PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16
PARTIES:	**ASHVAN INVESTMENTS UNIT TRUST** (Appellant) **v** **BRISBANE CITY COUNCIL** (Respondent) And **PETTA ROGERS**, **KATHRYN JAY, PETER BARR, WILHELMINA THOMSON, PETER THOMSON, ANNETT KRUSE, MARK SHUTE, AZUNO DEVELOPMENTS PTY LTD, ANNE WELLEN, CLARE KEATING, JOE WRIGHT, ANNA MAGNUS, JONATHAN ROGERS, GOLDIE STREET RESIDENTS ASSOCIATION, LINDA ROZDARZ, JEREMY ROZDARZ, ANDREW ROGERS, RODERIC GIRLE, EDWARD BELING, KELLY BUAKHAI, THOMAS GRAHAM, ELTON CANE, ANNE WRIGHT, JEREMY DURBIN, GERALDINE ROZDARZ, JOYCE METCALFE** (Co-respondents by election)
FILE NO:	2121/18
DIVISION:	Planning and Environment Court
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	26 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19, 20, 21, 22 and 23 November 2018
JUDGE:	Williamson QC DCJ
ORDER:	**1. The Appeal is dismissed.** **2. The decision of the Respondent's delegate of 1 June 2018 to refuse the Appellant's development application is confirmed.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where application for a material change of use for a Childcare centre in the Low density residential zone – whether development would serve a local community facility need only – whether development was of a bulk and scale compatible with the built form intent of the Low density residential zone – whether the development would be appropriately located – whether development would be compatible with residential amenity – whether development sensitively transitions to surrounding residential uses – whether the development would unacceptably impact on amenity – whether the development would introduce non-residential traffic into a residential street.

LEGISLATION: *Acts Interpretation Act 1954*, s.14D.

Integrated Planning Act 1997 (Qld), s.3.5.14.

Local Government (Planning & Environment) Act 1990, ss.4.4(3)(l) and (5A), 4.7(5A), 4.13(5A) and 5.1(6A).

Planning Act 2016 (Qld), ss.3, 4, 5, 45, 59, 60 and 62.

Planning Regulation 2017 (Qld), ss.30 and 31.

Planning and Environment Court Act 2016 (Qld), ss.43, 45, 46 and 47.

Sustainable Planning Act 2009 (Qld), s.326 and Schedule 3.

CASES: *Bell v Brisbane City Council & Ors* [2018] QCA 84

Chartres Constructions Pty Ltd v Randwick Municipal Council (1972) 25 LGRA 193

Cooloola Ratepayers & Residents Assoc Inc v Cooloola Shire Council & Ors [2004] QPELR 544

Gaven Developments Pty Ltd v Scenic Rim Regional Council [2010] QPEC 51

Glenella Estates Pty Ltd v Mackay Regional Council & Ors [2010] QPEC 132

Gracemere Surveying & Planning Consultants Pty Ltd v Peak Downs Shire Council & Anor [2009] QCA 237

Hotel Property Investments Ltd v Council of the City of Gold Coast [2019] QPEC 5

Hua Sheng Co Pty Ltd v Brisbane City Council & Ors [1991] QPLR 99

Indooroopilly Golf Club v Brisbane City Council & Ors [1982] QPLR 13

Isgro v Gold Coast City Council [2003] QPELR 414

Mackay v Brisbane City Council [1992] QPLR 65

Mallcap Properties Ltd v Brisbane City Council [1992] QPLR 208

Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Ors (1986) 162 CLR 24

M.J & M.E Creed v Caboolture Shire Council [1994] QPLR 97

Parmac Investments Ltd v Brisbane City Council [2018] QPELR 1026

Phil Fletcher Planning & Investment Services Pty Ltd v Brisbane City Council [1991] QPLR 16

Provincial Securities Pty Ltd v Brisbane City Council [2001] QPELR 143

Retirement Properties of Australia Pty Ltd v Maroochy Shire Council & Anor [2008] QPEC 61

Seven Eleven Stores Pty Ltd v Pine Rivers Shire Council [2005] QPEC 070

Smout v Brisbane City Council [2019] QPEC 10

The Shell Company of Australia Ltd v Gold Coast City Council [1993] QPLR 293

Williams McEwans Pty Ltd v Brisbane City Council [1981] QPLR 33

Wingate Properties Pty Ltd v Brisbane City Council [2001] QPELR 272

WOL Projects Pty Ltd v Gold Coast City Council [2018] QPEC 48

COUNSEL:	Mr M Batty for the Appellant Mr R Bain QC and Mr J Ware for the Respondent Mr M McDermott for the Co-respondents by election
SOLICITORS:	Holding Redlich for the Appellant City Legal for the Respondent QuDA for the Co-respondents by election

Introduction

[1] The Appellant (***Ashvan***) wishes to develop land situated at the corner of Payne Road and Goldie Street, The Gap, (***the Land***) with a Childcare centre. It is intended the facility will accommodate 114 children, ranging in age from new born infants up to 5 years old. The proposed operator is C&K Child Care and Kindergarten (***C&K***).

[2] In December 2017, Ashvan made an impact assessable application to the Council for a material change of use approval for the Childcare centre. The application was publicly notified and attracted 87 properly made submissions. The Council's delegate refused the application. This is an appeal against that refusal. Twenty-six of the submitters have elected to participate in the appeal as Co-respondents by election (***Co-respondents***).

[3] The Council and Co-respondents maintain the application should be refused. The reasons for refusal were refined during the course of the appeal, and are identified in a document described as 'REVISED AGREED LIST OF ISSUES'. The document is dated 22 November 2018[1]. It alleges the proposal does not comply with in excess of 40 provisions of the Council's planning scheme, City Plan 2014. The provisions are contained in the Strategic framework, relevant zone code, and two specific use codes, namely the Childcare centre code and the Community facilities code.

[4] Despite the imposing list of planning scheme provisions relied upon, on closer examination, the agreed list can be reduced to a limited number of planning issues that are to be determined. The issues principally emerge from the Low density residential zone code in City Plan 2014.

[5] The Land is included in the Low density residential zone in City Plan 2014. The purpose of the zone, as expressed in the zone code, is to provide for, inter alia, non-residential facilities that support local residents[2]. A Childcare centre is such a facility, and is expressly anticipated in the zone. It is recognised in the Strategic framework of City Plan 2014 that the use is one that supports the local character and amenity of low density residential areas[3].

