gym; health and wellness centre with attached change-room; bathroom and multi-purpose area; kitchen and attached indoor communal dining area; lounge and games area; communal BBQ area; administration area for staff; communal eating area (café); cinema; business centre; meeting rooms and consulting rooms for visiting health professionals; greenhouse and planting areas; and a communal bus.
- [26] Access is proposed via an eight-metre-wide crossover on Free Street to the internal driveways and the carparking area. A secondary access point to Free Street is available for emergency vehicle access. It will be separated by bollards. No access is provided from Pine Street. The majority of carparking is located at the basement level. Pedestrian access is proposed via a number of entrances along Free Street.

### The building envelopes

- [27] The use is to be contained in eight separate buildings – one single-storey unit and seven multi-storey buildings of varying height.
- [28] The proposed buildings are to be constructed over the top of a single basement carpark that circumnavigates the subject site. The buildings have between two and four habitable floors.
- [29] The single-storey unit is an existing unit in the retirement village. It sits adjacent the Free Street frontage, on the northern side of the proposed access driveway. There is no opposition to its built form.
- [30] Building ILU A adjoins Free Street at the northern part of the subject site. It is approximately 60 metres in length. Its length is generally oriented east-west, parallel to the northern boundary. At its highest point, the building is three storeys, but the northern half steps down to two storeys. It is setback six metres from the proposed 3.75 metre offset or boundary realignment and 9.75 metres from the current boundary adjoining the Free Street frontage. It is setback six metres from the common boundary with the adjoining residences to the north.
- [31] Building 1 is to the immediate south of building ILU A. Its length is oriented in an east-west direction. It also adjoins Free Street. It is four storeys but the eastern part of the building steps down to three storeys. Building 1 is setback more than six metres from the proposed 3.75 metre offset or boundary realignment and more than 9.75 metres from the current boundary adjoining the Free Street frontage.
- [32] Building ILU D adjoins Free Street and the pathway to Balun Park. It is approximately 75 metres in length. Its length is oriented in a north-south direction, generally parallel to the Free Street frontage. At its highest point, the building is five storeys. At its northern end, the building is no more than four storeys. The additional storey at the southern end is a function of the design of the basement carpark on the southern one-third portion of the subject site. On that part of the subject site adjoining the pedestrian pathway to Balun Park and the park, the basement will extend more than one metre above ground level as defined in City Plan. As such, the protrusion is a storey for the purpose of City Plan. However, the building will present as no more than four storeys in height. This is because the basement protrusion will be disguised by a battered landscape edge. The eastern half of building ILU D is stepped down one storey, providing a transition in height towards the site boundary. That part of the building that adjoins Free Street is setback six metres from the proposed 3.75

metre offset or boundary realignment and 9.75 metres from the current boundary adjoining the Free Street frontage. That part of the building that adjoins the pathway to Balun Park is setback even further, between 10 and 16 metres.

- [33] Buildings ILU E and F adjoin the southern boundary of the subject site. They are each approximately 55 metres in length, with their longest axis parallel to the southern boundary. They have a height of five storeys as defined by City Plan. This is because the basement extends more than one metre above natural ground level. As with building ILU D, the basement protrusion will be disguised by a battered landscape edge. The apparent height of the building perceived by a casual observer will be four storeys. In addition, that part of building ILU E that adjoins the eastern boundary is stepped down one storey in height. Both buildings are setback a minimum of six metres from each of the eastern, southern and northern boundaries.
- [34] Buildings ILU C and B adjoin the western boundary of the subject site. Their length runs parallel to that boundary. Building ILU C is about 60 metres long. It has a height of between four and five storeys north to south. The change is due to the emerging basement level. Building ILU C is setback a minimum of six metres from the western boundary, but about half of its length is setback approximately 15 metres. Building ILU B is stepped in height from north to south with two, then three, then four storeys. It is setback a minimum of six metres from the northern boundary and approximately 15 metres from the western boundary.
- [35] The proposed buildings cover approximately 46 per cent of the subject site. The balance area is predominantly used for landscaping, access, and integrated open space. The total area of communal open space is 4 410 square metres or approximately 15 per cent of the subject site.

#### The design

- [36] The overall built form has been designed to complement the natural contours of the subject site, which fall away from the Free Street frontage towards the parkland and watercourse along the southern and western boundaries. Higher parts of the buildings are positioned along the southern and western boundaries, as well as centrally on the subject site where retirement units are located above communal facilities.
- [37] Along the northern boundary, at the interface with adjoining residences, the proposed development is limited to two storeys. Those parts of the buildings nearest the eastern boundary will appear as three storeys in height.
- [38] The maximum height of the buildings apparent to a casual observer is no more than four storeys. In those parts of the subject site where the basement extends above ground level, the design approach is for the finished ground levels to gently rise up to the podium level, offering a battered landscape edge. This results in reduction by one storey of the apparent height of the building envelope perceived by a casual observer.
- [39] The proposed development incorporates other favourable design elements such as central public spaces; extensive pedestrian circulation pathways and linkages; various garden areas (including the purpose-built greenhouse); landscaping along the boundaries adjoining residential development; and deep planting areas throughout the subject site.



- [40] The setback of the multi-storey buildings from the boundaries of the subject site will be no less than six metres and up to approximately 16 metres.
- [41] Mr Peabody, the architect retained by Aveo, gave evidence about the design approach adopted for the proposed development.
- [42] I accept the evidence of Mr Peabody that the master planning of the proposed development carefully considered the existing road patterns and arranged the building envelopes to encourage visual and physical permeability through the subject site. The setbacks are, in part, the same as that provided for in applicable acceptable outcomes in City Plan. However, as was observed by Mr Peabody during cross-examination, some of the buildings provide greater setback, such as those adjacent the pathway to Balun Park.
- [43] I also accept Mr Peabody's evidence that the design of the proposed development takes account of the subject site's topography while integrating with the existing built form in the area and neighbouring uses. As Mr Peabody explains in his individual report, it does so by providing a terraced arrangement of building envelopes above finished ground level with:
- (a) two storey buildings proximate the adjoining existing dwellings along the northern boundary;
  - (b) buildings with an apparent height of two and three storeys addressing Free Street and the pedestrian pathway between Balun Park and Free Street; and
  - (c) buildings with an apparent height of four storeys addressing the Balun Park frontage and the open space and recreation areas proposed at the centre of the subject site.
- [44] Mr Peabody also explains that the built form aesthetic of the proposed development is further articulated by a layering of elements, including:
- (a) undulating lines of balcony edges;
  - (b) sweeping rooflines and deep eaves contrast with portal frames;
  - (c) batten screening arranged in varied pattern, providing privacy and shade;
  - (d) visual diversity in balustrade treatment;
  - (e) planter elements offering visual relief and identifying building entries; and
  - (f) material and colour pallet accentuating the layering in the building form.
- [45] His evidence about articulation was unchallenged and I accept it.
- [46] Exhibit 3 is a report prepared by Mr Mark Elliott. It contains a series of digital photomontages that illustrate the impact of the design measures adopted.
- [47] During cross-examination, Mr Craven made the following observation about the photomontages:
- "A photo montage is creating - I don't know if "illusion" is the right word, but it's certainly creating a - it's crafting a situation to produce an effect, and so one is real

life and the other one is an artist's impression, which is what it is; it's not fact. And there's more than just that photo to look at. I think we're kidding ourselves if we think that that angle is the way in which the public will see this complex.”

- [48] Mr Craven does not have the qualifications possessed by Mr Elliott. He accepts he is not a visual impact expert. I reject his criticisms of the photomontages.
- [49] Mr Elliott was not required for cross-examination. In his report, Mr Elliott provides a detailed and cogent explanation of the process he followed to produce the photomontages. He opines that the photomontages represent a reasonable, survey-accurate interpretation of the proposed built form design and the proposed landscaping concept five years after practical completion of the development. The vantage points selected for the photomontages represent viewing locations of concern to the Appellants.
- [50] The photomontages accord with the descriptions of the proposed development given by Mr Peabody.
- [51] Mr Powell, the landscape architect and visual amenity expert retained by Aveo, regarded the photomontages as reliable in their depiction of the proposed landscaping concept five years after practical completion. During his oral evidence, Mr Powell gave the following evidence about his reliance on the photomontages:

“I take it that you’ve formed the view, as a visual amenity expert, that there will not result in unacceptable visual impacts – there will not be resulting unacceptable visual impacts from this development, and, in forming that view, you’ve relied upon the photo montages prepared by Mr Elliott?---Both are correct. Yes.

Is there a difference in terms of assessing visual impact between reliance upon photo montages and examining cross-sections or elevations?---Yes. I – I mean, it differs between sites, but the – some of the fundamental differences here are that the – the elevations don’t give you an appreciation of – of depth of plane, such that when verandahs and – and walls are recessed, they don’t give you an appreciation for parallax or angle of view and what you might perceive from those different angles of view in terms of the transition down to the – the front – front of the street. They also don’t appreciate – in circumstances where you have a rather confined visual catchment and where you can’t view them from a long distance, the elevations aren’t read – the proposal isn’t read as the elevations are read, and the montages do a much more successful job.

And I take it that montages also include something near to your heart – the landscaping treatment included in the development?---That’s correct. Yes. It can’t – the – the landscape treatment can’t be ignored, but it isn’t – it isn’t the gamut of the – the – the reason why I – I find the – the proposal acceptable.”

- [52] I accept the evidence of Mr Elliott with respect to the reliability of the photomontages. They provide a helpful demonstration of the proposed development in its final form from the identified vantage points.

### The issues to be determined

- [53] The ultimate issue to be determined is whether the proposed development should be approved, approved subject to conditions or refused.<sup>2</sup> That decision is to be based on<sup>3</sup> an assessment carried out:
- (a) against the assessment benchmarks applying at the time the development application was properly made;
  - (b) having regard to any matters prescribed by regulation;
  - (c) against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise; and
  - (d) giving the weight considered appropriate to any amendment to the assessment benchmarks.<sup>4</sup>
- [54] The changes made to the development application at the commencement of the hearing have not allayed the Appellants' concerns. Nevertheless, on the second day of the hearing, the Appellants abandoned a number of issues.<sup>5</sup> Still further issues were abandoned in the Appellants' written submissions<sup>6</sup> and during the closing address.<sup>7</sup> In response to a request for submissions addressing other alleged non-compliances, the Appellants provided further written submissions in which they abandoned yet further issues.<sup>8</sup> Mr Wylie explained that the Appellants position was not a concession that there was compliance with particular provisions. Rather, the Appellants took the pragmatic, and commendable, approach that those provisions that remain would dictate the outcome of the appeal and, as such, it was unnecessary to litigate the issue of compliance with the other provisions.
- [55] The remaining assessment benchmarks that the Appellants rely on to oppose the proposed development are:
- (a) strategic outcome 3.5.1(1)(d) and specific outcome SO1 and land use strategy L1.2 for Element 5.6 Brisbane's Greenspace System, each of which is contained in the Strategic framework;
  - (b) overall outcomes (1) and (4)(c) of the Low density residential zone code;
  - (c) overall outcome (3)(b) of the Ashgrove - Grange district neighbourhood plan code; and
  - (d) overall outcomes (2)(e), (g) and (h) and performance outcomes PO5, PO15, PO51 and PO52 of the Multiple dwelling code.
- [56] The Appellants contend that assessment against these assessment benchmarks demonstrates that the proposed development is of an unacceptable height, density, bulk and scale.

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<sup>2</sup> *Planning Act 2016*, s 60(3).

<sup>3</sup> *Planning Act 2016*, s 59.

<sup>4</sup> *Planning Act 2016*, s 45.

<sup>5</sup> T2-65 – T2-66.

<sup>6</sup> Outline of Argument for the Appellants [14a].

<sup>7</sup> T4-25.

<sup>8</sup> Supplementary Outline of Argument for the Appellants [2].

- [57] The Appellants also contend that the court should give weight to overall outcomes (4)(b) and (5)(a) of the Low density residential zone code in the current version of City Plan.
- [58] Aveo contends the court should have regard to the current lawful use of the premises. This is a matter prescribed by s 31(1)(f) of the *Planning Regulation 2016* (Qld).
- [59] Aveo also contends the court should have regard to a number of relevant matters. They include amendments to the planning framework in City Plan proposed by the Council, the need for the proposed development, the absence of hard amenity impacts and the absence of unacceptable visual impacts.
- [60] It is Aveo's position that although there is some departure from the assessment benchmarks in force at the time the development application was properly made, they do not warrant refusal when one has regard to the need for the proposed development and the Council's proposed amendments to City Plan. Aveo submits that the proposed amendments to City Plan will remove the applicability of a number of the assessment benchmarks from which the proposed development departs and introduces other benchmarks that support the redevelopment of the existing retirement facilities as proposed.
- [61] It is the Council's position that despite the proposed building heights that exceed those contemplated in the Low density residential zone, the proposed development is appropriate when one has regard to a range of relevant matters. The Council notes, in particular, the absence of tangible impact associated with the non-compliance. The other relevant matters referred to by the Council involve considerations of need for the proposed development; the fact that the Council has prepared relevant amendments to City Plan that are in the very late stages of implementation; and the application of sound town planning principles generally.
- [62] Aveo bears the onus of establishing that the appeal should be dismissed.<sup>9</sup>

### **The assessment benchmarks**

- [63] Version 3.01 of City Plan was in effect at the time the development application was properly made. Assessment of the proposed development must be carried out against that version.<sup>10</sup>
- [64] The subject site is included in the Low density residential zone of City Plan. It is also included in the Ashgrove – Grange district neighbourhood plan area.
- [65] Pursuant to s 5.3.3(1)(d) of City Plan, impact assessable development must be assessed against all identified codes in the assessment criteria column (where relevant), as well as against the balance of City Plan, to the extent relevant.
- [66] The provisions of City Plan that the Appellants contend are of significance for the outcome of this appeal are identified in paragraph [55] above. Having regard to the identified provisions, the issues raised by the Appellants broadly relate to alleged non-compliances associated with:

- (a) height;

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<sup>9</sup> *Planning and Environment Court Act 2016*, s 45(2).

<sup>10</sup> *Planning Act 2016*, s 45(6).

- (b) density, bulk and scale; and
- (c) impacts on Balun Park.

**Is there non-compliance occasioned by the height of the proposed development?**

[67] The Appellants allege that the height of the proposed development results in non-compliance with overall outcome (4)(c) of the Low density residential zone code, and overall outcome (2)(h) of the Multiple dwelling code. They relevantly provide as follows:

**“6.2.1.1 Low density residential zone code**

- (4) Development location and uses overall outcomes are:
  - (c) **Development for other housing types, being a residential care facility or retirement facility, which provides housing diversity and enables people to remain within their local neighbourhood throughout their life cycle, may be accommodated at appropriate locations where height is no greater than 1 or 2 storeys.”**

**9.3.14 Multiple dwelling code**

- (2) The purpose of the code will be achieved through the following overall outcomes:
  - (h) **Development is of a height that is appropriate to the strategic and local context and meets community expectations consistent with the following:**
    - (i) ...
    - (viii) **2 storeys in the Low density residential zone.”**

(emphasis added)

[68] Aveo concedes that, by virtue of its height, the proposed development does not comply with overall outcome (4)(c) of the Low density residential zone code and overall outcome (2)(h) of the Multiple dwelling code.

[69] The Appellants also submit that the height of the proposed development results in non-compliance with performance outcome PO5 of the Multiple dwelling code,<sup>11</sup> which states:

**“PO5**

**Development is of a bulk and scale that is consistent with the intended form and character of the local area** having regard to:

- (a) existing buildings that are to be retained;
- (b) significant infrastructure or service constraints such as tunnels;
- (c) existing and proposed building heights in the local area and street;
- (d) adjoining buildings and separation of buildings necessary to ensure imp the impact of slope acts on residential amenity and privacy are minimised;
- (e) the impact of slope.”

(emphasis added)

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<sup>11</sup> The allegation that the height of the proposed development resulted in non-compliance with performance outcome PO52 of the Multiple dwelling code was abandoned during the closing address. The Appellants still allege non-compliance in the context of bulk and scale.

- [70] The Appellants submit “*it is ... patent that there is plain non-compliance*” with performance outcome PO5. The Appellants submissions do not clarify how the height of the proposed development results in “*plain non-compliance*”. The evidence on which the Appellants rely does not clarify the basis for the submission.
- [71] Height is but one aspect that informs the bulk and scale of development. It is the bulk and scale of the proposed development that is to be consistent with the intended form and character of the local area, not its height alone. I will deal with compliance with this provision further below as part of the consideration of the bulk and scale of the proposed development.

**Is there non-compliance occasioned by the density, bulk and scale of the proposed development?**

- [72] The Appellants submit, in addition to height, the proposed buildings also have a bulk and scale that is discordant with the receiving environment, and the unambiguous scheme intentions for the locality. The Appellants allege that the density, bulk and scale is inconsistent with overall outcome (1) of the Low density residential zone code, overall outcome (3)(b) of the Ashgrove-Grange district neighbourhood plan code, overall outcomes (2)(e) and (g) of the Multiple dwelling code and performance outcomes PO5, PO15, PO51 and PO52 of the Multiple dwelling code. Those provisions state:

**“6.2.1.1 Low density residential zone code**

- (1) **The purpose of the Low density residential zone code is to provide for predominantly dwelling houses supported by community uses and small-scale services and facilities which cater for local residents.**

**7.2.1.4 Ashgrove / Grange district neighbourhood plan code**

**7.2.1.4.2 Purpose**

- (3) The overall outcomes for the neighbourhood plan area are:
- (b) **Low density housing will dominate outside of these corridors** and will maintain identified housing and precincts of distinctive local character such as Ashgrovian housing and the Lind Street, Gray Street and Greene Street area at Newmarket.

**9.3.14 Multiple dwelling code**

**9.3.14.2 Purpose**

- (2) The purpose of the code will be achieved through the following overall outcomes:
- (e) **Development has a bulk, scale, form and intensity that integrates with the existing and intended neighbourhood structure** for the area as expressed by zone, zone precinct and neighbourhood plan outcomes, and is **consistent with**:
- (i) **the location and street context of the site;**
- (ii) **its proximity to an activity centre, higher capacity public transport services, or other community facilities;**
- (iii) **the capacity of infrastructure.**
- (g) **Development** in the Low density residential zone or Infill housing zone precinct of the Character residential zone includes a range of

detached and attached building forms and **is of an intensity that reflects the lower density form and character of these zones.**

### 9.3.14.3 Assessment criteria

The following table identifies the assessment criteria for assessable development.

**Table 9.3.13.3.A–Criteria for assessable development**

| Performance outcomes  | Acceptable outcomes   |
|---|---|
| <p><b>PO5</b></p> <p><b>Development is of a bulk and scale that is consistent with the intended form and character of the local area</b> having regard to:</p> <ul style="list-style-type: none"> <li>(a) existing buildings that are to be retained;</li> <li>(b) significant infrastructure or service constraints such as tunnels;</li> <li>(c) existing and proposed <u>building heights</u> in the local area and street;</li> <li>(d) adjoining buildings and separation of buildings necessary to ensure the impacts on residential <u>amenity</u> and privacy are minimised;</li> <li>(e) the impact of slope.</li> </ul> | <p><b>AO5</b></p> <p>Development is contained within the building envelope for the site created by applying:</p> <ul style="list-style-type: none"> <li>(a) the maximum building height in <u>Table 9.3.14.3.B</u>;</li> <li>(b) front, rear and side boundary <u>setback</u> requirements in <u>Table 9.3.13.3.C</u>;</li> <li>(c) car parking boundary setback requirements in <u>Table 9.3.13.3.E</u>;</li> <li>(d) building separation requirements in <u>Table 9.3.13.3.F</u>;</li> <li>(e) acceptable outcomes for building height transition where required.</li> </ul> <p>Refer to <u>Figure b</u> and <u>Figure c</u>.</p> <p>Note—This acceptable outcome can be demonstrated by the preparation of a <u>building envelope</u> plan, elevations and sections.</p>   |
| <p><b>PO15</b></p> <p><b>Development has a building depth and form that must be articulated to:</b></p> <ul style="list-style-type: none"> <li>(a) <b>ensure that the bulk of the development is in keeping with the form and character intent of the area;</b></li> <li>(b) provide adequate <u>amenity</u> for building residents in terms of natural light and ventilation</li> <li>(c) provide opportunities for dual aspect dwellings.</li> </ul> <p>Refer to <u>Figure k</u>.</p>   | <p><b>AO15.1</b></p> <p>Development where in the Medium density residential zone, Low-medium density residential zone, in the Infill housing zone precinct of the Character residential zone or Low density residential zone, the maximum length of a wall in any direction is 30m with substantial articulation provided every 15m.</p> <p>Note—Substantial articulation is a full building separation of 6m or a change in building line of plus or minus 2m for a length not less than 5m.</p> <hr/> <p><b>AO15.2</b></p> <p>Development where in the High density residential zone, the maximum length of a wall in any direction is 50m with substantial articulation provided every 15m.</p> <p>Note—Substantial articulation is a full building separation of 6m or a change in building line of plus or minus 2m for a length not less than 5m.</p> |

|  |  |
|--|--|
| <p><b>PO51</b></p> <p><b>Development</b> in the Low density residential zone <b>supports</b> neighbourhood structure, and <b>a lower intensity residential character</b> and <b>integrates with adjoining sites</b> through:</p> <p>(a) a mix of dwelling types and building forms such as freestanding <u>dwelling houses</u> and townhouses;</p> <p>(b) dwelling houses addressing existing streets;</p> <p>(c) the proportion of dwelling houses increasing for larger sites;</p> <p>(d) connection to the existing or proposed local street and park network;</p> <p>(e) legible and direct pedestrian and cyclist access to surrounding and future community facilities in the area such as schools, parks, neighbourhood shops and public transport;</p> <p>(f) appropriate development interfaces to side boundaries and adjacent sites;</p> <p>(g) new public roads and <u>parks</u> as appropriate to the scale of the site.</p> <p>Refer to <u>Figure a</u>.</p> | <p><b>AO51.1</b></p> <p>Development is not vertically stacked in an apartment form but is attached or freestanding and visually recognisable as such, by variation in the dwelling size, materials, textures, colours and built form features.</p> |
|  | <p><b>AO51.2</b></p> <p>Development in the form of a free-standing dwelling house is located on an existing street frontage and provides a transition to adjoining dwelling houses.</p>  |
|  | <p><b>AO51.3</b></p> <p>Development provides connections to existing road, park and pathway networks.</p>  |
|  | <p><b>AO51.4</b></p> <p>Development is within 60m of a public road.</p>  |
|  | <p><b>AO51.5</b></p> <p>Development applies rear boundary setback requirements to side boundaries.</p>   |
|  | <p><b>AO51.6</b></p> <p>Development on sites of 7,000m<sup>2</sup> or greater:</p> <p>(a) includes public roads, spaces or footpath connections in accordance with a neighbourhood plan;</p> <p>(b) is not gated.</p>                              |
| <p><b>If in the Low density residential zone or the Infill housing zone precinct of the Character residential zone</b></p>   |  |
| <p><b>PO52</b></p> <p><b>Development</b> in the Low density residential zone or the Infill housing zone precinct of the Character residential zone <b>respects the intensity and form of the neighbourhood</b> and demonstrates an appropriate site density.</p>   | <p><b>AO52.1</b></p> <p>Development in the Low density residential zone does not exceed 1 <u>dwelling</u> per 200m<sup>2</sup> of site area.</p>   |
|  | <p><b>AO52.2</b></p> <p>...</p>  |

(emphasis added)

[73] The Appellants rely on five observations in support of their submissions.

[74] First, building ILU D has a length of some 75 metres from north to south.

[75] Second, in cross-examination, Mr Peabody accepted that the appearance of the proposed development would be quite different in bulk and scale to the detached houses to the east of Free Street.



- [76] Third, buildings ILU E and F have lengths addressing Balun Park of approximately 55 metres each, and buildings ILU C, ILU A and building 1 similarly have lengths of approximately 60 metres.
- [77] Fourth, Mr Perkins readily accepted, both in the joint expert report and in cross-examination, that the proposed development was not low rise or low density. He also confirmed that the proposed buildings will be significantly larger than what is currently on site and would be significantly larger than surrounding development.
- [78] Fifth, in cross-examination Mr Gaskell confirmed that the form of development could not be described as small-scale, low density or low rise, and described the development as being “*medium-rise*”.
- [79] The Appellants submit, “*Without more, the proposed development would result in non-compliance with density, bulk and scale provisions of City Plan.*”
- [80] This submission ignores that the provisions relied on by the Appellants call for an evaluative judgment, not just a quantitative analysis. I will consider each of them in turn now.

Overall outcome (1) of the Low density residential zone code

- [81] The Appellants’ written submissions emphasised the reference to “*small-scale services and facilities*”.
- [82] The Appellants’ submissions do not identify any plainly identified non-compliance with this provision. The provision does not contain a requirement with which each development in the Low density residential zone must comply. Rather, it outlines the purpose of the code.
- [83] Overall outcome (1) does not prevent development that is not low density residential uses. It specifically contemplates community uses; small scale services which cater for local residents; and facilities which cater for local residents. This is apparent when the provision is read in context. Two pertinent observations can be made in that regard.
- [84] First, s 6.2.1.1(3) of the Low density residential zone code explains that the purpose of the code will be achieved through the overall outcomes.
- [85] Second, overall outcome (4)(c) specifically contemplates development for a retirement facility. It contains a limit on height, but it does not purport to give any direction as to the scale of such uses in the Low density residential zone. In that respect it can be contrasted with overall outcome (4)(h), which speaks of “*small-scale non-residential uses*” and stipulates a gross floor area of less than 250 square metres.
- [86] As I have already noted in paragraph [68] above, Aveo concedes that the proposed development does not comply with overall outcome (4)(c) of the Low density residential zone code. There is no other allegation of non-compliance with overall outcomes of that code.
- [87] Approval of the proposed development, despite the non-compliance with overall outcome (4)(c), would not prevent the Low density residential zone in this area providing for predominantly dwelling houses supported by community uses and small-scale services and facilities which cater for local residents.

Overall outcome (3)(b) of the Ashgrove-Grange district neighbourhood plan code

- [88] The Appellants submit if the proposed development is approved, low density housing could not be said to dominate the part of Free Street opposite the proposed development. The Appellants note that Mr Gaskell accepted as much during cross-examination.
- [89] Overall outcome (3)(b) of the Ashgrove-Grange district neighbourhood plan code should be considered in the context of overall outcome (3)(a). Overall outcome (3)(a) refers to development being underpinned by regionally significant transport infrastructure, focused along the Ferny Grove railway corridor, Enoggera Road and Waterworks Road. They are the “*corridors*” referred to in overall outcome (3)(b). Low density housing is to dominate outside of those areas.
- [90] In his closing address, Mr Wylie submitted that in this case the relevant area to be considered should be limited to the part of Free Street opposite the development and also the part of the Balun Park from which the development is observable.
- [91] I reject Mr Wylie’s submission. It is not supported by the words of the provision, and Mr Wylie did not identify any principle of statutory construction to support the submission. He also did not identify any sound town planning reason to construe the provision in such a narrow manner. None of the town planning experts opined that the provision should be approached in that way.
- [92] The provision expresses an objective or general principle. It does not use words of prescription or proscription. It is one of broad and general application that gives great flexibility to the Council when approving developments.<sup>12</sup>
- [93] The proposed development is not a use that is intended to dominate, but it is not expressly excluded. Approval of the proposed development could not be said to have the result that low density housing would not dominate outside the identified corridors, nor in this particular locality.<sup>13</sup> It will not change the current predominance or otherwise of detached houses in the locality, given the existing use.

Multiple dwelling code

- [94] The Appellants rely on those matters referred to in paragraphs [74] to [79] in support of their allegation of non-compliance with overall outcomes (2)(e) and (g) and performance outcomes PO5, PO15, PO51 and PO52 of the Multiple dwelling code.
- [95] The Appellants focus is on a quantitative comparison of the length of some of the proposed buildings to the bulk and scale of the detached houses to the east of Free Street, as well as a quantitative comparison of the density of the proposed development to that presently on site and in the surrounding development.
- [96] The requirements contained in these provisions are not set by reference to metrics, rather they require a qualitative consideration of the proposed development.

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<sup>12</sup> See *Gracemere Surveying and Planning Consultants Pty Ltd v Peak Downs Shire Council & Anor* [2009] QCA 237; (2009) 175 LGERA 126.

<sup>13</sup> See paragraphs [15] to [22] above.

Overall outcome (2)(e) of the Multiple dwelling code

- [97] Overall outcome (2)(e) of the Multiple dwelling code requires the proposed development to have a bulk, scale, form and intensity that integrates with the existing and intended neighbourhood structure for the area as expressed by zone, zone precinct and neighbourhood plan outcomes. It also requires the bulk, scale, form and intensity to be consistent with the location and street context of the site, its proximity to an activity centre, higher capacity public transport services, or other community facilities, and the capacity of infrastructure.
- [98] As I have already identified, the intended neighbourhood structure for the area expressed in the zone code and neighbourhood plan outcomes is not exclusively low density residential housing. The zone contemplates the provision of development with the bulk, scale, form and intensity associated with retirement facilities, albeit at a height of no more than one to two storeys.
- [99] The existing neighbourhood structure, including the location and street context of the subject site, are described in paragraphs [15] to [22] above.
- [100] Having regard to the matters outlined in paragraphs [36] to [52] above, I am satisfied the proposed development involves a well thought out design that achieves the outcomes sought with respect to integration and consistency with location and street context. The photomontages prepared by Mr Elliott demonstrate this well. The proposed development only adjoins detached housing on one boundary. It provides appropriate transitions to surrounding built form. It will sit in a well landscaped setting.
- [101] The subject site's proximity to centres and public transport services is outlined in paragraph [19].
- [102] In my view it is not axiomatic that the closer a retirement facility is to a shopping centre, the easier it is for residents to access it. This point was highlighted well during Mr Wylie's cross-examination of Ms Wells (the retirement and aged-care consultant retained by Aveo). I note, in particular, the following exchange:<sup>14</sup>

"Now, a recurring theme of the larger developments – and when I say "larger developments", I'm talking about developments of more than 150 units – is that they're extremely close to either a supermarket or a shopping centre; would you accept that?---Not necessarily. I think some are, some aren't.

But if we can take, for example – are you familiar with the WMB Wheller On The Park development?---Yes, I am.

...

**MR WYLIE: Ms Wells, it is the case that this development is directly opposite the Chermside shopping centre?---That's correct.**

**And so, compared to the subject site, it would be much easier for residents to access services associated with the shopping centre?---I would not agree with that. I actually know this development quite well and work for this provider, and many of the residents in the retirement village there are quite frail aged and need assistance to get across to that shopping centre. So I think it doesn't necessarily matter whether the shopping centre is located next door or a kilometre down the road; it's about: that's the shopping centre that's familiar**

<sup>14</sup> T2-36/L24-32 and T2-37 – T2-38/L35.

**to people. Most people will still need, as they age, some assistance to access these services. Some people may be able to access them on their own, and some people may need assistance to access the services. So I understand that crossing that road can be quite scary for a number of frail aged people.**

But for many – you said before that there’s going to be a range of mobility – within the patrons, they’re going to have ranges of mobilities?---They have ranges in mobilities, yes.

And there are people that are living here that would be able to access that Chermiside shopping centre quite easily?---There would be, but I think, equally, just as there would be able to who would be able to access the shopping centre at Newmarket as well. So you have people that are very mobile, and people that are very frail and need assistance. So you have a range of people for any development.

Ms Wells, are you suggesting that many people will be able to walk the 800 metres from the proposed site to the Newmarket shopping centre?---I’m not suggesting that many will be able to. I don’t know, because I don’t know what the resident profile will look like, but it is my experience that there will be a combination of people who would be able to do it and who would not be able to do it; just as, in Wheller Gardens, there would be a combination of people who can cross that road and can’t cross that road. **If people have slight dementia, that road is an inappropriate road for somebody to cross from a retirement village without assistance.**

**But you’d certainly accept that, for some residents with reasonable levels of mobility, the closer they are to a shopping centre, the better. You’d accept that?---No, I wouldn’t accept that.**

Okay?---I’d accept that they could walk – maybe walk to it, but it doesn’t mean that it’s better.

**Well, it means that they’re not reliant upon other people, such as a community bus. It means that they can be more independent, doesn’t it?---For some people, that might be the case. I don’t think in the main, no.**

That might be quite important to them, wouldn’t it?---For some people, that might be important.

And for those people that it is important, being within 100 to 200 metres of a shopping centre may make life a whole lot better, wouldn’t it?---For some people, that’s what they might choose.

Yes?---But I’m saying, I think that would be a smaller number of the resident population rather than a majority.

But for that smaller number, it would make a difference?---It may make a difference.

So your is evidence that it makes – you’re unable to form any opinion as to whether or not it’s better to be closer to a shopping centre or not?---I think it’s important that you have access to a shopping centre.

**Yes?---The proximity of it is – whether it’s across the road or 800 metres down the road, I don’t think is as important, because people will access that shopping centre in many ways. There could be people who are quite mobile that don’t want to cross a busy road, just as there are people who are quite mobile who don’t want to walk down the road to a shopping centre in the heat, for instance. So I think it is a range of people in a retirement village, and so long as they can access the shopping centre that’s familiar to them and known to them, that’s what’s important.**

Access to a shopping centre from the proposed site will be difficult for many, won’t it?---I don’t think so, no.

Is that because of the bus?---That can be a bus, that can be because of their home care help, that can be because of their family, it can be because of their friends. It can be exactly the way they might access it in their current residential home before they move into the retirement village.”

- [103] The traffic engineers also considered it relevant that the proposed development includes a range of community facilities on-site for use of residents and guests. Those services include a gym, health and wellness centre with attached change-room, bathroom and multi-purpose area, lounge and games area, café, cinema, business centre, meeting rooms and consulting rooms for visiting health professionals.
- [104] Having regard to the evidence of Ms Wells and the traffic engineers, I am satisfied that the proposed development, while having a greater intensity than that predominantly sought for the Low density residential zone, is consistent with the subject site’s proximity to centres and public transport services. As was noted by Mr Perkins, the larger scale of the retirement facility enables the provision of a community bus.
- [105] Dr Johnson gave evidence about the infrastructure capacity, other than that related to traffic. He was not required for cross-examination. Dr Johnson’s report provides a cogent analysis with respect to infrastructure capacity and he opines that there are no engineering infrastructure or flooding and drainage issues that warrant refusal. He says the civil engineering aspects of the proposed development are straight-forward and non-controversial. I accept his evidence.
- [106] With respect to traffic engineering infrastructure, both traffic engineers (one retained by Aveo and one retained by the Council) agreed daily traffic volumes would remain within acceptable parameters on the local streets near the subject site. They also agreed that the proposed development will not have unacceptable impacts on traffic and parking for local residents and users of the neighbourhood.
- [107] The traffic engineers were not required for cross-examination.
- [108] I am satisfied the traffic infrastructure has sufficient capacity to accommodate the proposed development.

Overall outcome (2)(g) of the Multiple dwelling code

- [109] Overall outcome (2)(g) of the Multiple dwelling code requires the proposed development to include a range of detached and attached building forms and to be of an intensity that reflects the lower density form and character of these zones.
- [110] As is evident from the description of the proposed development in paragraph [27] above, with only one detached building, the range of detached and attached building forms is limited. I am, however, satisfied that the proposed development appropriately reflects the lower density form and character of the Low density zone in light of the location and street context of the subject site as described in paragraphs [15] to [22] above and having regard to the matters outlined in paragraphs [36] to [52] above.