[6] Whilst a Childcare centre use is expressly anticipated in the Low density residential zone, this is not without qualification. The zone code includes a number of planning controls that are intended to limit the size and function of such a facility in the zone. The Council and Co-respondents contend the proposed development should be refused because it does not comply with these planning controls. Further, they contend the proposed development will not comply with a number of other complimentary planning controls in City Plan 2014, which are directed at protecting the high level of amenity expected in the Low density residential zone. Both the Council and the Co-respondents contend the alleged non-compliances with City Plan 2014 should be given determinative weight in the exercise of the planning discretion under s.60(3) of the *Planning Act 2016* (***PA***).

[7] The alleged non-compliances with City Plan 2014 require five topics to be examined: (1) the locational attributes of the land; (2) the intended function of the use having regard to the nature and extent of the need to be served by it; (3) the acceptability of the proposed built form; (4) the design of the proposal at its interface with an adjoining dwelling, Goldie Street, and Payne Road; and (5) the extent to which the development will impact on the amenity and character of the local area, particularly Goldie Street, which is a residential street terminating in a cul-de-sac.

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1 Ex.3A.
2 Ex.7, p.146, s.6.2.1.1(1)(b).
3 Ex.7, p.105, Table 3.7.6.1, SO7 and L7(b).

[8] As against this, Ashvan contends the proposed development complies with City Plan 2014. It submits, consistently with Mr Buckley's evidence, that an assessment of the proposal against City Plan 2014 demonstrates there is '*strong alignment with the planning scheme and the principles which underpin it*'[4].

[9] In the alternative, Ashvan contends that any non-compliance with City Plan 2014 is not determinative in the exercise of the planning discretion. It points to other planning considerations, principally the existence of a planning need, to contend the application should be approved in the exercise of the discretion.

[10] As this is an applicant appeal against a refusal, Ashvan must establish that the appeal should be upheld[5].

The Land and surrounding locality

[11] The Land is situated on the north-western corner of Payne Road and Goldie Street, The Gap. It is rectangular in shape, and comprises three contiguous lots with a total area of 2,052m^2. Each lot is improved with a dwelling house set in a landscaped setting. The Land slopes downwards from east to west towards adjoining parkland. This slope is coincident with the longest frontage of the Land, which is the Payne Road frontage, having a length of approximately 55m. The length of the frontage to Goldie Street is approximately 24m.

[12] A site inspection was carried out on the first day of the hearing. The inspection confirmed what is clear from the evidence; the Land forms part of an attractive and established residential area. The area is characterised by one and two storey dwelling houses, set in a '*well treed and vegetated setting*'. The pattern of subdivision is predominated by standard residential lots, typically 600m^2 to 800m^2 in size, with the occasional lot in the order of 1,000m^2. I am satisfied that the character of the area comfortably falls within the description in overall outcome (5)(a) of the Low density residential zone code. This provision describes the character of development in the zone as reinforcing a '*distinctive subtropical character of low rise, low density buildings set in green landscaped areas*'[6].

[13] The Land has two adjoining neighbours. The lot adjoining to the north has frontage to Goldie Street. It is developed with a two storey dwelling house, which is obscured from view by a large front fence, and a double garage built with little or no setback to the road reserve. The lot is well vegetated with mature trees along its side and rear boundaries, including the common boundary with the Land. The common boundary is in the order of 60m in length. It is evident from photographs of the adjoining land that the residents of this property enjoy a high level of amenity, both inside and outside the dwelling[7].

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4 Ex.4, p.10, paragraph 42 d).
5 s.45(1)(a) of the *Planning & Environment Court Act 2016* (***PECA***)
6 Ex.7, p.147.
7 Ex.30.

[14] The Land adjoins, and has ready access to a large reserve to its west and north-west, known as the Walton Bridge Reserve. The reserve has frontage to Payne Road. The town planning witnesses, as a matter of agreement, described the reserve as '*an extensive recreational space containing both active and passive recreational facilities'*[8], which *'contains a natural creek with a heavily treed landscaped environment'*.

[15] The reserve provides a physical connection between local infrastructure and facilities in the area, namely Payne Road State primary school, The Gap High School, and the principal retail and commercial centre for the suburb of The Gap. The principal centre is located some 430m to the north-west of the Land, connected via a pedestrian path that travels along a natural creek line in the reserve.

[16] Payne Road is classified as a District Road under City Plan 2014. This is the lowest order '*major road*' in the road hierarchy. The '*primary function and traffic role*' of a District Road is to, inter alia, provide a link for minor roads and local centres to suburban or arterial roads[9]. The traffic volume anticipated for a District Road is in the order of 6,000 to 15,000 vehicles per day[10]. In the vicinity of the Land, the cross-section of Payne Road is an undivided two lane road, with on-street parking lanes and pedestrian footpaths along both sides of the road reserve. Direct property access is provided to residential and non-residential uses. The posted speed limit is 50 km/hr[11].

[17] Goldie Street is a cul-de-sac that is about 114m in length, and provides access to 14 dwelling houses. The pattern of subdivision is not uniform. There is variation in lot shape and size, particularly where the lots are located at the head of the cul-de-sac, or adjoining the reserve to the north, and west. There is little uniformity in the line of the front setback for dwelling houses to the street.

[18] Goldie Street is classified as a local street under City Plan 2014. A local street is the lowest order '*minor road*' in the road hierarchy. It provides for local traffic movements[12]. The cross section of Goldie Street is an undivided one lane carriageway, about 6.5m wide. There are no pedestrian paths. On-street parking is permitted along both sides of the carriageway. In planning terms, the traffic volume anticipated for a local road may be up to 1000 vehicles per day. This is far from reality for Goldie Street. The expected daily traffic volume for the street is in the order of 140 vehicles per day, equating to a peak hour flow of 14 vehicles[13].

[19] The evidence establishes that Goldie Street is an attractive, and established residential street. All of the land in the street is included in the Low density residential zone. Like the surrounding area, the character of Goldie Street is consistent with the description in overall outcome (5)(a) of the zone code; development is of a form and scale that reinforces a distinctive subtropical character of low rise, low density buildings set in green landscaped areas.