Performance outcome PO5 of the Multiple dwelling code

- [111] Performance outcome PO5 of the Multiple dwelling code requires the proposed development to be of a bulk and scale that is consistent with the intended form and character of the local area.
- [112] The Appellants submit the local area is a discrete area bounded by Enoggera Road to the east, and Enoggera Creek to the north, west and south. Mr Powell considered that discrete area to be an appropriate definition for the locality when considering character, but noted the visual catchment for the proposed development would be more limited.
- [113] As I have already identified in paragraph [17] above, this discrete area bounded by Enoggera Road and Enoggera Creek contains a range of residential zoned land, including land within the Low-medium density residential (2 or 3 storey mix) zone, the Low density residential zone and the Character residential zone and the development on such land.
- [114] The Appellants submit:  
“existing and proposed building heights in the local area and the street ... are all low rise, low set, low-density dwelling houses and multiple dwellings.”
- [115] I accept the existing building heights are all low-rise. My attention was not directed to evidence of any proposed buildings that were not. I am perplexed by the reference to “*low-density*”, given the submission is about “*building heights*”. I do not accept existing buildings in the local area and street are all low density. As I have identified in paragraph [20] above, the area includes an aged care facility.
- [116] The area also includes a significant amount of low-medium density zoned land, which is relevant when considering the intended form and character of the local area.
- [117] The proposed development includes building heights greater than presently exist in the local area and street. The height is also greater than that intended on the subject site. This, in part, informs the bulk and scale of the proposed development. The extent to which it does so is ameliorated by the impact of the slope. As I have already noted in paragraphs [36] to [38] above, the building has been designed to complement the natural contours of the subject site.
- [118] In any event, height is not the only relevant consideration when considering the bulk and scale of the proposed development.
- [119] During cross-examination, Mr Powell accepted that it is relevant to consider the height and width of the proposed buildings when assessing the bulk and scale of buildings and their consistency with the character of an area. He also regarded distance from observer as a critical factor that requires consideration such as setbacks, separations and other contextual elements such as provision for landscaping. He also opined that treatments and articulation assist with perceptions of scale, but he did not regard them to be as important as the other considerations.
- [120] The relevance of distance from observer was well illustrated by Mr Powell in his individual report. He provided a number of diagrams demonstrating the impact of increased building setbacks on the perception of height.

[121] In his report, Mr Powell opines that the building interfaces with Pine Street and Free Street occur at a scale that is compatible with existing built form in those streets. His opinion is supported by a cogent explanation about how the transition in building heights, setbacks and the provision of landscaping will ensure the proposed development presents at an appropriate scale. His explanation was assisted by use of diagrams and reference to the photomontages. I find it compelling.

[122] During his cross-examination by Mr Wylie, Mr Powell provided further persuasive elucidation of the basis of his opinions.

[123] When challenged about the length of the buildings along the northern boundary of the subject site, Mr Powell explained:

“the built-form setback, limiting its height to two storeys at the interface, as well as introducing the building articulation with a rhythm that breaks up those units into a more house-scale size or interface, complemented by advanced trees at that interface that align with that rhythmic unit alignment, all contribute to something which is actually a positive – a positive element that reinforces the house-compatible scale of that interface.”

[124] In relation to the length of the buildings fronting Free Street, the following exchange took place during Mr Wylie’s cross-examination of Mr Powell:

“- - - there’s simply no similarity of any type between the eastern and western sides of Free Street, are there?---Well, not at the moment as well, in terms of the – the development turning its back on Free Street. In terms of the proposal – no, it’s not what I would call, as you say, reflecting the other side, and that’s not certainly what I would envisage is an appropriate response. As I said, a responsive development need not – a responsive and compatible development need not emulate or be slavish to the existing.

But I’ll put it to you that there has to be some sort of rhythm or rhyme as between the two different development forms, and there’s none here?---Oh, I think there is a considered approach to design in terms of – of providing the main building ILU – sorry, building 01 close to the Glin Avenue spine, to maximise, you know, the view – as Mr Peabody put it, that visual permeability from Glin Avenue into the site. So there is a logic there in terms of the alignment of those avenues. But I think that the ILU A and building 01, the facade widths are actually the narrowest along Free Street where they interface with residential dwellings opposite, and again, with ILU D, although it is a longer facade, only a third of that facade presents to Free Street. So I think that all of those facades or portions of facades that present to Free Street are moderated and limited, yes.

As one walks down to Ballen Park, and in particular as one enters the lane, it’s fair to say, isn’t it, that ILU D and ILU E will be the dominant built form?---The dominant built form? Yes, I suppose, although they will be overwhelmed by the shade trees and the avenue trees and the contribution to what I call the urban forest between ILU D and the path, and that will, in a way, funnel the pedestrian through a shaded canopy into the park, or from the park up into the open streetscape of Free Street.

...

But that certainly won’t be the case to the east of ILU E, will it?---No. I think – I think that’s a strong avenue, in that case.

What do you mean by “a strong avenue”?---So it’s a more regimented design of trees placed in a line that gives a visual cue to someone moving through a park that it’s an important, legible point of transition, and I think that pushing the trees closer to the observer, interspersing some shade trees, but having that regimented columnar avenue

of trees behind it, interfacing with the building, provides the observer with that visual cue that they're entering an important open space, as in the park.

And so your view is that the eyes will glide off the building; is that right?---I think that, primarily, the eyes of the person will be directed down towards the straight pathway and under the canopy of the shade trees which will overhang it and to some extent, they'll be aware of an avenue of columnar trees behind that, and they'll be aware of the building form beyond those two layers.

They'll be very aware, won't they? There's no hiding it?---I don't think – I don't think you can ignore it.

Yes?---But it won't be – it will be an element which forms a backdrop to the pedestrian experience, rather than a forefront.”

- [125] Mr Peabody also gave evidence about the compatibility of the proposed development with the surrounding built form. During his oral evidence, he said:

“Your Honour, from an architect's perspective, compatibility, in my mind, stems from a number of aspects. Obviously, there's a compatibility with regards to use. There's the physical setbacks compatible with residential – the residential context. There's a compatibility in my mind that the scale of the development, certainly along the fringes or the – the interface with the neighbourhood, is compatible in height. Certainly, the four residential – adjoining residential dwellings, where it adjoins ILU A and ILU B – and they're both a two-storey interface at that point and generously set back, as I mentioned a moment ago. The compatibility along the streetscapes, I think, works insofar as opportunities for extending view corridors, as I've mentioned in my report, and in the sense of addressing the street. And there's a fine-grained detail in the – in the development that – that is compatible with the residential scale and form, the – the proportion of each individual dwelling unit or ILU, independent living unit, and the proportion of the balcony spaces, the – the way that the walls are divided up, the fine-grained detailing of the batten screening, the roof forms. And whilst it is a contemporary form and whilst it's not a – you know, a series of houses, it has a compatibility, in my opinion, that ties in and complements and – and works well with the – the neighbourhood.”

- [126] Mr Peabody's opinions were tested by Mr Wylie during cross-examination, particularly by reference to the length and height of the buildings. In relation to building ILU D, the following exchange occurred:

“Could I ask you to look at the building that is ILU D?---Yes.

Would you accept that that building has got a length of about 75 metres?---Without scaling it, I would – I would accept that it's approximately that width.

And you'd accept, too, that a building of – and you'd accept that the southern part of that building has three storeys over a basement that is, effectively, almost one full storey above the natural ground level. Are you aware of that?---Yes. I've – I've acknowledged that in my report.

Yes. And – so as one walks down the footpath at Free Street, one's going to walk past – Free Street and then the footpath, one's going to walk alongside a 75-metre building that's going to increase in height from a three-storey scale height to four-storey scale height. Do you accept that?---Well, the landscape treatment through there – there's also a boardwalk that extends along there, and it's a well – it's a well-articulated edge treatment through there that extends from the footpath from – from approximately 15 metres up to, you know, 20-plus – certainly 20-plus metres, and, you know, that – that is a – that's as wide as a – a generous road frontage. And I – I don't – whilst – whilst I have acknowledged in our – in my report that the basement in that southern portion of the site can be perceived as being greater than at – as out



of the ground, the landscape treatment along those edges and the treatment of how the – the finished ground line has been applied, plus the boardwalk through there, really does sort of create an articulated and terraced vegetated zone. And the buildings, in my opinion, will read as three storeys.

As one walks down past – one walks south and one walks south past the northern part of ILU D – past that building, the subject site won't appear to have any permeable aspects, will it? You're going to be faced to the west with a very long wall?---Which is substantially set back from the boundary. I mean, you've got the first portion – the – if you divide the building into thirds, ie, being – the most northern portion being the Free Street frontage and then the – the two-thirds to the south of it being the pedestrian pathway, whilst you're walking along there, you've also got, as I mentioned a moment ago, a significant amount of landscaping buffer.

Yes?---And the building does, again, have a – a change in direction about midway along that elevation, and there's a lot occurring again on those elevations. So, in total – I acknowledge that the building is approximately 75 metres in length, but I don't think it's – I don't think, at three storeys along that elevation, it's going to read as a – overbearing by any stretch of the imagination.”

- [127] I was impressed by the considered and balanced nature of Mr Peabody's evidence. He gave similar balanced and considered explanations when challenged about the acceptability of the scale, and in particular the length, of other proposed buildings and their interface with the surrounding area.<sup>15</sup>
- [128] I accept this evidence of Mr Powell and Mr Peabody. It is supported by the photomontages.
- [129] In assessing the bulk and scale of the proposed development, performance outcome PO5 also requires one to have regard to adjoining buildings and separation of buildings necessary to ensure impacts on residential amenity and privacy are minimised.
- [130] A number of the Appellants gave statements of evidence expressing concerns about potential impacts on residential amenity and privacy. Their concerns included noise from the air conditioning units and increased traffic, impacts from headlights, loss of views of vegetation over the existing development and unacceptable impacts on the character of the area as a consequence of the incompatible built form. Those who live opposite the Free Street frontage were also concerned about potential impacts on privacy.
- [131] It is apparent from the statements that the residents enjoy living in the area, particularly it seems due to its proximity to the CBD, the friendly and engaging people who live in the area, the area being a “quiet” enclave with access to trees, parks, creeks and wildlife and the existence of many traditional character houses in the enclave. These features are unaffected by the proposed development.
- [132] In *Body Corporate for Kelly's Beach Resort v Burnett Shire Council & Ors*,<sup>16</sup> Skoien SJDC observed:

“It is trite to recall that probably all uses of land have some adverse effects on the occupants of a neighbouring residence. Even the most desirable neighbour must occasionally create noise or other activity which to some extent, even minor, is an

<sup>15</sup> See, for example, T2-14 – T2-18.

<sup>16</sup> [2003] QPEC 23; [2003] QPELR 614, 622 [60].

annoyance to others. Less desirable neighbouring residences may be the site of barking dogs, noisy children, over-loud television or stereo sets, over-frequent lawn mowing, a noisy vehicle. Human activities which disturb others may be annoyingly early or annoyingly late. The perfect neighbour does not exist except for the most tolerant person. So the test is not whether the amenity would be degraded but whether it would be unreasonably degraded.”

- [133] I have no doubt that the views expressed by the residents are honestly held. Residents of the area may well prefer that the proposed development not proceed, but it is necessary to have regard to all of the evidence.
- [134] As I have already noted at paragraph [12] above, Mr Craven accepted that the physical amenity impacts of the proposed development could be managed. Further, with respect to loss of views and shadowing, Mr Craven accepted that the proposed development was unlikely to create unreasonable amenity impacts.
- [135] There was also evidence about potential noise, breeze and lighting amenity impacts of the proposed development in two individual reports from Mr King, an expert retained by Aveo. In the supplementary report, Mr King addressed specific concerns raised in the statements of the Appellants.
- [136] Mr King was not required for cross-examination. It is apparent from his reports that his opinions are premised on careful consideration of the relevant issues. He opines that the proposed development will not have an unacceptable noise, breeze or lighting amenity impacts. I accept his unchallenged evidence.
- [137] Mr Peabody was cross-examined about the potential loss of views. He explained that any two-storey dwelling on the subject site’s boundary with the Goring Street residences would mask any views those residents have of distant vegetation. In expressing his views, he referred to the limit on visibility occasioned by available view lines. That concept was illustrated by Mr Powell in his individual report. I accept the evidence of Mr Peabody on this issue.
- [138] In the Town Planning Joint Expert Report, Mr Craven opined that the proposed development would create unreasonable amenity impacts with respect to overlooking on houses on the opposite side of Free Street. He considered the proposed development would detrimentally affect privacy experienced in those houses and their yards. He also considered that unacceptable impacts would be occasioned by “*virtually continuous heavy vehicle and other extraneous traffic experienced on local streets for the entire construction period.*” The foundation of Mr Craven’s opinion with respect to traffic was not disclosed and I do not accept it. Mr Craven also did not provide elucidation of the basis of his opinion with respect to overlooking.
- [139] In City Plan impacts on privacy and overlooking are typically framed with reference to adjoining premises.<sup>17</sup> It is reasonable to expect development would provide a degree of overlooking towards street frontages and other public interfaces so as to provide passive surveillance of these public spaces. As was explained by Mr Perkins, the passive surveillance achieved by overlooking of a public street is a positive planning outcome.
- [140] With respect to potential overlooking and impacts on privacy, Mr Peabody opined that the proposed development acceptably addresses those issues through the

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<sup>17</sup> See, for example, PO8 of the Multiple dwelling code and figure g and figure h.

mechanisms of setbacks and landscape buffers. He notes that the separation distances between the proposed development and adjoining residences are quite generous.

- [141] During cross-examination, Mr Peabody rejected that the outdoor terrace associated with the café proposed in building 1 would overlook Free Street and the residents opposite. As was explained by him, the topography is such that Free Street will be elevated between half a metre and one and a half metres above the terrace. His opinion accords with the detailed plans of the proposed development.
- [142] Mr Powell also opines that the design and proposed landscaping appropriately limits the extent and degree of overlooking to the surrounding residential environment. In his report, Mr Powell demonstrates the basis for his opinion by reference to Figures 3 to 8. They demonstrate how the design of the proposed development and its landscaping address this issue. Mr Powell provided further useful explanation about the impact of landscaping during cross-examination by Mr Wylie. He noted that the transitioning of the built form in height and the proposed vegetation would restrict the number of balconies that have a view across the road and ensure that the balconies would only have filtered or oblique views. He explained that the landscaping was designed to allow oblique or angular views down between trees toward the path from units to enable passive surveillance of the path while also ensuring there would not be direct views across to neighbouring residents.
- [143] I accept the evidence of Messrs Perkins, Peabody and Powell. I am satisfied that the proposed development does not introduce unacceptable impacts on privacy. Having regard to that evidence and that of Mr Craven, it is unsurprising that in his closing address for the Appellants, quoted at paragraph [5] above, Mr Wylie conceded the proposed development will not have any unacceptable impacts on residential amenity and privacy.
- [144] For the reasons provided in paragraphs [111] to [143] above, I am satisfied that the proposed development is of a bulk and scale that is consistent with the intended form and character of the local area.

#### Performance outcome PO15 of the Multiple dwelling code

- [145] Performance outcome PO15 of the Multiple dwelling code relevantly requires the proposed development have a building depth and form that is articulated to, amongst other things, ensure that the bulk of the development is in keeping with the form and character intent of the area.
- [146] The Appellants submit the proposed development's sheer size, bulk and scale means that, notwithstanding the articulation applied to the buildings, they are not in keeping with the form and character intent of the area. The Appellants say the intent is for low-rise, house-scale and low-density dwellings.
- [147] Mr Perkins considers the proposed development complies with this outcome. In the Town Planning Joint Expert Report he acknowledged that the length of the buildings are greater than that sought in the associated acceptable outcome. However, he considered that the buildings have been appropriately articulated by balconies, cladding and screens that serve to break down the bulk of the buildings. He also noted the façade of the building adjacent to Free Street has been designed to provide an articulated front by having the two portions of the front building angled towards different parts of the street with a landscaping area between to soften the building's

appearance. Mr Perkins considered that the separate setbacks of the roof line will reduce the building's bulk and scale.

- [148] Mr Craven did not suggest any non-compliance with this performance outcome.
- [149] In his report, Mr Peabody says:
- “the architectural design elements applied to the buildings shall offer a highly diversified and articulate collection of buildings as viewed from the adjoining streetscapes, parklands residential allotments and from within the development.”
- [150] He also expresses the opinion that the design outcome and scale of development remains highly articulated through undulating balcony edges, significant plan direction changes to the building footprints along with the application of materials, textures and colour.
- [151] Mr Peabody further notes that the depth and form of the proposed development is articulated by the terracing, which serves to ensure the bulk is in keeping with the form and character of the area. In addition, building widths along the Free Street road (as opposed to path) frontage are less than 30 metres and building ILU B addressing Pine Street is less than 30 metres in width. Mr Peabody also notes that the setback from all boundaries satisfy acceptable outcome AO5(b). He considers that this well considered architectural approach will mitigate the scale of development within the surrounding context.
- [152] The evidence of Mr Peabody with respect to articulation and the bulk of the development referred to in paragraphs [44] and [125] to [127] above is also relevant to this issue.
- [153] Mr Powell gave evidence about the visual impact of the articulation. In his report, Mr Powell expresses the view that the proposed built form is well articulated, both vertically and horizontally, via architectural treatments to the façades. His opinions about the bulk of the development as compared to the built form in the area withstood scrutiny under cross-examination as identified in paragraphs [122] and [124] above.
- [154] Having regard to the evidence of Messrs Perkins, Peabody and Powell, I am satisfied the proposed development complies with performance outcome PO15.

#### Performance outcome PO51 of the Multiple dwelling code

- [155] The Appellants submit the development does not have an intensity reflective of the lower density and form of the Low density residential zone, and does not comprise of a range of detached and attached buildings. They say this is particularly relevant given the subject site was described by Mr Perkins in cross-examination as being a larger site.
- [156] The Council submits that the primary objective of PO51 is that development “*supports neighbourhood structure*” and a “*lower*” intensity residential character, and integrates with adjoining sites. It submits that no plainly identified non-compliance arises with that primary objective. The Council says it is admittedly difficult to ascertain whether references, such as to a mix of dwelling types and building forms, is intended to relate specifically to each and every development in the zone. It submits that logic would suggest not, which is supported by references to other sub-paragraphs such as connections to the existing or proposed local street and park

network; legible and direct pedestrian and cyclist accesses; and new public roads and parks.