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8 Ex.4, p.5, paragraph 15.
9 Ex.7B, p.7.
10 Ex.7B, p.8.
11 Ex.6A, paragraph 1.8.
12 Ex.7B, p.3, s.2.2.3(1).
13 Ex.6A, paragraph 1.10.

[20] Statements prepared by local residents for the appeal paint a pleasant picture of Goldie Street. It can be accepted that residents enjoy a high level of amenity, particularly at the northern end of the street where it terminates in a cul-de-sac. The character and amenity of the street is, to a minor extent, influenced by the traffic, and activity on Payne Road. This is a busy distributor road in the locality, providing direct property access to a number of important non-residential uses, including the local state primary school. The school is located 350m to the west of the Land.

[21] I accept Mr Buckley's evidence that the activity and traffic on Payne Road has an impact on the character and amenity of Goldie Street. The impact will be at its greatest at the intersection of the two roads. The extent of that impact reduces the further a property is located to the north of the intersection. The impact will be at its smallest at the head of the cul-de-sac, about 114m to the north. Overall, I do not accept that this impact diminishes, in any material way, the character and amenity of Goldie Street, which is an established and attractive low density residential street.

The proposed development

[22] Ashvan's development application seeks approval to make a material change of use for a Childcare centre, being a defined use in City Plan 2014. This is one of a number of uses clustered in the '*Community facilities*' activity group. This is a defined activity group for the purposes of the planning scheme.

[23] As I have already said, the proposed Childcare centre is intended to accommodate 114 children. The development application states the children can be divided into four age brackets: 24 children aged between birth to 24 months; 35 children aged between 2 to 3 years; 33 children aged between 3 to 4 years; and 22 children aged between 3 to 5 years. C&K is the proposed operator, who is a well-recognised and successful operator of Childcare centres and kindergartens.

[24] The suite of plans for the proposed development are identified in a schedule at paragraph 29 of the town planning joint report[14]. The schedule includes two photomontages that depict the built form in its setting when viewed from Payne Road and Goldie Street. As a matter of impression, the photomontages, read with the proposed plans, depict a facility that will be perceived as a non-residential use on a corner site, in a residential area. The architecture is not of a residential vernacular.

[25] The development has been designed so that the built form presents a single storey structure to Goldie Street, increasing in height to two storeys as the built form follows the slope of the Land towards the adjoining reserve. As I have already said, the Land comprises 3 contiguous lots. The built form is sited such that it would be located on the two lots closest to the adjoining reserve. The lot on the corner of Payne Road and Goldie Street will be developed with an at-grade car parking area and access to a basement carpark.

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14 Ex.4.

[26] The built form, at its highest point, will not exceed 8.3m above ground level. This compares favourably to the acceptable solution for the height of a dwelling house in the Low density residential zone, which is 9.5m. The site cover for the proposed built form equates to approximately 50%. This is calculated having regard to the site area and gross floor area for the proposal, with the latter being a little over 1,000m^2. Whilst there are existing dwelling houses in the immediate area of Payne Road and Goldie Street that have a site cover in the order of 50%, none are comparable in size to the proposal. No existing development in Goldie Street, or the immediate locality of Payne Road, spans three contiguous lots, and has a gross floor area approaching 1,000m^2. The proposed built form will be appreciably larger in bulk and scale than the surrounding low density residential development.

[27] A number of recognised architectural design techniques have been incorporated into the proposal to break up its bulk and scale, and to provide visual interest. In particular, the plans of development indicate that the external façade has been articulated in the horizontal and vertical planes to break up the building mass. This is complimented by a variable roof form. The variation is provided by differing roof heights, lines and angles. Variation in the built form will also be provided by using a range of building materials of varying textures and colours.

[28] The proposed development provides for indoor and outdoor learning spaces. The former includes ancillary areas such as a staff room, office, laundry and a reception area. The external areas are predominantly play areas, taking advantage of the amenity provided by the adjoining reserve, which is well landscaped. The adjoining reserve will screen the western side of the proposed development from Payne Road. The western side of the development will be perceived as being sited in a landscaped setting.

[29] The Payne Road frontage of the development will, in part, be landscaped to soften the built form. The landscaping will include existing vegetation that has been retained. Even assuming the best case (in terms of landscaping) for the development[15], the built form will not be hidden from view from Payne Road. It will be perceived as a non-residential development in a low density residential area.

[30] A 1.4m wide landscape strip is proposed along the frontage of Goldie Street. This landscaping strip is intended to soften the development's interface with the street. At this interface, the built form will be well set back from the boundary. An at-grade carpark and a ramp providing access to a basement level of car parking is located in the setback area. The at-grade carpark is 17.5m long x 13.5m wide (236m^2). Again, even assuming the best case scenario for the development, the proposed landscaping will not obscure the at-grade carpark and built form from view. From Goldie Street, it will be perceived as a non-residential development in a low density residential area.

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15 This assumes the development is landscaped in accordance with Exhibit 31 and the vegetation is given a period of 5 years to mature.

[31] The development will share a common boundary with an adjoining dwelling, which is about 56m in length. At the eastern end of this boundary (Goldie Street end), a 2m high fence, with a 1.5m strip of landscaping is proposed. The fence and landscaping strip will be provided for a substantial part of the common boundary. The effective width of this landscape strip will be reduced, in part, by the presence of a retaining wall coincident with the change in levels necessitated by the ramp providing access to the basement carpark. The remainder of the common boundary will have a 2.4m high acoustic fence and landscaping. This will be provided in the nature based outdoor play area.

[32] As to traffic arrangements, access is proposed from a new cross-over on Goldie Street. Vehicles entering the Land via Goldie Street may park in one of two areas: (1) in one of 14 car parking spaces provided in a basement carpark accessed via a ramp; and (2) in one of 9 car parking spaces provided at-grade in an area between Goldie Street, and the eastern most façade of the proposal.

[33] The development application included a management plan prepared by C&K. The plan provides detail as to how the proposal will operate on a day-to-day basis. In particular, it identifies that:

(a) the centre will open from 7:00am to 6:30pm, Monday to Friday, 52 weeks per year;

(b) children will arrive from 7:00am, with the anticipated peak arrival period between 7am to 9am;

(c) peak time for departures will be between 3:30pm to 6:30pm;

(d) the hours of operation for outside play areas will be 8:00am to 5:00pm;

(e) a total of 21 staff are anticipated for the development, with some, but not all, expected to arrive before peak drop off, and leave after 6:30pm; and

(f) 2 to 3 contracted cleaners would be engaged to clean the development on a daily basis between the hours of 6:30pm and 8:00pm, Monday to Friday, 52 weeks of the year.

[34] The management plan prepared by C&K reflects that the proposed development, if approved, will operate at varying levels of intensity for 5 days of the week for 52 weeks of the year. It can be expected that the varying levels of intensity will commence some time before 7am, and cease around 8pm.

The statutory assessment and decision making framework

[35] The development application the subject of this appeal was made to the Council in December 2017, and was impact assessable. The PA was in force at this time, and provides the applicable statutory assessment and decision making framework for the application, and this appeal. This was common ground between the parties.

[36] In this context, the parties agreed a list of issues to be determined, which are articulated in a document marked Exhibit 3A. This document comprises six numbered paragraphs. The first five paragraphs require an examination of whether the development complies with identified parts of City Plan 2014, being the '*assessment benchmark*' for the application. The final paragraph of the document invites the Court to ask and answer this question:

> "*Whether there are relevant matters sufficient to warrant approval of the proposed development if the Court finds that the proposed development does not comply with the above assessment benchmarks*"

[37] Despite each party's acceptance that the PA applies to this appeal, the list of agreed issues has the tenor of a document that would have been apposite during the currency of the *Sustainable Planning Act 2009* (***SPA***). This is subject to one qualification. The issues have been articulated with two modifications in language in an attempt to align them with the tenor of the PA. The modifications are: (1) the words '*does not comply*' are used in lieu of '*conflicts*'[16]; and (2) the phrase '*relevant matters sufficient*' is used in lieu of '*sufficient grounds*'[17]. This is not the first occasion where this has occurred in a PA appeal before the Court[18].

[38] The modification to the language of the agreed list of issues is an attempt (by agreement) to shoehorn what would have been reasons for refusal in a SPA appeal, in to a PA appeal. This is problematic. It fails to recognise that the PA prescribes different assessment and decision rules to those applying under SPA. The issues as articulated in Exhibit 3A invite the Court to conduct, in effect, a SPA assessment, which involves a two stage conflict, and grounds test. This test is no longer applicable under the PA for impact assessable applications. The words '*comply*', '*conflict*' and '*grounds*' (or derivatives of them) do not appear in the PA[19] (or City Plan 2014[20]) in the context of assessing and deciding an impact assessable application.

[39] How is the assessment and decision making regime different for impact assessable applications under the PA?

[40] I briefly dealt with this question in *Smout v Brisbane City Council* [2019] QPEC 10[21]. The differences emerge from a detailed examination of the PA. The differences, in the context of an appeal before this Court, are also informed by relevant provisions of PECA. Given the development application finds its way before the Court as an appeal, I will deal with PECA first.

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16 This appears in paragraphs 2, 3 and 4 of Exhibit 3A, but not paragraph 1, which alleges '*conflict*'.
17 *WOL Projects Pty Ltd v Gold Coast City Council* [2018] QPEC 48, [10].
18 *WOL Projects Pty Ltd v Gold Coast City Council* [2018] QPEC 48, [18] and footnote 30.
19 Contrast s.60(2)(a) and (b) with s.60(3) of the PA.
20 Contrast s.5.3.3(5) with s.5.3.3(4) of City Plan 2014.
21 At paragraph [51].

[41] The Court's power to decide a PA appeal is contained in s.47 of the PECA. Subsection (1) of this provision requires the Court to do one of three things in a '*Planning Act appeal*', namely: (1) confirm the decision appealed against; or (2) change the decision appealed against; or (3) set aside the decision appealed against, and make a decision either replacing it, or remitting the matter to the entity that made the decision. The decision under s.47 of PECA is the '*appeal decision*'[22], which is treated under the PA as having been made by the entity that made the decision appealed against[23]. The appeal decision includes other orders, declarations or directions the Court considers appropriate[24]. The power conferred by s.47 of PECA is a broad discretion. The provision does not require the Court to refuse a development application in circumstances where '*conflict*' is established with an adopted planning control, and there is an absence of '*sufficient grounds*'.

[42] Turning to the PA, this Court in determining a PA appeal about a development application stands in the shoes of the assessment manager. An assessment manager's power to decide an impact assessable development application is contained in s.60(3) of the PA. The provision states:

> "***60 Deciding development applications***
>
> *…*
>
> *(3) To the extent the application involves development that requires impact assessment, and subject to section 62, the assessment manager, after carrying out the assessment, must decide –*
>
> *(a) to approve all or part of the application; or*
>
> *(b) to approve all or part of the application, but impose development conditions on the approval; or*
>
> *(c) to refuse the application.*"

[43] Subject to s.62 of the PA[25], the above provision confers a power on an assessment manager (and this Court on appeal) to exercise a broad planning discretion. The discretion must be exercised in one of three ways, which are identified in subsections (3)(a), (b) and (c). The provision does not require an application to be approved, or refused, in any particular circumstance, let alone a circumstance where non-compliance is established with an adopted statutory planning control.

[44] The absence of an express provision of this kind is not, in my view, without significance. If it was intended that the exercise of the planning discretion be constrained or mandated by the existence of compliance, or non-compliance with a planning scheme, the legislature would have provided for this eventuality, just as it has done in s.60(2)(a). This provision of the PA applies to code assessable applications. It requires a code assessable application to be approved where it complies with all of the assessment benchmarks.

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22 As defined in Schedule 1 of PECA by reference to s.47(1).

23 s.47(3) of PECA.

24 s.47(2) of PECA.