- [157] The Council's submission is consistent with s 5.3.3(1)(d) of City Plan, which requires assessment against applicable assessment criteria "*to the extent relevant*".
- [158] I accept the Council's submission about the primary objective of performance outcome PO51. The provision identifies several ways this primary objective might be achieved, including by providing for a mix of dwelling types and building forms or by the proportion of dwelling houses increasing on larger sites. However, properly construed, compliance with each of sub-paragraphs (a) to (g) is not required.
- [159] As such, although the proposed development does not provide any freestanding dwelling houses or townhouses, I am nevertheless satisfied that it would support the neighbourhood structure and, to the extent possible for a retirement facility, supports the generally lower intensity residential character.
- [160] In considering compliance with this provision, it is significant that the subject site has been used for a retirement village for nearly 30 years. A retirement facility use is part of the fabric of this neighbourhood.
- [161] Having regard to the other evidence already referred to above, including that about the design of the proposed development, I am satisfied the proposed development appropriately integrates with adjoining sites.

#### Performance outcome PO52 of the Multiple dwelling code

- [162] Performance outcome PO52 of the Multiple dwelling code requires the proposed development respect the intensity and form of the neighbourhood and demonstrate an appropriate site density.
- [163] The Appellants submit this is not complied with "*in circumstances where the neighbourhood built form is of a low-scale, low-rise and low-density nature*".
- [164] As is noted in the Council's submissions, the neighbourhood includes land in the Low-medium density residential zone.
- [165] In cross-examination, Mr Craven agreed that impacts of density, per se, are not the issue. This is unsurprising given his opinions as noted in paragraphs [7] to [14] above.
- [166] Having regard to that evidence, the lack of amenity impacts associated with the development and my findings about the acceptability of the bulk and scale of the development, I am satisfied that the proposed development complies with performance outcome PO52.

#### **Impacts on Balun Park**

- [167] The Appellants submit that particular consideration must be given to the potential impact of the development on Balun Park given it is identified in the Greenspace System as an area of corridor value.
- [168] In this context, the Appellants allege that the proposed development does not comply with strategic outcome 3.5.1(1)(d) of the Strategic framework. It is a strategic

outcome for Brisbane’s clean and green leading environmental performance. It states:

“The Greenspace System serves many functions. It contributes to the city’s character and liveability; it supports landscape, recreation and ecological functions, ecosystems services and defines local neighbourhoods and the edge of the city.”

- [169] The Appellants also allege that the proposed development does not comply with specific outcome SO1 and land use strategy L1.2 for Element 5.6 Brisbane’s Greenspace System. They provide:

| Specific outcomes  | Land use strategies  |
|--|--|
| <u>Greenspace System</u>   |  |
| <b>SO1</b><br>The <u>Greenspace System’s</u> values and functions are identified, retained and enhanced. | <b>L1.1</b><br>Development protects land allocated for nature conservation, public open space and sporting and recreation uses.                          |
|  | <b>L1.2</b><br>Development intensity, land use allocation, siting and design protect the multiple values and functions of the <u>Greenspace System</u> . |
|  | <b>L1.3</b><br>Development does not fragment high-value biodiversity areas, areas for large-scale rehabilitation, fauna movement and rural activities.   |

- [170] The Appellants submit that these provisions indicate that a purpose of Balun Park is to support landscape functions and to have a character that defines the local neighbourhood, and that such values and functions ought be identified retained and enhanced.

- [171] The proposed development does not involve development of any land that is part of the Greenspace System.

- [172] However, the Appellants rely on an impact on Balun Park described by Mr Craven in the Town Planning Joint Expert Report. He says:

“While it is agreed that overlooking of parkland assists with casual surveillance of paths and parks, that is achieved with building forms that are consistent with those in the surrounding low density residential area. Balun Park forms a quite narrow space between the site and Enoggera Creek, and conveys a passive, low intensity character. For local residents using it, the significantly out of scale development proposed is likely to seriously erode the identity and character of the immediate locality, which is characterised by 1-2 storey housing that is consistent with and respectful of the park.”

- [173] Mr Craven also says:

“With respect to the development’s impact on Balun Park and the entry to it at the end of Free Street, Mr Craven agrees that additional units create additional surveillance, but this does not establish carte blanche to develop beyond reasonable expectations. There is a balance between having sufficient surveillance from adjoining properties to provide some active deterrent to criminal behavior and

excessive overlooking, which can disturb the very purpose of passive recreation in a park. In Mr Craven's view, because Balun Park is quite narrow beside the subject site, the proposal's 4-5 storeys would create excessive actual and perceived overlooking, create an overbearing character that is beyond the small scale of the park and it would project to users of the park – especially local residents – a character curiously out of scale with that elsewhere in the precinct.”

- [174] Mr Craven opines the proposed development will create unreasonably amenity impacts with respect to overlooking of Balun Park and the pedestrian access to it. He considers the impact would result from the perception of being watched from highly visible buildings and would detrimentally affect passive recreational activities.
- [175] In their statements, a number of the Appellants expressed concern that the proposed development would “*loom large over the park*” and involve unacceptable overlooking of the park.
- [176] The Appellants submit Mr Craven's evidence indicates that Balun Park's landscape form and function intended by the scheme comprises a natural environment surrounded by a low-rise, low-density built form. The proposed development, by introducing a built form of a greater height and density than otherwise anticipated by the surrounding zoning, will change the intended character of the park, and would be accordingly inconsistent with the strategic framework provisions.
- [177] The submission suggests the local neighbourhood defines the character of the park. This is inconsistent with s 3.5.1(1)(d), which identifies that one of the functions of the Greenspace System is that it defines local neighbourhoods.
- [178] In any event, I do not accept Mr Craven's characterisation of Balun Park as “*quite narrow*” between the subject site and Enoggera Creek.
- [179] As is noted by Mr Powell in his report, the width of the park between the boundary of the subject site and the creek varies between 40 and 150 metres wide. The park is roughly rectangular in shape, with dimensions in the order of approximately 160 metres (measured north-west to south-east) by 130 metres (measured north-east to south-west). It is approximately two hectares.
- [180] Mr Perkins also did not regard the park as narrow. He has particular familiarity with it, having ridden his bike through it for the past decade or so.
- [181] I am also not persuaded that the proposed development will have the impact on Balun Park described by Mr Craven and the Appellants.
- [182] The setback of the proposed development from Balun Park varies between approximately 6 and 12 metres to balconies above ground floor level and 8 to 15 metres to building walls and openings.
- [183] The adjacent portion of building ILU D is setback between 10 and 16 metres from the boundary. Substantial landscaping, including deep planting, are contained within the setback.
- [184] The eastern face of ILU E is setback approximately six metres from the boundary and is to contain substantial landscaping in the form of advanced trees.

- [185] Detailed cross-sections of the interface of the proposed development and the pathway connecting the southern end of Free Street to Balun Park prepared by Mr Powell demonstrate that ILU E will be well-separated (by approximately 18 to 20 metres) from buildings to the east. A generous landscape buffer containing advanced tree specimens is proposed.
- [186] In his individual report, Mr Powell opines that the architectural drawings and photomontages demonstrate that the proposed buildings and landscape are responsive to the scale of the park and the landscape setting, and will minimise the apparent bulk and scale of the building when viewed from nearby.
- [187] Mr Powell provided a cogent explanation of the basis for his opinion. He notes the proposed development allows the natural and semi-natural features in the park context (planted native trees in grass, open grassed areas, and gardens) to visually dominate the foreground and midground.
- [188] Mr Powell gave further explanation of this view during cross-examination. He said:  
“... the existing mature vegetation in the park already creates a setting that – where the canopy sits above the form. So the – there are much larger riparian tree species that will visually dominate a building in this area.”
- [189] This description of the vegetation in the park relative to the subject site accords with what I viewed during the site inspection.
- [190] In his report, Mr Powell also explains that the proposed development will be viewed from the park through a filtered vegetative buffer of existing and proposed plantings in the foreground and midground.
- [191] In terms of the interface of the proposed development with the pathway connecting the southern end of Free Street to Balun Park, Mr Powell opines that the proposed landform and advanced landscaping between ILU E and the path will ensure a responsive development interface to the east.
- [192] During cross-examination by Mr Wylie, Mr Powell was questioned about the impact of overlooking. The following exchange occurred:  
“And, similarly, if you were in the park an effect of having so many balconies with those views is that, you know, one could feel as if the – one would feel the overbearing nature of this development if one were recreating in the park to the immediate south of the building. It would – there would be an overbearing feel, wouldn’t there?---I don’t know. I mean, depends on the individual. But I think the reality is that those apartments that are near ground or just above the ground level that would have a greater ability to have a visual engagement with the park are those which are going to be more quickly softened with filtered vegetation. So their views are going to be out through filtered vegetation. They will sort of see what’s going on in the park. But the reverse amenity – the reverse views back through this filtered screen from the pedestrians that are further afield will see more of that vegetation and less of the buildings and the people behind. They will be a bit more disguised. But I don’t think that that will be an overwhelming sense of overlooking, and I think that the top floor, in reality, as I said, would be broad, elevated views across into the canopy of the trees over the top of the park. So a reasonable person I don’t think would find that to be, to use Mr Craven’s term, excessive overlooking.”



- [193] I accept the evidence of Mr Powell. His evidence on visual impact is consistent with that depicted in the photomontages. I also accept his evidence with respect to overlooking.
- [194] For the reasons provided, I am satisfied that, even if the proposed development was approved, Balun Park will continue to contribute the city's character and liveability; support the city's landscape, recreation and ecological functions, ecosystems services and define the local neighbourhood.

**Should weight to be given to the amendment to the assessment benchmarks?**

- [195] The Appellants contend that the court should give weight to overall outcomes (4)(b) and (5)(a) of the Low density residential zone code in the current version of City Plan.<sup>18</sup>
- [196] The Appellants submit the density, bulk and scale of the proposed development is of a fundamentally different nature to that existing in the locality and to that identified as appropriate in these provisions of City Plan. They submit that for the reasons provided with respect to non-compliance with bulk and scale requirements in City Plan as in force at the time of the application, the proposed development significantly deviates from these requirements of the current version of City Plan in a significant way.
- [197] Aveo submits these provisions are of no concern as, when read in context with overall outcome (4)(d), there is little work for the provisions to do in the case of a retirement facility.
- [198] When construing overall outcome (4)(b) and (5)(a), it is important to consider it in context. Relevantly, overall outcomes (4)(a) to (d) and overall outcome (5)(a) in the current version of City Plan provide as follows:
- “(4) Development location and uses overall outcomes are:
- (a) Development provides for suburban living in dwelling houses of predominantly 1 or 2 storeys in height, on appropriately sized and configured vacant lots, which maintain the low density detached housing suburban identity of the Low density residential zone.
  - (b) Development provides for other housing types at a house scale to provide housing diversity offering choice to different household types and individuals to suit residents through different life-cycle stages.
  - (c) Development, other than a dwelling house, including dual occupancy of a multiple dwelling is not accommodated within this suburban setting unless on a well-location site of over 3,000m<sup>2</sup>.
  - (d) Development for other housing types, being a residential care facility or retirement facility, which provides housing diversity and enables people to remain within their local neighbourhood throughout their life cycle, may be accommodated at appropriate locations where height is no greater than 1 or 2 storeys.

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<sup>18</sup> Effective 1 December 2017.

(5) Development form overall outcomes are:

(a) Development is of a form and scale that reinforces a distinctive subtropical character of low rise, low density buildings set in green landscaped areas.”

[199] Like Aveo, the Council submits that overall outcome (4)(a) deals with dwelling houses, (4)(b) deals with housing types other than dwelling houses and (4)(d) deals with housing types of a specific nature. The Council accepts that absent overall outcome (4)(d) one would construe (4)(b) as including retirement facilities but submits one would not do so in circumstances where specific reference is made to retirement facilities in overall outcome (4)(d). As was observed by Mr Job in his closing address, such a construction does not leave overall outcome (4)(b) with no work to do. Other household types that provide for residents through different life-cycle stages include share houses for students and smaller housing types for empty nesters, such as town houses and smaller multiple dwellings. I agree. In my opinion, the proper construction of the provision is as contended by Aveo and the Council.

[200] Even if I am wrong about the proper construction of the provision, it would not change my view about the outcome in this appeal for three reasons.

[201] First, to the extent that the proposed development is not of a “*house scale*” or low density, I do not consider the departure from the provisions to be significant in light of the evidence of Mr Peabody, which I accept, that the development is of a “*house compatible scale*”. His evidence in this respect is quoted at paragraph [125] above.

[202] Second, for reasons already explained, I am satisfied that the proposed development is of an acceptable bulk, scale and density.

[203] Third, the same provisions are incorporated into the draft scheme amendments that have been proposed by the Council.

[204] The adoption of the amendments is imminent. The proposed amendment includes a change to overall outcome (4)(d) that will require retirement facilities to meet the bulk and building height requirements of the Retirement and residential care facility code. For reasons explained at paragraphs [255] to [278] below, I am satisfied that the proposed development complies with that draft code.

[205] The nature of the alleged non-compliance with respect to overall outcome (5)(a) was addressed by the Appellants in their Supplementary Outline of Argument. They submit a comparison of overall outcome (5)(a) to overall outcomes (5)(b), (c), (d) and (e) demonstrates the provision requires all development to be of a form and scale that reinforces a distinctive character of low-rise, low density buildings set in green landscaped areas. They submit the locality’s prevailing character is low-rise. They also submit the relationship between the proposed development and the detached housing in the locality demonstrate the proposed development would not “*reinforce*” the low-rise character but would cut across it.

[206] I have described the character of the locality in paragraphs [15] to [22] above. The photos in Exhibit 3 provide a useful depiction of the subtropical character of the area. They show the subtropical character of the locality is informed by substantial street trees that provide filtered views of built form, as well as a density of development that permits landscaping in front yards (visible through the front fences).

- [207] The photomontages demonstrate how this character is reinforced by the proposed development, particularly as a consequence of the extensive landscaping proposed. This is particularly evident from a comparison of the photos of the existing views in Free Street with the equivalent photomontages. The photos reveal how the existing development, with its solid metal fence, detracts from the subtropical character otherwise present. The proposed development not only reinforces the subtropical character otherwise present in the area, it provides a substantial enhancement to that character. It is able to do so because of the extent of setbacks provided and the transition in building height.
- [208] As such, even though the proposed development does not contain low rise and low density buildings, I am nevertheless satisfied it is appropriate.

### **Relevance of the existing use – a matter prescribed by regulation**

- [209] Aveo contends the court should have regard to the current lawful use of the subject site. The Appellants did not contend otherwise. This is unsurprising given the current lawful use of premises is a matter prescribed by s 31(1)(f) of the *Planning Regulation 2016* (Qld).
- [210] The subject site has been used for approximately 28 years as a retirement village with 74 independent living units and a community building. Site works commenced in or about June 1990.
- [211] Aveo submits the existing use of the subject site is significant for three reasons.
- [212] First, that the present use of the subject site is relevant when assessing whether the proposed development would be for an appropriate use. In circumstances where the land has been used for a retirement village for almost three decades, it is submitted that the proposed development would be an appropriate use of the land. I agree. Indeed, the submitters do not object to the proposal on the basis of “*use*”.
- [213] Second, Aveo submits the existing use is relevant in assessing the existing character and amenity of the locality. I agree. This is an area where the residents in detached houses have apparently successfully cohabitated with retirees in a retirement village for more than a generation. This existing use has influenced the character and amenity of the area. It informs reasonable public expectations.
- [214] Third, Aveo submits the existing use of the subject site provides evidence as to the need for the proposed development. It contends the need is highlighted by comparing the contemporary facilities that the proposed development would deliver for the safety, wellbeing, and enjoyment of its residents to the design and facilities that are nearly three decades old. In this respect, Aveo relies on the evidence of Mr Kordic.
- [215] As is noted by Mr Kordic, the head of development for Aveo, the existing use is a 1970s style brick and tile single level development. It uses a lot of land to house relatively few retirees.
- [216] Mr Kordic also explains that the current facility does not meet the standards or expectations of today’s retirees. It represents an older style of retirement village built across a site with multiple levels with steps and “*thresholds*”. These steps and thresholds present falling hazards and are the antithesis of good design for a retirement village. Similarly, the residents do not have all weather access to their

cars, nor do they enjoy the range and standard of facilities available at a modern retirement village.

- [217] In addition, Mr Kordic notes that the design of buildings and onsite facilities are outdated by today's standards having regard to factors such as energy standards, security, technology, the appearance of the buildings, the standard of design and finishes, and *Disability Discrimination Act* compliance.
- [218] I accept Mr Kordic's evidence. It is relevant that approval of the proposed development would result in an enhanced development outcome being delivered to a greater number of retirees. This matter is in the public interest, particularly when one considers the ageing population and the growing demand for such facilities.

### **Relevant matters**

- [219] Aveo and the Council submit the court should have regard to a number of relevant matters. They include amendments to the planning framework in City Plan proposed by the Council, the need for the proposed development, and other sound town planning principles (including absence of tangible impact).

### **Proposed City Plan amendments**

#### Should the proposed amendments be given weight?

- [220] On 14 June 2016, the Council resolved to amend City Plan. The amendments are "*intended to support the provision of aged care accommodation*".
- [221] The Council minutes of adoption record:
- "The proposed amendment will achieve the following.
- Update the Strategic framework to emphasise the importance of facilitating well-located retirement living and aged care accommodation.
  - Create a new Retirement and residential care facility code, with specific provisions tailored to such facilities, to replace the use of multiple codes.
  - Encourage the refurbishment and extension of existing retirement and residential care facilities.
  - Broaden the zones in the city where a retirement facility and residential care facility is envisaged, to encourage new retirement and residential care facilities in our neighbourhoods.
  - Provide for retirement and residential care facilities in Low density residential and Low-medium density residential zones as code assessable where they meet existing height requirements.
  - Increase allowable building height as code assessable for residential care facilities and retirement facilities in the Medium density residential and High density residential zones.
  - Facilitate retirement facilities and aged care facilities in well-serviced areas near existing shops, public transport and key services."

[222] On 12 December 2016, the proposed amendments were sent to the State. On 6 April 2018, the Minister advised that public consultation could proceed. That occurred between 18 June and 21 September 2018. Submissions were assessed and changes were made to the proposed amendments. The Council considers that the changes did

not make the proposed amendments significantly different to the version on which it carried out public consultation.