25 Which does not apply to this appeal.

[45] Unlike its statutory predecessor, the exercise of the planning discretion under s.60(3) of the PA is not mandated by a conflict and grounds test. Notions of '*conflict*' and '*grounds*' are features of s.326(1)(b) of SPA. This provision constrained an assessment manager's power (and this Court on appeal) to approve a development application. The relevant constraint is contained in Chapter 6, Part 5, Division 3, Subdivision 2 of SPA, titled '*Decision rules-generally*. The provision states:

> "***326 Other decision rules***
>
> *(1) The assessment manager's decision must not conflict with a relevant instrument unless –*
>
> *…*
>
> *(b) there are sufficient grounds to justify the decision, despite the conflict; or…*"

[46] The constraint on the decision making power stated in s.326(1)(b) of SPA was recognised as involving a two-step process. It involved: (1) the identification of conflict between a decision to approve, and a relevant instrument; and (2) if conflict was present, a mandated refusal, save where the carrying out of an assessment of sufficient grounds established that an approval could be justified in the circumstances, despite the conflict. SPA defined grounds as '*matters of public interest*' that did not include '*the personal circumstances of an applicant, owner or interested party*'.

[47] Section 326(1) of SPA was not the first legislative provision in Queensland to expressly constrain the exercise of a planning discretion by reference to a conflict and grounds test. Legislative provisions of this character have been a feature of planning legislation in Queensland since 1992.

[48] A statutory provision of this character first appeared as an amendment to the *Local Government (Planning & Environment) Act 1990* ("***1990 Act***") in 1992. The amendments to the 1990 Act inserted a number of provisions mandating refusal of an application if conflict with a strategic plan, or development control plan was established, and there were not sufficient grounds to justify an approval despite the conflict[26].

[49] In March 1998, the 1990 Act was repealed and the *Integrated Planning Act 1997* ("***IPA***") took effect. IPA, like the 1990 Act, included a constraint on the exercise of a planning discretion where conflict with a planning instrument was established. For example, s.3.5.14(2) provided that an assessment manager's decision to approve an impact assessable application must not compromise a desired environmental outcome, nor conflict with a planning scheme unless there were sufficient grounds to justify such a decision. IPA was repealed, and SPA took effect in December 2009. As is clear from s.326(1)(b), the planning discretion continued to be constrained under SPA by a conflict and grounds test. This constraint applied to both code and impact assessable development applications.

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[26] For example see ss.4.4(5A), 4.7(5A), 4.13(5A) and 5.1(6A).

[50] The purpose of setting out this brief legislative history is to make this point: the PA is the first piece of planning legislation in Queensland since 1992 that does not mandate how a planning discretion is to be exercised where conflict with an adopted statutory planning control is established. The Explanatory Notes for the *Planning Bill 2015* confirm this is a deliberate change to the statutory assessment regime for impact assessable applications. The Explanatory Notes state[27]:

> "*The form of the assessment and decision rules under the Bill is designed to address difficulties that arose in administering the old Act, due to the so-called "two part test" for both code and impact assessment. Under that test, an assessment manager's decision could "conflict" with a relevant instrument if there were "sufficient grounds to justify the decision, despite the conflict". In practice, as a result of judicial authority in several cases, this test resulted in time consuming and unproductive enumeration of supporting or conflicting "grounds", instead of the intended assessment of the merits of the proposal based on established policy, and other relevant considerations to reach a balanced decision in the public interest.*
>
> *The assessment and decision rules for both code assessment and impact assessment under the Bill dispense with the "two part test".*"

[51] Dispensing with the so-called two part test means that non-compliance with assessment benchmarks, which include planning schemes, no longer has assumed primacy in the exercise of the planning discretion. As I said in *Smout v Brisbane City Council* (*Supra*) at [51], in this way, the discretion conferred by s.60(3) of the PA admits of more flexibility for an assessment manager (or this Court on appeal) to approve an application in the face of non-compliance with a planning document in contrast to its statutory predecessor. This, the Explanatory Notes state, is to allow a '*balanced decision in the public interest*' to be reached, based on an assessment of the merits of an application having regard to established policy and other relevant considerations.

[52] If non-compliance with a planning scheme no longer has assumed primacy under the PA, what role, if any, does it have to play in the exercise of the planning discretion under s.60(3) of the PA?

[53] An application must be assessed against the applicable assessment benchmarks, which will invariably include a planning scheme for appeals before this Court. That assessment will inform whether an approval would be consistent, or otherwise, with adopted statutory planning controls. The existence of a non-compliance with such a document will be a relevant '*fact and circumstance*' in the exercise of the planning discretion under s.60(3) of PA. Whether that fact and circumstance warrants refusal of an application, or is determinative one way or another, is a separate and distinct question. That question is no longer answered by a provision such as s.326(1)(b) of SPA. It will be a matter for the assessment manager (or this Court on appeal) to determine how, and in what way, non-compliance with an adopted statutory planning control informs the exercise of the discretion conferred by s.60(3) of the PA. It should not be assumed that non-compliance with an assessment benchmark automatically warrants refusal. This must be established, just as the non-compliance must itself be established.

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27 At p.74.

[54] In practical terms, the change to the statutory assessment and decision making framework may call for an assessment manager (or this Court on appeal) to reach a balanced decision in the public interest where two competing considerations are at play: (1) the need for the rigid application of planning documents on the one hand; as against (2) the adoption of a flexible approach to the application of planning documents to, inter alia, exercise the discretion in a manner that advances the purpose of the PA.

[55] That the exercise of the planning discretion may involve striking a balance between rigidity and flexibility is not novel. This was discussed by Judge Carter in *Williams McEwans Pty Ltd v Brisbane City Council* [1981] QPLR 33. In an appeal against a decision to refuse a re-zoning, His Honour said[28]:

> "*Any zoning scheme must have as its basis the desire to so order land use as to best satisfy the needs and the physical well being of the community for whose benefit the zoning scheme is constructed. The enormously difficult task confronting the framers of a town planning scheme is to try to control land use in such a way that the needs of the community and its ability to enjoy life within that community are best served. This involves the subjection of the individual will to the overall good of the community, as it is perceived to be by those who frame, and by those who ultimately adopt, the scheme thereby giving it legal efficacy. The scheme, once it becomes law, must be seen to be an expression of the will of the community that its various needs are best provided for in the manner, by which the scheme controls the use to which land might be put. The scheme, in turn seeks to serve the need in the community for an agreeable residential amenity, the need to ensure adequate and suitably located land for heavy and light industry and for the manufacture and the retailing of consumer goods, the need for open space, the need for facilities for public purposes and so on. In respect of the scheme in its final form, the assumption is that these various needs are provided for in such a way that the physical well being of the total community is guaranteed. But is (sic) cannot be validly asserted that the needs of a community remain static and immutable*".

[56] His Honour went on to say[29]:

> "*The ultimate task must be to ensure a proper balance which at a particular time adequately expresses the community will. My point is to emphasise, on the one hand, the necessity for control or the necessity for rigidity in a planning scheme, and on the other, the necessity to recognise the need for adjustment of that scheme if needs be or, the necessity for flexibility.*"

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28 At p.34.
29 At p.35.

[57] The rationale underlying the need for the rigid application of adopted planning controls is clear. Adopted statutory planning controls are given the force of law after an extensive preparation process, including public notification and State interest checks. As Judge Carter said, a planning scheme reflects the will of the community. This community will is determined by elected officials who comprise the local planning authority. It is this entity who decides what is, or is not, in the community's interest from a planning perspective. It is not for the assessment manager, nor this Court on appeal, to gainsay the expression of what constitutes the public interest in a planning sense[30]. In real terms, a rigid application of planning documents has the wholesome purpose of building a community's confidence in a planning scheme, being a statutory document that is relied upon for public and private investment. The desirability of confidence on the community's part in the provisions of a planning scheme is a matter that has been stressed by this Court for many years[31].

[58] The rationale for adopting a flexible approach to the application of adopted planning controls is equally clear. What underlies a flexible approach is a recognition that planning is not an exact science, and planning schemes are not immutable.

[59] Little exposure is needed to planning schemes promulgated after IPA took effect to appreciate they are lengthy and complex documents. They embody a significant number of forward planning policy decisions. Those policy decisions are implemented through detailed scheme provisions that are expressed in performance based terms. Provisions of this kind, by their very nature, do not envisage a single development option or design[32]. Nor do they prohibit development. Rather, planning scheme provisions are intended to guide development in a city or region in a way that achieves the will of the community (in land use terms) as determined by the elected officials at a particular point in time. The will of the community, in land use terms, cannot be forecast with scientific precision. The land use needs of a city, or region, are dynamic. The statutory assessment and decision making framework under the PA enables considerations of this kind to inform the exercise of the discretion to reach a balanced decision in the public interest about an impact assessable application.

[60] The manner in which the balance between rigidity and flexibility is struck in any given case does not lend itself to a general statement of principle, or precise formulation. The planning discretion, and the inherent balancing exercise, is invariably complicated, and multi-faceted. It is a discretion that is to be exercised based on the assessment carried out under s.45 of the PA. It will turn on the facts and circumstances of each case, including the nature and extent of the non-compliances, if any, identified with an assessment benchmark. As I said recently in *Smout v Brisbane City Council* (*Supra*) at paragraph [54]:

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30 *Bell v Brisbane City Council & Ors* [2018] QCA 84, per McMurdo JA at [67].

31 *M.J & M.E Creed v Caboolture Shire Council* [1994] QPLR 97 at 98 Line J.

32 *Parmac Investments Pty Ltd v Brisbane City Council & Anor* [2018] QPELR 1026 at 1033 [26](c).

> "*Given the size, and complexity of modern performance based planning schemes, not every non-compliance, in my view, will warrant refusal. Each non-compliance should be examined having regard to: (1) the verbiage of the planning scheme; and (2) proper town planning practice, and principle. The verbiage of the planning scheme is to be examined to ascertain the planning purpose of, and degree of importance attached to compliance with, a particular planning principle. The extent to which a flexible approach to the exercise of the discretion will prevail in the face of any given non-compliance with a planning scheme (or other assessment benchmark) will turn on the facts and circumstances of each case.*"

[61] The balance between a rigid and flexible approach may more easily be struck where development complies with adopted statutory planning controls. As this Court has recognised, ordinarily, one would need strong reasons for refusing an application, which on its face, was consistent with the adopted planning controls[33].

[62] Whilst s.60(3) of the PA confers a broad planning discretion, it does not follow that the repeal of SPA, coupled with the absence of a provision such as s.326(1)(b), means the discretion admits of an unbridled opportunity to approve, or refuse, impact assessable development applications. It is subject to three requirements, which I identified recently in *Smout* v *Brisbane City Council* (supra)[34] as follows:

> "*The planning discretion conferred under the PA to decide an impact assessable application is broad. It is to be exercised subject to three requirements: (1) it must be based on the assessment carried out under s.45 of the PA; (2) the decision making function must be performed in a way that is consistent with s.5(1) of the PA, namely the assessment and decision making function must be performed in a way that advances the purpose of the Act; and (3) the discretion is subject to any implied limitation arising from the purpose, scope and subject matter of the PA.*"

[63] I intend to deal with each of three requirements in more detail, but before doing so I would, in this context, add that I also consider the observation made by his Honour Judge Quirk in *Hua Sheng Co Pty Ltd v Brisbane City Council & Ors* [1991] QPLR 99 as being apposite to the exercise of the discretion under s.60(3) of the PA. In that appeal, the Court was invited to exercise a planning discretion to approve an application for town planning consent where the discretion was not expressly constrained by a conflict or grounds test. The case was decided prior to the 1992 amendments to the 1990 Act. In this context Judge Quirk said at p.102:

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33 *Mackay v Brisbane City Council* [1992] QPLR 65 at 67.

34 At paragraph [51].

> "*While in no way wanting to be tedious, I feel that I should once more repeat what I wrote in Stendis (sic) Morris & Partners v Cairns City Council (1989) QPLR 15 at 18*:
>
> > "*The exercise of the planning discretion, whichever way it goes, is not a matter of mere caprice. The decision must withstand scrutiny against the background of the relevant provision (sic) of the scheme and proper planning practice. Whether or not Town Planning consent will be forthcoming in a particular case should not be a purely speculative matter but one in respect of which a well considered judgment can be made. It is highly desirable that the Town Planning process enjoy the confidence of all those whose interests are thereby affected. This of course includes the whole range of interests whether they be entrepreneurial or conservative.*"

[64] I agree that the exercise of the planning discretion must withstand scrutiny against the background of relevant planning provisions (here, the applicable assessment benchmarks), and proper planning practice. In the context of s.60(3) of the PA, the exercise of the discretion must withstand scrutiny having regard to, inter alia, the assessment carried out under s.45 of the PA, in particular ss. 45(5)(a) and (5)(b).