- [223] At its meeting of 27 November 2018, in accordance with the draft resolution provided to it, the Council resolved to proceed with the proposed amendment and to seek the Minister’s approval to adopt the proposed amendment
- [224] The “*major amendment*” is at a very late stage of the adoption process. It is clear from Statutory Guideline 01/16 that the outstanding action is for the Minister to consider whether there has been appropriate compliance with public consultation, and whether there is a significant difference between the amendment proposed to be implemented and the version that was the subject of public consultation. If the Minister is satisfied with the public consultation and that there is no significant difference, the Council must decide whether to adopt the proposed planning scheme. The “*performance indicator timeframe*” under the Guideline for those steps are 40 and 30 business days respectively.
- [225] The Council submits the court may proceed on the reasonable assumption that the amendments the Council has very recently endorsed will proceed to implementation within the next few months. That was Mr Perkins’ expectation.
- [226] Aveo and the Council submit that the proposed amendments should be afforded substantial weight. The Council submits that is particularly so in the context of the need for such facilities. It submits the Council identified the need as part of the amendment process over the last few years. It says the expert evidence in this appeal supports the Council’s position.
- [227] The Appellants concede it is open for the court to give significant weight to the proposed City Plan amendments.<sup>19</sup>
- [228] I am satisfied that it is appropriate to give the proposed amendments significant weight. The precise details of the proposed amendments are known, the process is at a very advanced stage, and the Council has indicated its determination to implement the amendment.

#### The relevant proposed amendments

- [229] The package of amendments includes amendments to the Low density residential zone code. In particular, the overall outcomes are intended to provide:
- “(1) **The purpose of the low density residential zone is to provide for:**
- (a) a variety of low density dwelling types, including dwelling houses;
  - (b) community uses, and small-scale services, **facilities** and infrastructure, **to support local residents.**
- (2) The purpose of the zone will be achieved through overall outcomes for:
- (a) zone role;
  - (b) development location and uses;
  - (c) development form.

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<sup>19</sup> T4-4 – T4-5.

- (4) Development location and uses overall outcomes are:
- (a) Development provides for suburban living in dwelling houses of predominantly 1 or 2 storeys in height, on appropriately sized and configured vacant lots, which maintain the low density detached housing suburban identity of the Low density residential zone.
  - (b) Development provides for other housing types at a house scale to provide housing diversity offering choice to different household types and individuals to suit residents through different life-cycle stages.
  - (c) Development, other than a dwelling house, including dual occupancy or a multiple dwelling is not accommodated within this suburban setting unless on a well-located site of over 3,000m<sup>2</sup>.
  - (d) **Development for other housing types, being a residential care facility or retirement facility together with ancillary convenience activities and allied services (care co-located uses), which provide housing diversity and enable people to remain within their local neighbourhood throughout their life cycle, may be accommodated at appropriate locations where development meets the bulk and building height requirements of the Retirement and residential care facility code.**
  - (e) Development for a relocatable home park or tourist park may continue to operate and expand where on an existing site to provide housing diversity.
- ...
- (i) Development for a compatible and individual small-scale non-residential use which is a community care centre, community use, health care service, office, shop or veterinary service (together with any associated caretaker's accommodation or dwelling unit), where not on land within the Commercial character building overlay is to:
    - (i) have a gross floor area of less than 250m<sup>2</sup>;
    - (ii) serve local residents' day-to-day needs;
    - (iii) not undermine the viability of a nearby centre.
  - (j) Development for a home-based business may operate in a dwelling house and is of a scale and nature that protects the amenity of adjoining residents.
  - (k) Development for a non-residential use serves a local community facility need only, such as a childcare centre or a substation, and is of a bulk and scale that is compatible with and integrates with the built form intent for the low density residential zone.
  - (l) Development for rooming accommodation accommodates five persons or less.
- (5) Development form overall outcomes are:
- (a) **Development is of a form and scale that reinforces a distinctive subtropical character of low rise, low density buildings set in green landscaped areas."**

(emphasis added)

[230] Overall outcome (4)(a) regulates the development of dwelling houses. They are to be "predominantly" one or two storeys in height. Overall outcome (4)(b) refers to

development for “*other housing types*” (i.e. other than dwelling houses). They are intended to be developed “*at a house scale*”. Overall outcome (4)(c) intends that development other than dwelling houses are not accommodated within the Low density residential zone unless on a well-located site of over 3 000 square metres. Most relevantly for this development though, overall outcome (4)(d) relates specifically to development of the type proposed. Such development is expressly envisaged at appropriate locations where development meets the bulk and building height requirements of the Retirement and residential care facility code.

[231] Reference to the Retirement and residential care facility code indicates a range of overall outcomes that may be described as relevant to the proposed development on the subject site. They include:

**“9.3.18.2 Purpose**

- (1) The purpose of the Residential care facility code is to assess the suitability of development to which this code applies.
- (2) The purpose of the code will be achieved through the following overall outcomes:
  - (a) Development is designed and sited to achieve a high level of amenity for residents of the facility and provides a comfortable, stimulating and attractive living environment for residents.
  - ...
  - (c) **Development provides buildings that are designed to integrate with the character of the locality, present as non-institutionalised and provide home-like environments, a sense of belonging, privacy, independence, comfort and safety.**
  - (d) Development promotes a residential environment that is capable of supporting older people to age in place, avoiding or delaying the need for residents to relocate to alternative accommodation as their care needs change.
  - ...
  - (f) Development is conveniently located in relation to activity centres, community facilities and services, public spaces and public transport, to enable access to, and active participation and social interaction with, the wider community.
  - ...
  - (h) Development has a site area and frontage width that is sufficient for the scale, form, open space provision and operation of the development, to deliver a comfortable living environment and to minimise adverse impacts on neighbours.
  - (i) Development is designed and sited to contribute to and minimise adverse impacts upon the amenity of adjoining and nearby residential dwellings and other sensitive uses, including protecting visual privacy through appropriate setbacks and separation of buildings, landscape buffering, and screening.

- (j) The proportion of built and natural features, the siting, bulk and scale and design features of buildings, services and infrastructure, and on site open spaces and landscaping achieves:
  - (i) a high level of amenity for occupants, visitors and staff and adjoining residents, including access to open and landscaped spaces, natural light, sunlight and breeze to support outdoor subtropical living;
  - (ii) a development that is integrated with the local neighbourhood and presents an attractive interface that positively contributes to Brisbane's character and identity and high quality subtropical streetscapes, public spaces and pedestrian environment;
  - (iii) building location and building heights that transition sensitively to adjoining and nearby development;
  - (iv) a highly articulated and physically modulated building form, and varied roof form elements;
  - (v) generous locations for deep planting.
- (k) **Greater building heights for a retirement facility or residential care facility are supported on larger sites where the impacts from the height on adjoining and nearby sites can be mitigated by:**
  - (i) **transitioning the height of the building down to the height of buildings surrounding or opposite the development;**
  - (ii) generous landscaping and open space buffers to adjoining sites and providing appropriate building setbacks, landscaping and deep planting;
  - (iii) providing an appropriate balance of built form and open space.”

(emphasis added)

[232] Performance outcomes PO5, PO7, PO8 and PO11 of the Retirement and residential care facility code, and their corresponding acceptable outcomes, are also relevant. They state:

**Table 9.3.18.3.A–Criteria for assessable development**

| <b>Performance outcomes</b>                    | <b>Acceptable outcomes</b> |
|--|----------------------------|
| <b>Section B-If for assessable development</b> |                            |
| <b>Site area and frontage</b>                  |                            |



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| <p><b>PO5</b></p> <p>Development has a site area and frontage width that is sufficient to:</p> <ul style="list-style-type: none"> <li>(a) accommodate the scale and form of the buildings and transitioning of height;</li> <li>(b) deliver useable communal open space areas and private open spaces;</li> <li>(c) create suitable separation between buildings on site and adjoining sites to accommodate landscaping buffering;</li> <li>(d) achieve viable areas of deep planting and landscaping to retain significant vegetation and protect and establish large subtropical shade trees;</li> <li>(e) achieve safe and convenient vehicle access to the site;</li> <li>(f) accommodate on site parking and vehicle manoeuvring for residents, visitors and service providers;</li> <li>(g) accommodate the location and size requirements of service authorities and site services, including electricity transformers and fire hydrant and boosters assemblies, to minimise adverse visual and amenity impacts on neighbours and the streetscape;</li> <li>(h) minimise the impact of new driveways on the streetscape.</li> </ul> | <p><b>A05</b></p> <p>Development:</p> <ul style="list-style-type: none"> <li>(a) in the Low density residential zone: <ul style="list-style-type: none"> <li>(i) has a minimum 3,000m<sup>2</sup> site area and 40m frontage width; or</li> <li>(ii) is on the site of an existing residential care facility or retirement facility; or</li> <li>(iii) is extending the site of an existing residential care facility or retirement facility;</li> </ul> </li> <li>(b) in any other zone has a minimum 800m<sup>2</sup> site area and 20m frontage width.</li> </ul> <p>Note-The site frontage is measured at the property line on the primary road boundary.</p> <p>Editor's note-Any other zone, means a zone where a retirement facility or residential care facility is potentially envisaged, being the Low-medium density residential zone, High density residential zone, Medium density residential zone, a zone in the Centre zones category, Mixed use zone, Community facilities zone (Community purposes zone precinct, Health care purposes zone precinct and Major health care zone precinct), Specialised centre zone (Major education and research facility zone precinct) and Emerging community zone.</p> |
| <p><b>PO7</b></p> <p><b>Development ensures that the proportion of buildings to open space and landscaping on a site:</b></p> <ul style="list-style-type: none"> <li>(a) <b>results in a building bulk and form that is appropriate in its local setting;</b></li> <li>(b) enhances residential amenity including access to natural light, sunlight, breezes and outlook;</li> <li>(c) supports useable outdoor subtropical spaces;</li> <li>(d) provides generous and varied private and communal open space opportunities for residents and visitors to recreate, socialise and experience relief from the built form;</li> <li>(e) provides for winter sun access into communal open space areas;</li> </ul>  | <p><b>A07</b></p> <p>Development has a maximum site cover that:</p> <ul style="list-style-type: none"> <li>(a) complies with the requirements set out in a neighbourhood plan; or</li> <li>(b) if no neighbourhood plan applies or no requirements are specified in the neighbourhood plan: <ul style="list-style-type: none"> <li>(i) 45% where in the High density residential zone;</li> <li>(ii) 50% where in any other zone; whichever is the greatest.</li> </ul> </li> </ul> <p>Note-The site cover provisions of this code do not apply to sites in a zone in the centre zones category or the Mixed use zone, where the provisions of the Centre or mixed use code prevail.</p>  |

|  |   |
|--|---|
| <p>(f) provides for deep planting areas to retain, create and enhance significant vegetation and protect and establish large subtropical shade trees;</p> <p>(g) provides for generous buffers to adjoining premises to mitigate the impacts of higher building heights.</p>   |   |
| <b>Building design and appearance</b>  |   |
| <p><b>PO8</b></p> <p><b>Development height, bulk and scale, siting and layout ensures:</b></p> <p>(a) building height on sites of under 3,000m<sup>2</sup> where outside of the Medium and High density residential zones are consistent with intended form and character of the local area including the predominant height of existing or approved buildings in the street;</p> <p>(b) <b>where building height is greater than the predominant height in the local street context, the development sensitively reduces heights towards site boundaries to a compatible scale with the height of buildings on adjoining or opposite premises;</b></p> <p>(c) impacts on residential amenity and privacy from overlooking, visual dominance and overshadowing are minimised and adequate levels of natural light, sunlight and breezes are maintained to a habitable room, balcony and private open space for both the development and residences on adjoining and nearby sites;</p> <p>(d) <b>sufficient visual and acoustic privacy between dwellings without reliance on screening;</b></p> <p>(e) <b>the development contributes to the character of the streetscape and landscape and relates to the existing streetscape rhythm and setback pattern;</b></p> <p>(f) there is adequate landscape buffering, the retention of significant vegetation and protection and establishment of large subtropical shade trees in deep planting areas.</p> <p>Editor's note-This is demonstrated through the provision of streetscape elevations, site sections</p> | <p><b>AO8</b></p> <p>Development is contained within the building envelope for the site created by applying:</p> <p>(a) the maximum building height in Table 9.3.18.3.B or in a neighbourhood plan;</p> <p>(b) acceptable outcomes for building height transitions specified in Table 9.3.18.3.C and in a neighbourhood plan, where applicable;</p> <p>(c) front, rear and side boundary setback requirements specified in Table 9.3.18.3.D and in a neighbourhood plan, whichever is the greatest;</p> <p>(d) car parking boundary setback requirements specified in Table 9.3.18.3.E and in a neighbourhood plan, whichever is the greatest;</p> <p>(e) building separation requirements in Table 9.3.18.3.F;</p> <p>(f) deep planting and landscaping requirements in Table 9.3.18.3.G.</p> <p>Refer to Figures a and b.</p> <p>Note-This acceptable outcome can be demonstrated by the preparation of a building envelope plan, elevations and sections.</p> <p>Note-Roofing of terrace areas on car parking structures are to comply with boundary setback requirements for balconies.</p> |

|  |   |
|--|---|
| <p>and plans showing adjoining and street context, shadow diagrams and landscape plans</p>   |   |
| <p><b>PO11</b><br/>Development has a building depth and/or length that:</p> <ul style="list-style-type: none"> <li>(a) contains a high level of modulation and articulation to ensure that the bulk of the development is in keeping with the form and character intent of the area;</li> <li>(b) is read as a series of buildings through the use of distinct architectural forms;</li> <li>(c) provides adequate amenity for building residents in terms of natural light and ventilation;</li> <li>(d) does not adversely impact on access to breezes, sunlight and daylight to adjoining premise open space and habitable rooms;</li> <li>(e) does not create wind tunneling impacts on adjoining premises;</li> <li>(f) provides opportunities for dual aspect dwellings;</li> <li>(g) incorporates changes in material, finish or texture at regular intervals;</li> <li>(h) provides expressive shadow casting elements;</li> <li>(i) provides opportunities for additional deep planting.</li> </ul> | <p><b>AO11.1</b><br/>Development has a maximum building length in accordance with table 9.3.18.3.H.</p> <p><b>AO11.2</b><br/>Development has a full building separation of 6m every 15m or, substantial articulation is provided every 15m, that includes:</p> <ul style="list-style-type: none"> <li>(a) a strongly defined change in building line of plus or minus 2m for a length not less than 5m;</li> <li>(b) changes in materials, finishes or texture;</li> <li>(c) re-entrant corner or three dimensional and dynamic shadow casting elements.</li> </ul> <p>Refer to Figure e.</p> <p>Note-Variation in the building plane as a result of gentle curves would not be considered to provide substantial articulation to reduce the perception of building bulk.</p> |

(emphasis added)

[233] These provisions evidence a clear shift in planning strategy in the draft City Plan. The Council no longer intends for there to be any overall outcome (or, indeed, any performance outcome) that is applicable to an assessment of the proposed

development that calls for retirement facilities to be no greater than two storeys in height in the Low density residential zone.

- [234] The shift in planning strategy is to be achieved by the above provisions, as well as by amendments that will result in the Multiple dwelling code no longer being a code against which a retirement facility needs to be assessed.

Does the proposed development comply with relevant proposed amendments to the Low density residential zone code?

- [235] The Appellants submit that the proposed development does not comply with s 6.2.1.1(1)(a) and overall outcome (4)(b), (4)(d) and (5)(a) of the proposed amended Low density residential zone code.
- [236] With respect to the purpose in s 6.2.1.1(1)(a), the Appellants again rely on the development not being low density. Like overall outcome (1) of the Low density residential zone code in place at the time the development application was properly made, the purpose in the proposed amended code does not prevent development that is not low density residential. It contemplates facilities that support local residents. Other provisions also remain the same. For the reasons consistent with those provided in paragraphs [82] to [87] above, I am satisfied the proposed development would comply with this provision.
- [237] With respect to overall outcome (4)(b), the Appellants again rely on the proposed development not being of a house scale. I do not accept the provision is applicable, given the specific provision for development of other housing types being a retirement facility in overall outcome (4)(d). The reasons outlined in paragraphs [196] to [213] above also apply to the proposed amendments.
- [238] The Appellants submissions with respect to non-compliance with overall outcome (4)(d) of the proposed amended Low density residential zone code focus on the phrase “*enable people to remain within their local neighbourhood throughout their life cycle*”. The Appellants submit it is implicit that deferral to the Retirement and residential care facility code is limited to matters associated with bulk and building height. They say matters of density, form and scale remain constrained and controlled by other zone provisions such as the stated purpose in s 6.2.1.1(1)(a) and overall outcome (5)(a). The Appellants further submit a developer will only obtain the benefit of this enlarging provision if the principal purpose of the development is to enable people to remain within their “*local neighbourhood*”. They submit the provision must be given work to do in circumstances where there are no similar provisions in the other residential zone codes (even following introduction of the proposed amendments).
- [239] The Appellants submit the only evidence about the meaning of the “*local neighbourhood*” in this context was given by Mr Perkins, who described the local neighbourhood as being Newmarket, and Mr Craven, who described it as a local area of between two to three suburbs. The Appellants says the requirement for development of this type in this zone to be locally focused is consistent with the low-density intent for the area.
- [240] The Appellants also submit the proposed development does not comply with the requirement because both Ms Wells and Mr Duane, the economist retained by Aveo, described the principal catchment area as being five kilometres from the subject site.

The Appellants also rely on their evidence of a “*broader catchment*” to Bridgeman Downs and Fitzgibbon.

- [241] The Appellants submit that the size of the proposed development, and its intent to provide a product principally for the benefit of those outside the subject site’s “*local neighbourhood*”, would indicate that the deviation from the “*ordinary*” bulk and height provisions of the zone code described in overall outcome (4)(b) is not required or appropriate.
- [242] I reject the Appellants’ submissions for four reasons.
- [243] First, I do not accept that the reference to “*local neighbourhood*” is appropriately limited to the suburb of Newmarket.
- [244] The Appellants submissions with respect to the evidence of Mr Perkins on this issue are inaccurate. Mr Perkins evidence on the issue was as follows:

“With respect to the locality or the local neighbourhood would you describe the local – in the context of the low-density residential zone code - - -?---Yes.

Would you describe the local neighbourhood as being maybe Newmarket? What area would you describe as the local neighbourhood?---So, in the context of – of words in this document or as a general proposition?