[65] The change to the statutory assessment and decision making framework will, I expect, impact on the manner in which reasons for refusal are articulated. I also expect it will impact on the manner in which issues are articulated in an appeal before this Court. For example, in this case it is alleged that an approval will not comply with identified parts of City Plan 2014. Given the size, and complexity of modern performance based planning schemes[35], it is unsurprising that a party, and its legal representatives, can run a comb through the document, and find a raft of provisions that support refusal. Such a list, without more, does little to inform what, if any, planning issues are engaged for consideration in the exercise of the discretion.

[66] An imposing list of alleged non-compliances with a planning document, without more, does not demonstrate that refusal of an application is warranted. Reasons for refusal, or identified issues need to identify the facts and circumstances relied upon to contend that identified non-compliances warrant refusal of an application. That exercise should not involve trawling a planning scheme for every possible provision that may be said to support a refusal. Not every alleged non-compliance will warrant refusal. Judgment will need to be brought to bear as to the provisions of the document that genuinely warrant refusal of an application, as distinct from those provisions that provide context, or are merely repetitive of the planning policy or objective relied upon to warrant refusal[36].

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35 City Plan 2014 is no exception.

36 As is required by s.10(2) of PECA in the context of an appeal to this court.

[67] In the context of an appeal about an impact assessable application where a party contends that a non-compliance with an assessment benchmark warrants refusal, that party will need to identify at least two things in any document purporting to articulate the issues in dispute: (1) it will need to identify the non-compliance alleged; and (2) it will need to identify the planning basis it relies upon to contend the non-compliance warrants refusal in the exercise of the discretion under s.60(3) of the PA. The second category of matters may be identified having regard to, inter alia, town planning principle and practice. It is a matter about which town planning experts will be expected to assist the Court[37]. The document identifying the issues in dispute may also need to allege, where relevant, how and in what way an approval would not advance the purpose of the PA.

[68] The obverse side of the same coin involves the articulation of an applicant's case in favour of approval. As s.60(3) of the PA involves the exercise of a discretion, an applicant will be expected to identify the reasons relied upon to contend the discretion should be exercised in its favour. This is not simply an identification of the '*grounds*' or '*relevant matters*' relied upon to justify an approval despite non-compliance with a planning document. Rather, an applicant is required to identify all of the matters that will, either individually or collectively, be relied upon to contend an approval should be granted in the exercise of the discretion.

[69] The reasons relied upon by an applicant will ordinarily be founded on one of two alternative cases. The first alternative will likely assume an approval will comply with the assessment benchmarks. This will need to be alleged and, if particular planning provisions are to be emphasised, those provisions should be identified, along with any planning principle to be relied upon in support. The second alternative case will most likely proceed on the footing that a non-compliance is established with an applicable assessment benchmark, but that non-compliance ought not be determinative in the circumstances of the case. The relevant circumstances relied upon to advance this position will also need to be identified.

[70] In identifying the issues to be determined in an appeal, it needs to be borne in mind that the exercise of the planning discretion under s.60(3) of the PA is subject to three requirements, to which I referred earlier. I wish to say something further about those requirements as they impact on the planning discretion the Court is invited to exercise in this proceeding.

[71] The first requirement is simply stated. The exercise of the planning discretion must be based on the assessment of the application. This is reflected in s.59(3) of the PA, which states:

> "*(3) Subject to section 62, the assessment manager's decision must be based on the assessment of the development carried out by the assessment manager*."

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[37] For example, see *Hotel Property Investments Ltd v Council of the City of Gold Coast* [2019] QPEC 5, [13].

[72] Section 62 of the PA is not relevant to this appeal. Accordingly, s.59(3) requires the exercise of the planning discretion to be based on the assessment of the development carried out. No specific provision or part of the PA is called up as defining the '*assessment*'. In my view, s.59(3) is intending to capture the assessment carried out under Chapter 3, Division 1 of the PA, titled '*Types of development and assessment*'. More particularly, this captures s.45 of the PA. Section 46 of PECA makes it clear that this provision applies to the Court in a PA Appeal.

[73] Turning to s.45 of the PA, subsection (1) states there are two categories of assessable development, namely code and impact assessment. Section 45(5) defines impact assessment. The provision states:

> "*(5) An **impact assessment** is an assessment that-*
>
> *(a) must be carried out -*
>
> *(i) against the assessment benchmarks in a categorising instrument for the development; and*
>
> *(ii) having regard to any matters prescribed by regulation for this subparagraph; and*
>
> *(b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise.*
>
> *Examples of another relevant matter –*
>
> - *a planning need*
> - *the current relevance of the assessment benchmarks in the light of changed circumstances*
> - *whether assessment benchmarks or other prescribed matters were based on material errors…*"

[74] Section 45(5)(a)(i) provides that an assessment manager, and this Court on appeal, must carry out an assessment of the development application against the assessment benchmarks in a categorising instrument. An '*assessment*' is not defined in the PA. The ordinary meaning of '*assessment*', in the context of s.45(5)(a), is to measure, or evaluate the development against an assessment benchmark identified in a categorising instrument[38]. In the case of this appeal, that involves an assessment of the application against City Plan 2014, to the extent relevant.

[75] Section 45(5)(a)(ii) provides that an assessment manager, and this Court on appeal, must carry out the assessment having regard to any matters prescribed by regulation. The relevant provisions of the *Planning Regulation 2017* (***PREG***) are ss.30 and 31. It is unnecessary for me to dwell on these provisions of the PREG.

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38 As defined in the Macquarie dictionary, revised third edition.

[76] Section 45(5)(b) contemplates that an assessment may be carried out against, or by having regard to a '*relevant matter*'. The provision requires, in the first instance, an examination of whether a matter relied upon is '*relevant'*. Once this threshold is crossed, it is for the assessment manager, or this Court on appeal to determine how and in what way the relevant matter informs the assessment of an impact assessable application. This will turn on a range of considerations, including the requirement specified in s.5(1) of the PA. I will return to this shortly.