Well, we’ll start with – in the context of a general proposition. What would you describe as the local neighbourhood?---Possibly Newmarket.

...

MR WYLIE: Can I invite you to read paragraph – within the low-density residential zone code paragraph 4(d)?---Yes

And you’ll note that it – the purpose of – with respect to the residential care facilities or retirement facilities is to enable people to remain within their local neighbourhoods?---Yes.

And so, in that context, you’d expect that that would relate to people living in the Newmarket area?---If you put my previous answer together with that, yes.

But does seeing this change your opinion?---**Look, I’m just – just still unclear about the exact description of local neighbourhood and what the – what City Plan means by local neighbourhood. It’s a term – it’s a bit imprecise so – well, it’s going to at least include the suburb in which you’re located.** Whether it – whether the use actually needs to include more suburbs than that to, sort of – to satisfy a threshold for – for the uses provision, that may be the case but, I don't know. Nothing – nothing much – I’m just not getting much out of the – out of the – out of the – out of the statement so - - -

Newmarket would be a reasonable starting point?---Well, **Newmarket would be at least a starting point for it.**

And if one turns to page 3 and you’ll note in that in the low-medium density residential zone code at paragraph 4(f), there’s no mention of local neighbourhoods there?---No. There’s no reference in 4(f).

And if one turns to page 6 for the medium-density zone, at paragraph 4(g), no mention of local neighbourhoods there?---No.

And, similarly, for the high-density residential zone at page 8, at paragraph 4(g). Again, no reference to local neighbourhoods there?---That's right.

And I can indicate the changes that – if you can take it as being so that the changed zone codes that are contained in exhibit 4, volume 2, for the zones repeat that – repeat those – the reference to the local neighbourhood in the low-density zone as opposed to the other zones?---Yes.

That's got to mean something, doesn't it, Mr Perkins? That difference, that's intentional?---It may be intentional. I – I – I don't know. I hadn't considered the – I haven't considered the issue.

And you've heard the evidence Ms Wells and Mr Cordick and they're going to be drawing residents to this – they propose to draw residents from this facility much larger area than Newmarket. Would you accept that's so?---Yes, I do.

So, on its face, it would appear that that's inconsistent with the intent for development of this type in this zone, wouldn't you?---Well, that would – that would depend on what the boundary, the local neighbourhood was, I would've thought.

**You wouldn't say that it goes as far north as Bridgeman Downs, would you?---I wouldn't have thought that it would extend to the outer – to the outer circle, that's for sure."**

(emphasis added)

- [245] It is also not accurate to summarise Mr Craven's evidence as limited to two or three suburbs. His evidence was as follows:

**"And in this context, what would you describe as being the site's local neighbourhood in the context of 4(d)?---You're talking about an area that – that people of, say, about 75 years old, I gather, would like to remain in when they're looking for the next step in their housing choice. I'm thinking two or three suburbs. So from here, we're looking at Newmarket, maybe Ashgrove, Wilston, Kelvin Grove – close."**

(emphasis added)

- [246] In terms of the area that older people would like to remain in, the evidence of Ms Wells was particularly instructive. She said:

**"Why is it beneficial for the community for older generations to age – be able to age in place?---It's important to be able to age in place in your own neighbourhood because that enables you to have that continuity of lifestyle support and networks. It also enables to you to have a familiarity about the surrounding that – in which you are, which supports your health and wellbeing. It also ensures that your networks remain in place to enable you to continue to age well. Removal of those networks and removal of somebody from their immediate catchment where they age in place actually dislocates somebody from all those network, so it means they might become socially isolated, their health and wellbeing suffers, etcetera. But to be able to age in place inside a retirement village is very important, otherwise we can go from the community, in our normal home, and be very isolated and alone, straight into a residential aged care facility, which is not desirable to the community, and it's certainly not desirable to the government either. So having a retirement village and letting us age in that retirement village provides that intermediate solution, and for some people, a full solution.**

**Just to try and understand the jargon – in terms of networks, do you mean social networks, family networks, medical services networks, retail networks?---Yes.**

**The whole suite of - - -?---Yes. So everything that we would use in our normal daily life, a senior person also uses in their normal daily life. So health, medical, lifestyle and essential services."**

(emphasis added)

- [247] In his examination in chief, Mr Duane indicated that people in retirement facilities tend to try to live close to their existing community. Based on his research, he considered that five kilometres provides an appropriate guide to a catchment area for that purpose.
- [248] In my view, the appropriate “*local neighbourhood*” for a retirement facility should be an area that would allow its residents to have continuity of lifestyle in terms of their support and social networks, and familiarity about the surrounding area in which they live. I do not consider the inner catchment identified in Exhibit 28 to be unreasonable in that respect.
- [249] Second, as is submitted by Aveo and the Council, insofar as this overall outcome refers to enabling people to remain within their local neighbourhood throughout their life cycle, it is an enabling provision. Draft overall outcome (4)(b) does not preclude a use which would also cater to residents from outside of the local neighbourhood.
- [250] Third, I do not accept that matters of density, form and scale remain constrained and controlled by other zone provisions such as the stated purpose in s 6.2.1.1(1)(a) and overall outcome (5)(a). I accept the submissions of Mr Job QC on behalf of the Council that bulk is not a discrete matter such as height. Bulk involves matters of density, form and scale. It is not intended to be considered in isolation. As much is apparent when one reads the proposed Retirement and residential care facility code. It is replete with references to bulk and height, but not in isolation.<sup>20</sup>
- [251] Other provisions of the proposed amended Low density residential zone code also indicate an intention that, to the extent an overall outcome deals with a particular form of development, it outlines the intended requirements with respect to density, form and scale. This is apparent from provisions such as overall outcomes (2) and (4)(e), (i), (j), (k) and (l).
- [252] Fourth, for reasons already provided, I do not accept that, when read together, the context requires compliance with proposed overall outcome (4)(b).
- [253] I am satisfied that the proposed development complies with overall outcome (4)(d) of the proposed amended Low density residential zone code.
- [254] With respect to overall outcome (5)(a) of the proposed amended Low density residential zone code, the Appellants rely on the fact that the proposed development is not low rise or low density. The provision does not require it to be. Rather, it requires development to be of a form and scale that reinforces a distinctive subtropical character of low rise, low density buildings set in green landscaped areas. For the reasons provided in paragraphs [206] and [207] above, in my view the transitions in building heights, setbacks and proposed landscaping results in the proposed development reinforcing a subtropical character in the area. To the extent the proposed development does not contain low rise and low density buildings, I am nevertheless satisfied that it is appropriate for reasons already explained.

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<sup>20</sup> See, for example, overall outcomes (2)(j) and (k) and performance outcomes PO7, PO8, PO10 and PO12.

Does the proposed development comply with relevant proposed amendments to the proposed Retirement and residential care facility code?

- [255] The Appellants submit that the proposed development does not comply with overall outcomes (2)(c), (2)(k)(i) and performance outcomes PO7(a), PO8(b), PO8(d), PO8(e) and PO11(a) of the proposed Retirement and residential care facility code.
- [256] Overall outcome (2)(c) requires that development provide buildings that are designed to integrate with the character of the locality.
- [257] The Appellants submit the proposed development is fundamentally different in character to the surrounding detached low-set houses. They particularly note building ILU D is about 75 metres in length and four (apparent) storeys in height visible from Free Street (and its lane to the south), and other buildings of five storeys in height overlooking Balun Park. They submit that the court could not be comfortably satisfied that an appropriate level of integration has occurred in light of such stark differences in built form, size, density and appearance. I disagree.
- [258] Although the proposed development is different in character to the surrounding detached low-set houses, the locality does not only include development of that scale. Further, for reasons already explained, particularly with respect to the transitions in building heights, setbacks and proposed landscaping, I am satisfied that the proposed development will appropriately integrate with the character of the locality.
- [259] Overall outcome (2)(k)(i) identifies that greater building heights for a retirement facility are supported on larger sites where the impacts from the height on adjoining and nearby sites can be mitigated by, amongst other things, *“transitioning the height of the building down to the height of the buildings surrounding or opposite the site”*. Similarly, overall outcome (2)(j)(iii) requires the proportion of built and natural features, the siting, bulk and scale and design features of buildings, services and infrastructure, and on-site open spaces and landscaping to achieve building location and building heights *“that transition sensitively to adjoining and nearby development”*.
- [260] Performance outcome PO8(b) also relates to transitions. Where building height is greater than the predominant height in the local street context, performance outcome PO8(b) requires development to *“sensitively reduce heights towards site boundaries to a compatible scale with the height of buildings on adjoining or opposite premises”*.
- [261] The Appellants submit the proposed development does not achieve a sensitive transition. They refer to the diagrams contained in Mr Powell’s report at sections 1, 2 and 3 walking down the path from Free Street to Balun Park (as amended). They submit those diagrams indicate that the building eave heights of building ILU E are almost double the height of the existing residential building eave heights. The Appellants also submit the photomontages show the differences in built form heights adjoining Free Street. They refer to the height of the existing dwelling on the corner of Glin Avenue and Free Street depicted on image 8, which presents to the street as a single-storey building, and the appearance of building 1 opposite as depicted on image 13. They say building 1 plainly presents as a large building of three storeys stepping back to four storeys.
- [262] Having regard to such differences in height between the proposed development adjoining Free Street, and the single and two storey built forms opposite, the



Appellants again submit the court could not be comfortably satisfied that an appropriate “*transition*” or “*sensitive transition*” in height has occurred or that the heights are reduced to a “*compatible scale*”.

- [263] The Appellants submissions with respect to overall outcome (4)(k) ignore that the provision nominates the transition in building heights as one of the several identified means of achieving the stated objective, namely that impacts from the height on adjoining and nearby sites be mitigated. There is no allegation that the proposed development will result in unacceptable hard amenity impacts. Further, when considering whether the transition is sensitive, in my view it is not appropriate to focus on relative building eave heights without also having regard to setbacks and landscaping.
- [264] As I have already explained, I am satisfied that the proposed development is appropriate in terms of its transition to buildings adjoining and opposite it, particularly having regard to the extent of setback and the landscaping proposed. I am satisfied the proposed development complies with each of overall outcomes (4)(j) and (4)(k) and performance outcome PO8(b) of the proposed Retirement and residential care facility code.
- [265] With respect to performance outcomes PO7(a), the Appellants submit that the court could not be satisfied the proportion of buildings to open space and landscaping results in a building bulk and form that is appropriate to the local setting. They say the size, density, bulk and scale of the proposed development is inconsistent with both the adjoining development on Free Street, and the intent for built form in Low density residential zone land overlooking Balun park. I do not accept this submission for reasons already provided with respect to the appropriateness of the bulk and form of the proposed development to the local setting. Further, and in any event, there is no need to demonstrate compliance with performance outcome PO7 as there is compliance with acceptable outcome AO7.
- [266] With respect to performance outcomes PO8(d), the Appellants submit the provision requires:
- “development height, bulk and scale, siting and layout to ensure that impacts on residential amenity and privacy from overlooking, visual dominance and overshadowing are minimised.”
- [267] They submit the Court could not be satisfied that impacts on residential amenity from visual dominance have been minimised.
- [268] These submissions are inaccurate. Performance outcome PO8(d) does not refer to visual dominance at all. It requires development height, bulk and scale, siting and layout ensure sufficient visual and acoustic privacy between dwellings without reliance on screening. For reasons already provided with respect to privacy, I am satisfied the proposed development achieves compliance. In particular, the proposed development’s siting (including setback) and layout contributes to its compliance.
- [269] Performance outcome PO8(c) contains requirements of the type referred to by the Appellants.
- [270] Figure 5 of Mr Powell’s report demonstrates how greater than normal residential setbacks reduce the visual dominance of the proposed built form. During cross-examination, Mr Powell opined that the proposed shade trees and the avenue trees

overwhelm the dominance of the built form of the proposed development, particularly as one walks down to Balun Park. He described how the landscaping would funnel a pedestrian through a shaded canopy into the park. I accept his opinion.

- [271] I also accept the opinion of Mr Powell that, when viewed from Balun Park, the large riparian tree species in the park will visually dominate. The vegetation in the foreground, being the riparian trees in the park, and the proposed vegetation on the subject site will soften views of the proposed development.
- [272] Mr Powell also opined, during evidence in chief, that the transitions are managed effectively, thereby addressing any potential dominance of the development as perceived by adjacent residents.
- [273] I am satisfied that the setbacks, transitions in building height, and the landscape setting appropriately address the potential for visual dominance. The proposed development achieves compliance with performance outcome PO8(c).
- [274] Performance outcome PO8(e) requires development height, bulk and scale, siting and layout to ensure that the development contributes to the character of the streetscape and landscape and relates to the existing streetscape rhythm and setback pattern.
- [275] The Appellants submit the proposed development could not be said to “*relate*” to the existing streetscape rhythm opposite on Free Street because building ILU D has a height and length fundamentally different to the existing dwellings on the opposite side of the road. I do not accept this results in non-compliance with this provision.
- [276] Performance outcome PO8(e) requires an appropriate relationship to be achieved through a combination of height, bulk and scale, siting and layout. To the extent that the height and length of the proposed development is different to the existing dwellings on the opposite side of the road, I am satisfied the development has an appropriate relationship to the existing streetscape rhythm by reason of the design mechanisms used to reduce bulk (including elements that provide articulation), its setback from the boundary, and the layout of the buildings in a manner that allows for the provision of significant landscaping.
- [277] For reasons already provided, including in paragraphs [146] to [154] above, I am also satisfied that the depth and length of the proposed buildings contain a high level of modulation and articulation to ensure the bulk of the development is in keeping with the form and character intent of the area. It complies with performance outcome PO11(a) of the proposed Retirement and residential care facility code.
- [278] The Appellants do not allege non-compliance with any other provisions of the proposed Retirement and residential care facility code. I am, however, also satisfied that the proposed development complies with acceptable outcome AO5, performance outcome PO5 and the proposed amendment to the Strategic framework, which provides that:

“development for retirement facilities and residential care facilities occurs on **well located sites in Suburban Living Areas**. The **scale and built form** of retirement facilities and residential care facilities is **commensurate with the size of the site and sensitive to the surrounding character and amenity** of Suburban Living Areas.”

(emphasis added)

### Conclusion regarding significance of the proposed amendments

- [279] I am satisfied the proposed development complies with the draft City Plan provisions, including the specific use code. This compliance is material for two reasons.
- [280] First, the specific provisions of City Plan with which the proposed development does not comply at present are proposed to be amended by the relevant planning authority in the near future.
- [281] Second, the proposal is consistent with the local government's most contemporary statement of planning intent for important facilities associated with the accommodation of its ageing population.

### **Need**

- [282] Aveo and the Council submit that approval is supported by the need for the proposed development.
- [283] The Appellants accept there is an economic need for the proposed development. They regard it as modest. However, the Appellants do not regard the need to be supportive of approval of the proposed development. The Appellants provide two alternative bases for their position.
- [284] First, the Appellants submit that, under s 45(5)(b) of the *Planning Act 2016*, to warrant a departure from the clear intent of a planning scheme, it would be appropriate for any relevant matter to be properly limited to the need for a scale and form of development beyond what would otherwise ordinarily comply with the relevant assessment benchmarks.
- [285] Second, in the alternative, the Appellants submit, in addition to need for the development being a relevant matter, it is also relevant that the need could be satisfied by a smaller form of development.
- [286] Before turning to each of the Appellants submissions on the relevance of need, it is helpful to identify the general principles with respect to need identified in the cases and the evidence of need in this case.

### General principles

- [287] The general principles with respect to need are well-settled. Many of them are referenced by Wilson SC DCJ in *Isgro v Gold Coast City Council*<sup>21</sup> as follows:

“[20] In *Watts & Hughes Properties Pty Ltd v. BCC* (1998) Q.P.E.L.R. 273 at 275 the Court said:

**Need in the town planning sense does not mean a pressing need or a critical need or even a widespread desire. A thing is needed if its provision, taking all things into account, improves the physical well-being of the community (see *Cut Price Stores Retailers v. Caboolture Shire Council* (1984) Q.P.L.R. p.126 at 131). Need does not connote a pressing urgency but relates to the well-being of the community. A use would be needed if it would, on balance, improve the services and facilities available in a locality (see *Roosterland Pty Ltd v. Brisbane City Council* (1986) 23 A.P.A.D. p.58 at p.60).**

<sup>21</sup> [2003] QPEC 2; [2003] QPELR 414, 417-20.

[21] **Need, in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community** (*Fitzgibbons Hotel Pty Ltd v. Logan City Council* (1997) Q.P.E.L.R. 208 at 213; *Bunnings Building Supplies Pty Ltd v. Redland Shire Council* (2000) Q.P.E.L.R. 193 at 198C). Of course, a need cannot be a contrived one. **It has been said that the basic assumption is that there is a latent unsatisfied demand which is either not being met at all or is not being adequately met** (*Indooroopilly Golf Club v. BCC* (1982) Q.P.L.R. 13 at 32-35, *William McEwans Pty Ltd v. BCC* (1981) 1 Q.P.L.R. 33 at 35).

[22] **The question whether need is shown to exist is to be decided from the perspective of a community and not that of the applicant, a commercial competitor, or even particular objectors:** *Sempf v. Gatton Shire Council* (1997) Q.P.E.L.R. 198, at 199-200; *Arksmead Pty Ltd v. Gold Coast City Council* (1989) Q.P.L.R. 322 at 330. Nor is the impact of a proposed development on existing like businesses a matter which is to be taken into account adversely to the proposed new facility unless, as Ms Scally noted in her report, the extent of competition will cause an overall adverse effect on the extent and adequacy of facilities available to the community: *Kentucky Fried Chicken Pty Ltd v. Gantidis* (1979) 140 C.L.R. 675, at 687.

[23] Any possible adverse effects on an existing business will only be relevant to the extent that there is a risk of a reduction in the level of services enjoyed by the community by depressing one provider, and not replacing it with another: *Zieta No. 59 Pty Ltd v. Gold Coast City Council* (1987) 2 Qd. R. 116, at 120; *Whitehead v. Hervey Bay City Council* (1999) Q.P.E.L.R. 131, at 132. Indeed, **providing competition and choice can be a matter which also provides for a need, in the relevant sense:** *Bunnings Building Supplies Pty Ltd v. Redland Shire Council* (2000) Q.P.E.L.R. 193, at 198.

[24] **The weight to be given to the question of need, in assessing the merits of an application, is not fixed.** As Moynihan J said in *Intrafield Pty Ltd v. Redland Shire Council* (2001) Q.C.A. 116, at para.[20]:

... Need is a relative concept to be given a greater or lesser weight depending on all of the circumstances which the planning authority was to take into account.

**In some instances public or community need for a service or facility may not be great, and other considerations may be of greater moment.**

[25] It is also relevant to have regard to the nature of the proposed development.  
...

[27] As to the question of the weight to be ascribed to need here, **while this is a development of a “special” kind with a specific purpose, suggesting the issue should be looked at fairly critically** (as Skoien SJDC suggested in *Harburg* (supra)) **the proper care of children, and the provision of adequate facilities for that purpose are of manifestly greater importance, and of a more critical kind for the wellbeing of an important group in the community (parents of young children), than such things as service stations, liquor barns, hardware houses and cinemas, or the like. On any view, the existence or otherwise of a latent unsatisfied demand for childcare facilities is a matter of greater significance to the community than, say, having to drive a few extra miles or minutes to fill a car with petrol, or reach a cinema complex.** The presence of other existing child care centres in the area of the proposed development, and the competition it might provide to them, is to be considered in this light.

[28] **Relevantly, too, need is but one of a large number of issues Council is required to consider in an application of this kind and is not, on any view,**

**paramount.** In the context of this scheme, its proper position in the spectrum of matters of greater or lesser importance was fairly set out by Council's own planner, Ms Scally, in the passage already transcribed at para[14]: ie **unless approval of the proposal is likely to have an obvious detrimental effect, need is a matter of relevance, but no great moment. Here, where the proposed development provides an important service to the community, is permissible in the area in which it is to be located, and is largely consonant with surrounding facilities, need is not a matter to which great weight should be given. In particular, it was not incumbent upon the applicant here to establish existing facilities were inadequate, or that approval might potentially impact upon them. Rather, it was only required to show that, in the existing marketplace there was still a reasonably apparent, discernible need for extra childcare places.**

[29] When a Council comes to consider issues of this kind, it is a relevant matter that nothing in the legislation suggests local authorities are intended, or required, to actively manage and oversee private enterprise in their areas, or assume a planning role which requires them to protect existing businesses from competition. **There must, too, be some reasonable, practical limits to the quality and detail of information an applicant must adduce to satisfy a Council about the matters raised,** here, under s17.2.2.2, and .3. As Skoien DCJ recognised so long ago as *Cut Price Stores Retailers & Ors v. Caboolture Shire Council* (1984) Q.P.L.R. 126 at 131, **an obligation to provide information about the likely economic impact of a proposed development upon similar existing businesses could, strictly speaking, involve crippling amounts of time, and money. For these reasons need has never been defined, in this jurisdiction, as reflecting an economic imperative, or one which (by extension) requires an applicant to establish an overwhelming demand by means of very strong supporting evidence:** *Cut Price Stores Retailers (supra)* at 131; *Roosterland Pty Ltd v. Brisbane City Council* (1986) 23 A.P.A.D. 58 at 60; *William McEwans Pty Ltd v. Brisbane City Council* (1981) 2 A.P.A.D. 165.

[30] **Within those parameters the central question is whether or not there is evidence of an existing, latent unsatisfied demand** of the kind discussed in *Queensland Investment Corp (supra, at 373)* and *Arksmead Pty Ltd v. Council of the City of the Gold Coast* [2000] Q.P.E.L.R. 285.”

(emphasis added)

[288] In *PMM Group Pty Ltd v Noosa Shire Council*<sup>22</sup> Robertson DCJ observed:

**“It is trite that any established need has to be considered by the decision maker against the background of the relevant planning provisions in the particular case.** Senior Judge Skoien said in *Skateway Pty Ltd v Brisbane City Council & Ors* [1980] QPLR 24 that a consideration of the extent of need is “subject always to other considerations of the town planning kind...””

(emphasis added)

#### Evidence of need

[289] With respect to questions of economic, planning and community need, the only economist to give evidence was Mr Gavin Duane, and the only retirement and aged care expert was Ms Catherine Wells. Both experts were called by Aveo.

[290] Mr Duane expresses the opinion that there is a clear need for the proposed development. His opinion is underpinned by a detailed catchment area analysis and a supply and demand analysis.

<sup>22</sup> [2005] QPEC 79; [2006] QPELR 144, 168 [129].

- [291] Mr Duane identified a catchment area likely to be served by the proposed development, taking into account existing facilities provided throughout the region, accessibility of the subject site and natural barriers. Mr Duane's defined catchment reflected the subject site's inner-city location, and the likely premium offer that he considered would appeal to residents from a broad region.
- [292] Mr Duane noted that within the catchment the number of persons aged over 65 years is currently estimated at 59,730 (or 13 per cent of the total population). That age group is projected to "*nearly double*" over the period to 2036, increasing to 96,180 people. At that time, people over 65 years are projected to represent a greater proportion of the total catchment – namely 17.5 per cent.
- [293] When cross-examined about the generally younger demographic in the area surrounding the subject site, Mr Duane explained that it is reflective of the absence of sufficient facilities. This causes elderly residents to have to move away from the area.
- [294] In terms of a supply and demand analysis, in his report Mr Duane notes that, aside from the existing facility, there are no retirement facilities within two kilometres of the subject site. The nearest is 2.6 kilometres away, where only 18 independent living units are provided. Mr Duane also notes that vacancy levels across retirement facilities within the catchment are relatively low. The average vacancy rate is currently 2.6 per cent and is reflective of the increasing demand for retirement facilities in inner-city areas. At present 744 independent living units are currently under construction or approved in the catchment. If they are assumed to be developed by 2021, the catchment area would have 4 129 beds by 2021.
- [295] Allowing 1.3 persons per independent living unit, there are currently 4 401 people living in retirement facilities within the catchment area. That indicates around 7.4 per cent of the catchment area over 65 population live in independent living units. That is a lower penetration rate than across Brisbane more generally. Mr Duane considers it is likely to be a function of the lower level of supply provided within the catchment area.
- [296] Assuming a supply of independent living units in line with the current Brisbane average, Mr Duane's analysis shows there is a current undersupply of 107 independent living units. Taking account of those under construction and approved, by 2021, there would be an oversupply of 92 independent living units (assuming a demand of 7.6 per cent of people over 65-years old).
- [297] The Appellants note that Mr Duane accepted in his cross-examination that his forecast does not take account of any additional new facilities. He also accepted that one new facility of between 100 and 150 independent living units every 18 months would be likely to meet this increasing demand. This evidence does not detract from Mr Duane's opinion that there is a clear need. There is no evidence to suggest that such new facilities are likely. To the contrary, Mr Duane explained the difficulties of providing new facilities. Impediments include the difficulties associated with amalgamating larger parcels of land and the scarcity of future development sites within the catchment area. Further, as Mr Duane explained, in inner city locations the retirement facility developers must compete with the residential multiple dwelling unit developers. The latter are developing and selling to a generally more affluent and younger market.

- [298] In addition, with growth in demand for retirement facility spaces predicted over time, the Brisbane average, if it grew in line with the predictions for retirement facilities in Australia, would be closer to 9.7 per cent of people over 65-years old in retirement facilities by 2025 (rather than the current average of 7.6 per cent).
- [299] Mr Duane also considered the availability of community-zoned land within the catchment area. His analysis shows there is very little vacant land currently available. Consequently, retirement facilities have to compete for medium and high density residential zoned land, which he described as typically targeted at developments for a younger age group. Larger sites that could accommodate an integrated retirement facility in close proximity to aged care and a range of services and health facilities are currently unavailable.
- [300] The evidence of Ms Wells supports Mr Duane's opinions.
- [301] As was noted by Ms Wells, the percentage of persons aged 65 and over who are able to reside in an independent living unit in the total catchment is only about 6.2 per cent. This compares unfavourably to other catchment areas such as Redlands (10.2 per cent), Buderim (28.6 per cent), Noosa (13.8 per cent), North Sydney (12 per cent) and Redcliffe (9.4 per cent).
- [302] The situation is even worse when the catchment is divided into an "*inner catchment*" and an "*outer catchment*". The existing penetration within the inner catchment is only about 1.8 per cent. That is much lower than the 6.2 per cent of the total catchment and dramatically lower than other localities.
- [303] In the opinion of Ms Wells, if the inner catchment area were to achieve a penetration of at least 6.2 per cent of persons aged 65 and over for independent living units (consistent with the general catchment), there would be a demand for an additional 381 independent living units in the inner catchment as at 2018. There would also be a demand for an additional 354 independent living units at 2026 following development of the proposed development and 587 independent living units at 2036 (assuming the proposed development is approved and built).
- [304] On the evidence of Ms Wells, it is clear that there is presently an undersupply of retirement facilities in the inner catchment.
- [305] This undersupply is also evidenced by the low vacancy levels across the facilities in the catchment area. Most facilities have less than five vacancies. This equates to an average vacancy rate of 2.6 per cent.
- [306] While the supply and demand analysis of Ms Wells and Mr Duane address both the inner and outer catchment areas, Ms Wells expects most of the residents for the proposed development will come from the local area. She explained the basis of her opinion during evidence in chief as follows:

“So through focus groups, the studies of 10 retirement resident populations and residential aged-care populations across Australia, which – obviously, I’ve done hundreds of supply and demand studies and studies of those populations – most people come from within around about a five kilometre drive. The reason being – is, once upon a time, people would relocate. There might be a tree change or a sea change to move to a retirement village. Increasingly, as people come in at an older age bracket, around 75-plus, that geographic catchment area tightens and shrinks to around five kilometres, and that is con – appears to be consistent across Australia

except when we're in regional areas, where people have to drive further to access because of larger geographical distances and spreads of population.”

- [307] I accept Ms Wells' opinion.
- [308] In support of the submission that the need is only modest, the Appellants rely on the evidence of Mr Kordic.
- [309] Mr Kordic confirmed that prior to buying back the independent living units on the subject site, occupancy rates were around 80 per cent. This is less than average occupancy rates for independent living units within retirement villages, which are 93 per cent.
- [310] Mr Kordic also confirmed that he expected the time to complete the development would be approximately six or seven years and that a complete uptake of the proposed development would take approximately four years to realise.
- [311] To my mind, these matters do not significantly detract from the need described by Mr Duane and Ms Wells for two reasons.
- [312] First, it is to be expected that demolition of an existing facility and construction of a new facility in an established area will take some time. The practicalities of delivering the final product justify Mr Duane's consideration of need over the period up to 2021 and beyond.
- [313] Second, the lower occupancy rates must be considered in light of the other evidence about the existing facility.
- [314] The existing facility contributes to the present supply of facilities, providing an important choice and contribution to the facilities available for accommodation of seniors. However, it is nearly 30 years old.
- [315] I accept the opinion of Ms Wells that the existing facility is no longer fit for purpose. It does not meet public and community desires and expectations. It is unable to provide a quality ageing in place product to meet the future needs of seniors in line with aged care policy direction. The design of the residences present unacceptable trip hazards to elderly residents. The trip hazards result from the slopes across the subject site, the steps providing access to many of the units and the thresholds in every doorway – external and internal.
- [316] The internal design of the units is also dated. As was explained by Ms Wells, the existing village does not offer modern individual accommodation of a desirable standard for seniors (and future residents) of the catchment area. It also does not offer communal areas that enable the desired multitude of activity and social spaces or access to technology and wellness services enabling seniors to maintain independence.
- [317] I am satisfied the existing facility is not of an appropriate standard. As such, I do not regard its existence, or its lower occupancy rates, as detracting from the evidence of need for the proposed development.
- [318] I accept Mr Duane's opinion that there is a “*clear need*” for the development.



- [319] In contrast to the existing facility, the proposed development would offer modern retirement accommodation. It includes the type of communal amenities and services that would enable choice in a range of individual accommodation of a desirable standard. It includes communal areas that enable the desired activity and social spaces. It will also provide access to technology and wellness services enabling seniors to maintain independence. It will allow seniors to age in place.
- [320] Ms Wells noted that many seniors understandably seek access to retirement accommodation in their local neighbourhood, where the services of the local area (including food, health, lifestyle, and essential services) are familiar and known to them. This ensures continuity in lifestyle, care and support. It also enables seniors to remain close to social and support networks. Conversely, removal of seniors from their local neighbourhoods often results in a disconnection from their networks. It can result in reduced civic participation, social isolation, and a decline in wellbeing, particularly where a partner has died.
- [321] Ms Wells considered the proposed development offers superior access to a large range of essential health and lifestyle services to assist future facility residents to age in a neighbourhood. The services include the private and shared spaces of the facility. It also includes a large range of health services, a large shopping precinct, and a range of commercial, retail and lifestyle opportunities outside of the immediate development but within one kilometre of it. A private bus service and adequate public transport will facilitate access. The proposed development also adjoins the park, providing easy access for walking and other recreation.
- [322] Ms Wells observed that in the inner catchment area there are only five existing retirement facilities. They offer residents of the locality access to very traditional retirement facilities with limited modern community amenity or features, and very small numbers of independent living units. There is no larger scale or modern retirement facilities, such as the proposed development. The proposed development would be the only one of its kind in the inner catchment area. As such, it would provide a choice that is currently unavailable.
- [323] The combined effect of the evidence of Mr Duane and Ms Wells is that there is a clear need for the proposed redevelopment of the subject site to address the present and continuing demand to house our ageing population.

#### Relevance of need

- [324] With respect to the relevance of the need, the Appellants submit:

“Given acceptance by the Co-Respondent of non-compliance with provisions of City Plan, it is submitted the “relevant matter” to be considered for the purpose of s.45(5)(b) of the Planning Act is not the requirement for the proposed development *per se*, but instead the requirement for the proposed development to be of a form or scale that would otherwise exceed or contravene the provisions that would ordinarily apply to development of that type.”

[325] The Appellants submit that this approach is supported by analogous findings of McMurdo JA, with whom Sofronoff P and Philippides JA agreed, in *Bell v Brisbane City Council & Ors*<sup>23</sup> (“*Bell*”) as follows:

“It was necessary to consider whether there was a need, of each kind, for this development, rather than a need which could be satisfied by a development of the same kind, but of a height and scale which was consistent with community expectations and, in particular, which complied with the prescribed maximum of 15 storeys.”

And:

“The question here was whether there was both a community need and an economic need “for the development”, an expression which unambiguously refers to the particular development which is being assessed.”

[326] The “*quote*” of the findings of McMurdo JA extracted by Mr Wylie is inaccurate. It omits important context. The relevant findings were as follows:

“*Community and economic needs*

[40] **I have referred to the two questions under overall outcome (3)(a) (*sic*).** The applicant’s argument is that notwithstanding the judge’s extensive discussion of the evidence of the three economists, his Honour did not consider the second of these questions, which is whether there was a community need and an economic need for *the development*. In essence, the argument is that it was necessary to consider whether there was a need, of each kind, for this development, rather than a need which could be satisfied by a development of the same kind, but of a height and scale which was consistent with community expectations and, in particular, which complied with the prescribed maximum of 15 storeys.

[41] The same argument was advanced in the Planning and Environment Court and was rejected by the judge in the passage which I have set out above at [25]. The submissions in this Court for the respondents, in substance, adopt the judge’s reasoning. For the following reasons, the applicant’s argument should be accepted.

[42] The question here was whether there was both a community need and an economic need “for the development”, an expression which unambiguously refers to the particular development which is being assessed. The question arises in the context of the height of the development being inconsistent with community expectations for the relevant precinct, sub-precinct or site. Consequently, the question must be answered by reference to a development of this height.

[43] For the purposes of discussion, let it be assumed that there is a community need, and an economic need, for a high quality residential development which provides public spaces of the kind and to the extent which the judge described; but let it also be assumed that these needs could be satisfied by the provision of, say, 300 units within three towers, none of which would exceed 15 storeys. In that case, the second respondent’s proposed development might be described as satisfying a need. But this development would more than do so. The question is not whether the development would satisfy community and economic needs; it is whether there is a need for this development, or put another way, whether it is necessary to develop their site by buildings of this height.

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<sup>23</sup> [2018] QCA 84, [40], [42].

- [44] To vary the facts of that example, take a case where there are community and economic needs for, say, 300 units and for the other benefits as I have described, but where for reasons of commercial practicality, no development providing only that number of units within 15 storeys or fewer, would be undertaken. In that case, it would be necessary to construct buildings which were inconsistent with community expectations, because a smaller and compliant development, being commercially impracticable, would not be built and therefore could not satisfy the need.
- [45] The judge observed that this site had been unused for a decade. He referred to the “disbenefit” to the community in that respect. Perhaps he had the impression, given the length of that period, that this could be a case of a kind which I have described in the preceding paragraph. But if so, there was nothing said of it in the judgment. His Honour did not consider whether a development had to be of this height to satisfy community and economic needs.
- [46] His Honour said that there would be “an economic and community disbenefit if efficient development were to be refused with the consequence of the site remaining vacant until what might be regarded as a “perfect” development can be achieved, whatever that might be.” But the question was not whether there was a need for some development of the site. Nor was the question whether, as the judge put it, the proposal “*addresses*” economic and community need. It was whether *this* development was *necessary*, which did not require a consideration of whether there was a “perfect” development which could be achieved.
- [47] By endorsing the proposition that “a need exists if the well-being of the community is enhanced [by the development]”, again his Honour addressed the wrong question. The well-being of the community could be enhanced by something which provided *more than* the community needed.
- [48] In his reasoning on this question, the judge also referred to the status of the site as a landmark site and as a catalyst site. He found that there was “an expectation that development should achieve architectural excellence and obtain citywide prominence.” He was satisfied that the development would achieve those things. Accepting that to be so, those attributes could be relevant to this question under overall outcome (3)(h), only if there was a community need and an economic need for a development with those attributes. But the judge did not find that there was both a community and an economic need for those attributes. And nor did he find that only this development could provide them.
- [49] Accepting, as this Court must, **the judge’s analysis of the evidence in his discussion of this question, his findings provided no basis for a conclusion that upon the proper interpretation of this provision, there was a demonstrated community need and economic need for this development. In the absence of a demonstrated need of each kind, the development was inconsistent with overall outcome (3)(h). The extent of that inconsistency was considerable: two of the towers exceeded the maximum number of storeys by more than 50 per cent and the third tower was even higher.**

(emphasis added, footnotes omitted)

[327] The “two questions under overall outcome (3)(h)” to which McMurdo J had referred were as follows:<sup>24</sup>

“[23] His Honour then said that the non-compliance with PO1 was not the end of the matter because **the development might still comply with the relevant overall outcome (3)(h). It is convenient to again set out that provision:**

“**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.**”

**That provision raised two questions in the present case.** The first was whether the heights of the proposed towers exceeded “community expectations”. The judge found that they did. At one point he found that the proposed towers were of a height which exceeded “reasonable expectations”, but at another point in the judgment, he found that the height did not accord with community expectations.

[24] **The second question, under overall outcome 3(h), was whether there was both a community need and an economic need for the development. His Honour found that there was a need of each kind. That finding is strongly challenged by an argument that it involved a legal error in the interpretation of the provision.**”

(footnotes omitted, emphasis added)

[328] In my view, the findings relied on by the Appellant are not general findings about the approach to be adopted when considering the need for a proposed development. The findings are made with respect to the appropriate approach to overall outcome (3)(h) of the Toowong-Auchenflower Neighbourhood Plan in City Plan 2014. There is no equivalent provision to be considered in this case. As such, I do not accept that the findings of the Court of Appeal in *Bell* are analogous or applicable.

[329] Further, as I noted in *Parmac Investments Pty Ltd v Brisbane City Council & Ors*<sup>25</sup>, it must be remembered that the statutory assessment process under the *Planning Act 2016* differs from the assessment regime that applied under the *Sustainable Planning Act 2009*, which was being considered in *Bell*.

[330] The new assessment and decision rules for both code and impact assessment dispense with the “2 Part Test” (i.e. the conflict and grounds test) that existed under the *Sustainable Planning Act 2009*.<sup>26</sup> The legislature has determined it appropriate to remove this two-part test that had informed the decision-making rules for several decades under successive planning legislation.<sup>27</sup> There is no longer an obligation to refuse a development application that conflicts with a planning instrument absent sufficient grounds. Under the *Planning Act 2016*, the decision is to be based on the assessment under s 45(5), (6) and (7) of the *Planning Act 2016*,<sup>28</sup> subject to s 46(2) of the *Planning and Environment Court Act 2016*.

<sup>24</sup> [2018] QCA 84, [23], [24].

<sup>25</sup> [2018] QPEC 32, [24].

<sup>26</sup> p 74.

<sup>27</sup> See, for example, s 326 of the *Sustainable Planning Act 2009*, s 3.5.14 of the *Integrated Planning Act 1997* and s 4.13(5A) of the *Local Government (Planning and Environment) Act 1990*.

<sup>28</sup> *Planning Act 2016*, s 59(3).

- [331] As I also noted in *Parmac Investments Pty Ltd v Brisbane City Council & Ors*<sup>29</sup>, the expression of a clear and deliberate policy in a planning scheme about the appropriate development of land should not be readily departed from. However, it is also inappropriate to approach the assessment on the basis that the provisions of a planning scheme are to be rigidly applied, or on the basis that they cannot be overcome.
- [332] In this case, when considering where to strike the appropriate balance, I consider it relevant to have regard to the strategic planning context.
- [333] Provisions identified by Mr Duane indicate a planning desire to provide a range of housing forms to cater for people at all stages of their lives. However, at present, City Plan does not contain focussed provisions that reflect the need to provide accommodation that allows people to age in place. The proposed amendments to City Plan seek to change this.
- [334] I accept the views of Mr Perkins, expressed in his individual report, that the amendment package brings with it a serious attempt to maximise opportunities for aging in place (with attendant social interaction between generations). This is a matter of significance to the community and a sound town planning goal.
- [335] The significance to the community of accommodation options that allow people to age in place is evident from a submission made by the Retirement Village Association to the Transport and Local Government Committee in September 2012. The Association is a representative of 800 members nationally who play a role in the ongoing growth and sustainability of the retirement village industry. As Mr Duane notes, the submission said Queensland faces an enormous challenge in how to care for and house an ever-increasing ageing population. To meet that challenge it is vital that a wide range of choice in retirement accommodation is available. Retirement villages were identified as one option for accommodation and care in later life. They house more than 5 per cent of people aged over 65 years and more than 10 per cent of those aged over 75 years. The report notes retirement villages enable people to downsize and live affordably as they age. They also enable people to live in a purpose-built community facility with full-scale infrastructure. It is desirable if they enable them to age near to the areas they live or grew up in, assisting them to maintain their networks and social connections. They provide a communal and supportive living environment for people who need it most; and reduce the economic burden across government in the delivery of housing and support for older people.
- [336] The significance of the issue of providing options for aging in place is also evident from the National Overview of the Retirement Village Sector Report (2014) prepared by the Property Council of Australia. As is noted by Mr Duane, it records that, in 2014, in Queensland 6.4 per cent of people over 65 years lived in retirement villages. That proportion was projected to increase to 7.5 per cent by 2025. The report also indicated that retirement facilities/villages not only improved a resident's lifestyle, but also provided significant savings for governments by delaying residents' entry into the government funded aged care facilities. Further, retirement villages are part of the solution to the challenge of ensuring there are enough affordable homes for Australians of all ages that are compatible with different stages of life. They are important to ensuring less reliance on taxpayers.

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<sup>29</sup> [2018] QPEC 32, [27].

[337] As I have noted, the proposed amendments seek to address this community concern. Although the proposed amendments to City Plan are in draft form, they follow the December 2008 *“Lord Mayor’s Taskforce into Retirement and Aged Care – Independent Recommendation Report”*. As Mr Duane notes, the report records:

**“By 2026, an extra 41,000 persons aged over 65 years will live in Brisbane, bringing the total of this age group to almost 156,000. Most of these people will want to stay in their homes, and their own neighbourhood, as long as possible. This is known as ‘ageing in place’ and it’s a concept that underpins government policy at all levels. Others will be seeking retirement villages or residential aged care services (also referred to as nursing homes and hostels) with varying levels of care.**

...

**The problem is there is already a shortage of housing for older people in Brisbane.**

**Existing aged care facilities are themselves ageing, their redevelopment hampered by increasing construction costs. Few cater for high care needs. As land values have skyrocketed, particularly in the inner city, nursing homes have been replaced by hip new apartments, designed with the young and able in mind. Housing for older people is being pushed to the outer suburbs where land is cheaper, but further away from vital services and facilities. As a result, older people are struggling to downsize, or find an affordable, low-maintenance home or retirement village without moving out of their community.**

In 25 years-time, Australia will need four times the amount of aged care accommodation now available, a trend that will almost certainly be mirrored in Brisbane.”

(emphasis added)

[338] Mr Duane opines that, consistent with the trend recognised in the Taskforce report, inner-suburban areas have experienced a sharp decline in the number of over 65-year-old residents between 2011 and 2016. This reflects the high cost to accommodate elderly persons in inner-city areas, pushing residents to relocate from those communities. This opinion was not challenged, and I accept it.

[339] Mr Duane also opined that there are many challenges facing the provision of suitable facilities to accommodate the elderly. The Australian population is ageing and the number of residents requiring aged-care and retirement facilities will increase substantially over time. Many Australians wish to age-in-place within the communities they have lived in most of their lives. There are increasing expectations around the standard of living for older people as the *“baby boomer”* population ages. This will likely impact on the size, location and quality of aged care developments sought to be provided and support services likely to be included in new facilities. However, supplying affordable accommodation is difficult, particularly the provision of quality accommodation in highly sought-after areas. There are constraints to supply due to a number of issues, including planning and financial issues. These constraints are particularly relevant in inner-city areas, where the value of land has resulted in higher density development targeted at a younger population. Mr Duane’s opinion in this regard was unchallenged and I accept it.

[340] In my view, the provision of adequate facilities for the purpose of aging in place are of significant importance to the community. They are critical to the wellbeing of an important group in the community. The need for retirement facilities, in light of the

absence of specific provisions directed to facilitating their provision, is a compelling matter favouring approval of the proposed development.

[341] The Appellants submit, in addition to need for the development being a relevant matter, it is a relevant matter to consider that a smaller form of development could satisfy the need. In this context, the Appellants rely on four matters.

[342] First, the Appellants refer to evidence given by Mr Peabody. In his supplementary report, Mr Peabody notes that a development of the subject site limited to two storeys would result in a loss of 126 independent living units, leaving a development with 129 independent living units. He also accepted during cross-examination that there was no reason why a development of that nature and scale could not be designed and constructed.

[343] Second, the Appellants refer to the evidence of Mr Kordic. He confirmed in cross-examination that Aveo has not undertaken any analysis of options to refurbish the existing facility. He accepted that Aveo currently operate facilities with between 100 and 150 independent living units, and that they can still be functional and suitable.

[344] Third, the Appellants refer to evidence of Mr Duane and Ms Wells to the effect that there are suitable retirement facilities being constructed in a “*horizontal*” form.

[345] Fourth, the Appellants rely on the evidence of Ms Wells that, while a larger facility would offer a greater range of services and facilities, an appropriate level of service can be provided to facilities with between 100 and 150 independent living units. They submit a more modest development could fulfil all of the functional requirements of a facility proposed by Aveo.

[346] I do not regard the Appellants submissions as persuasive for four reasons.

[347] First, Mr Peabody is an architect. His evidence is to be understood as such. His opinion is not a reflection on whether it is economically feasible to demolish the existing facility and re-develop the subject site with a more limited facility.

[348] Second, the Appellants submissions misstate the overall effect of Mr Kordic’s evidence.

[349] Mr Kordic’s evidence on refurbishment during cross-examination was as follows:

“Renovation of aging retirement facilities must be a common recurring activity within your industry, is it not?---It is. So we – when a resident leaves they are reinstated often, which would mean retiling and repainting and things. The amount of work those units need to bring them up to a modern standard is substantial.

Yes?---And the community facilities is – is – I’m not sure how you’d update that currently.

But, with respect to the units, there’s no reason why they couldn’t be renovated, is there?---It would almost be easier to knock them down and build them again because there’s steps and thresholds all the way through. You would have to look – like, they need new kitchens, new bathrooms, new steps, concrete [indistinct] they would take a lot of work. It’d probably be almost as cheap to build a new one.

But it’s not something that you’ve analysed at this stage, is it?---No, we haven’t analysed completely renewing the units.”

- [350] Mr Kordic's evidence on the possibility of smaller facilities during cross-examination was as follows:

“Accepting, as you say, that more residents means more options, the fact remains that it's still – Aveo can operate functional and high quality residential facilities with between 100 and 150 units, can't they?---They can. But they will have a smaller social aspect and a smaller care perspective and possibly higher costs associated with that, and that's cost to the resident too, not Aveo because the residents have to pay for those services as a pool-type system.”

- [351] The impact of undertaking a refurbishment rather than the proposed facility was further clarified by Mr Kordic in re-examination as follows:

“Mr Kidic, my learned friend put a suggestion to you, which you rejected, that you could refurbish the existing units. Can I just ask you this. If you refurbish the existing units, would that address the level changes across the current site at Newmarket?---No, it wouldn't. What you'd have is a new unit sitting in a substandard relationship to the other units and to the community centre.

Would it provide all-weather access to garages?---No, it wouldn't.

Would it provide a range of the different types of units which both you and Ms Wells, I think, have spoken about? That is, one, two and three-bedroom configurations?---No, they would be predominantly exactly the same design.

Would it provide the type of communal areas, including wellness areas, hair salons, medical consultation, fitness centre, swimming pool?---No, it wouldn't, and there wouldn't be enough people there to actually pay for the running costs of those, even if you did put them in.”

- [352] Ms Wells gave similar evidence of the difference between the proposed development and a smaller development. During examination in chief, she said:

“MR HUGHES: And the final question I wanted to ask is, if we go to page 9 of your report, exhibit 10, in paragraph H, you say that to maintain the vibrancy of the amenities – and you've set out a number of the amenities in your report – at a retirement village requires a reasonable intensity of development. Can you explain what you meant by that?---**What I mean is scale – to be able to provide quality independent living that enables ageing in place, we need a whole range of services to be delivered to do that. So scale gives us great access to services. It gives us reduced-cost services. It gives us diversity of choice, and importantly, it provides a lot of opportunities and efficient service delivery.** So an example would be the more residents you have – and I have witnessed this in many retirement villages – the more residents you have, the more diverse the social programs and interests might be. It means that you'll be able to access a lot more social programs rather than a restrictive range of social programs. You'd be able to find people that had the same interests as you in those programs. It also means that there would be more volunteers volunteering to deliver services to assist their neighbours, to help them age in place. It provides a bigger community to provide all those services. **It also means that you would be able to have diversity of choice by a range of doctors visiting, or doctors visiting more frequently to the site.** So giving people choice in times and access to things. It also means that you may be able to have a chef on site to deliver food in the cafe, and that may be full time, rather than perhaps not being able to have one at all, or only having one one day a week. **It also means that you could deliver care more efficiently. So the more the scale of the village, the more residents, it means that you could have somebody on site to be able to deliver care services, and it would be a 24/7 arrangement. So it just provides that scale to deliver more services, more efficiently, with a large range of diversity of choice.**”



Finally – based on your experience, 255 independent living units, perhaps averaging, as it develops, 1.3 persons per unit, does that give you a sufficient scale to expect that variety of services, the extended services you’ve spoken about?---Yes, it does, and it would be my experience that, in the larger retirement villages, there is that vibrancy and people are able to access what they want in modern retirement villages because of that level of scale.”

(emphasis added)

- [353] The importance of a facility of a scale to provide a range of services was explained by Ms Wells during cross-examination as follows:

“With respect to ageing in place – Aveo and other providers do offer facilities that provide residential care as well as retirement living, don’t they?---Yes, they do.

And this development is not going to be providing that service, is it?---**This development, by being a modern ageing-in-place environment, will be able to replace residential aged care for many of its residents.** It will not be able to replace residential aged care for all of its residents, but an older facility is unable to do that, but a new facility is able to do that. **The expectation of the modern consumer is that they can age in place to high levels, and increasingly, in line with policy direction, we’re going to see that people want to be able to age in place in the retirement villages and will expect to do so. But we need modern environments to enable that to happen.**

...

You’d expect, for the larger developments, that it would be more appropriate to have that advanced care as part of the same development, wouldn’t you?---No, I would not. Not necessarily. Most – look, to be honest, **most seniors – nobody chooses to access residential aged care. It normally happens in a crisis situation, where people go off to hospital and they can’t go home again. If you have a modern retirement village that enables this ageing in place and has the scale of services, when somebody goes off to hospital, and they’re in something like a modern retirement village that has those services, they can go back home again, because the services are in their home, whereas they can’t necessarily go back to a residential home in the suburb; they would then have to go to residential aged care. So having this sort of development with the level of services would enable people to, perhaps for many people, never access residential aged care that otherwise perhaps would’ve accessed residential aged care. It can be as simple as having a fall in your home because your home isn’t designed to age in place – it has trip hazards, etcetera, that will send you to hospital and then residential aged care. These buildings are designed to minimise such risks.**”

(emphasis added)

- [354] Ms Wells also gave evidence as follows:

“But you would – do you accept that the way that the Commonwealth is moving is that they’re more willing to provide service or trying to provide service to people wherever they live?---That’s correct. If – if – however, those level of services can only provide so much service in a person’s home. **A person’s home doesn’t have access to health and wellbeing onsite. It doesn’t have doctors visiting onsite, dental visiting onsite, allied health onsite – it doesn’t have those things in somebody’s residential home. So it can only enable a person to age in place to a certain level.**”

(emphasis added)

- [355] The facility proposed is one that provides a particular level of service, including access to health and wellbeing onsite. Having regard to the evidence of Mr Kordic and Ms Wells identified above, I am not persuaded that a more modest development, in horizontal form or otherwise, could fulfil all of the functional requirements of the facility proposed by Aveo or address the need identified by the experts.

**Sound town planning principles including absence of tangible impact**

- [356] The Council submits the following sound town planning principles, referred to by Mr Perkins and reflected in the opinions expressed by Mr Gaskell, are supportive of approval of the proposed development.
- (a) The provisions of City Plan with which there was conflict did not reflect the importance of providing aged care accommodation in locations that are appropriately serviced in accordance with the State Planning Policy.
  - (b) The site is exceptionally large given its location in close proximity to the CBD, and within the inner-city area of Brisbane. It is therefore one of a very limited number of sites of that size that are physically suitable for the proposed development.
  - (c) The site is currently used for a retirement facility, and the proposed development provides for the redevelopment of the existing facility that is dated in form, materials, fencing, design and environmental performance.
  - (d) The proposed development provides for an appropriate co-location with the park, and provides opportunities for surveillance, use and potential embellishment.
  - (e) The scale of the proposed development provides an ability for it to support a range of facilities and services not currently available to residents, and not capable of being provided given the existing low density and development form.
  - (f) The South East Queensland Regional Plan 2017 and State Planning Policy 2017 are not appropriately reflected in City Plan.
  - (g) There is a demonstrated need for the proposed development, and a lack of suitably zoned land in the locality generally, and in a higher density residential zone specifically, which is able to cater for the identified need.
  - (h) The proposed development is consistent with the Strategic framework, read as a whole.
  - (i) The proposed development can be established on the subject site without causing unacceptable impacts on the residential amenity of existing residents of the locality.
  - (j) There are positive planning benefits to be derived from the timely provision of a conveniently located retirement facility. They include creating an enhanced sense of community and a well serviced community.

- (k) The proposed amendments to City Plan express the Council's preferred statutory approach to give effect to its "*well-telegraphed policy*" promoting the development and aged care housing in Brisbane.

[357] I accept the opinions of Mr Perkins and Mr Gaskell in this regard. These are relevant matters that sound in favour of approval of the proposed development.

### **Conclusion**

[358] For the reasons set out above, Aveo has discharged the onus and the appeal will, in due course, be dismissed.

[359] 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 13 March 2019, the Respondent is to deliver a draft suite of conditions to the other parties.
- (b) The appeal be listed for review at 9.15 am on 27 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.