[77] In my view, s.45(5)(b) of the PA has similar work to do as s.4.4(3)(l) of the 1990 Act, which states:

> "*(3) In considering an application to amend a planning scheme or the conditions attached to an amendment of a planning scheme a local government is to assess each of the following matters to the extent they are relevant to the application –*
>
> *…*
>
> *(l) such other matters, having regard to the nature of the application, as are relevant.*"

[78] The above provision, like s.45(5)(b) of PA, applied to the assessment of an application, and permitted the decision maker to have regard to such other matters as are relevant. Whilst s.45(5)(b) is different to s.4.4(3)(l) in that it excludes matters associated with personal or private circumstances, both provisions admit of an extensive range of considerations that may be legitimately considered in the assessment of an application.

[79] What is a relevant matter?

[80] A relevant matter is not defined in the PA. It is described in s.45(5)(b) by what it is not. It does not include a person's personal circumstances, financial or otherwise. Given it is not defined, it is a phrase that should be given its ordinary meaning, read subject to the words of limitation in the provision itself. The ordinary meaning of the phrase captures a '*matter*' that has a bearing upon, or is connected with[39] the assessment of the application, save for those matters that involve a person's personal circumstances. Subject to what I have said in paragraphs [81] and [82], it should, in my view, be treated as capturing an expansive range of considerations. Further, it is not to be treated as a synonym for '*grounds*' as defined in SPA or earlier statutory predecessors. It may include matters that militate for, and against[40], approval.

[81] Section 45(5)(b) of the PA is subject to an implied limitation. It is any implied limitation that may be found in the subject matter, scope and purpose of the PA[41]. This is to ensure that a matter relied upon, or to which regard is to be given, has a bearing upon or connection with the assessment and decision making process in a way that is within the contemplation of the PA, being the statute that confers the discretion to be exercised.

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39 '*Relevant*' as defined in the Macquarie Dictionary, Revised Third Edition.

40 For example a '*Coty*' point.

41 By analogy see *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24 at 39 to 40.

[82] The specific identification of '*relevant matters*' in any given case will be informed by two features of the PA, namely the examples that follow s.45(5)(b), and the subject matter, scope and purpose of the PA. The examples that follow s.45(5)(b) assist, in part, in identifying what is a relevant matter for the purpose of the PA. The examples include the existence of a planning need, and issues going to the relevance of particular planning controls, or their underlying soundness in planning terms. Historically, these are matters that were considered to be '*grounds*' that may justify an approval despite conflict with an adopted statutory planning control. They are examples only. The list is not exhaustive[42]. They do not limit, but may extend, the meaning of '*relevant matters*'[43].

[83] The second requirement attaching to the exercise of the discretion under s.60(3) of the PA is that expressed in s.5(1) of the same Act. This provision states:

> "***5 Advancing purpose of the Act***
>
> *(1) An entity that performs a function under this Act must perform the function in a way that advances the purpose of this Act.*"

[84] An assessment manager, or this Court on appeal, in deciding the fate of a development application is performing a decision making function under the PA. Accordingly, s.5(1) provides that this function must be performed in a way that advances the purpose of the Act. Section 5(2) provides a non-exhaustive list of matters that may be treated as advancing the purpose of the PA.

[85] The third requirement attaching to the exercise of the discretion under s.60(3) is an implied limitation. Section 60(3) does not prescribe how the discretion is to be exercised, be it to approve or refuse an application. In such circumstances, the discretion should be construed as one that is to be exercised for the purpose for which it is given, subject to any implied limitation arising from the subject matter, scope and purpose of the PA. Put simply, the discretion must be exercised for a purpose that is within the contemplation of the PA.

[86] This part of my reasons for judgment commenced with a discussion about the list of issues tendered by agreement and the statutory assessment and decision making framework applicable under the PA. In light of the foregoing analysis, it is my view that the agreed list of issues, as presently cast, has the potential to lead the Court into error. To the extent the document assumes non-compliance with a planning document requires refusal of the application where there is an absence of sufficient relevant matters, it invites the Court to ask and answer the wrong question. The real question to be determined can be stated as: should the discretion conferred under s.60(3) of the PA be exercised in favour of approval in the circumstances of this case? The determination of this question will be informed by an examination of the five planning topics I identified in paragraph [7]. In addition, the answer to the question will be informed by an examination of the specific considerations relied upon by Ashvan in support of approval, principally the issue of town planning need. I will now deal with these matters in turn.

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42 s.14D(a) of the *Acts Interpretation Act 1954*.
43 s.14D(b) of the *Acts Interpretation Act 1954*.

The location of the proposed Childcare centre

[87] The Childcare centre proposed by Ashvan will, if approved, be located on a major road and in close proximity to schools, parks and two designated centres. Notwithstanding this, the Council and the Co-respondents contend that the development will not be accessible and appropriately located having regard to specific requirements in City Plan 2014. The relevant requirements with respect to the accessibility and location of a Childcare centre emerge from the following planning provisions.

[88] Part 3 of City Plan 2014 contains the Strategic framework. This part sets the policy direction for the planning scheme, and forms the basis for ensuring that appropriate development occurs in the planning scheme area for the life of the plan[44]. For the purposes of describing the policy direction, the Strategic framework is structured to include five themes that collectively represent the policy intent of the planning scheme[45]. Three of the five themes are relevant to locational considerations.

[89] Theme 2 deals with '*Brisbane's outstanding lifestyle*'. The strategic outcomes expressed for this theme contemplate the city has a broad range of community facilities to support its well-being, which are located '*predominantly*' in centres and in Growth Nodes on Selected Transport Corridors[46].

[90] Theme 4 deals with transport and infrastructure. For the purposes of this theme, the concept of infrastructure includes the defined activity group of '*Community facilities*', which are treated as social infrastructure[47]. A Childcare centre falls within this defined activity group. The strategic outcomes for theme 4 contemplate that Community facilities are '*accessible, high quality and meet community needs*'. This policy statement is supported by Land use strategy L1.3 in Table 3.4.5.1, which provides that development for community facilities is '*located in or near centres and public transport*', or '*is encouraged to cluster around existing facilities*'[48].

[91] Theme 5 is about '*Brisbane's CityShape*'. The strategic outcomes for this theme provide that Brisbane's Suburban Living Areas represent the majority of established residential suburbs and comprise, inter alia, '*community facilities…as indicated in neighbourhood plans and the zoning pattern*'[49].

[92] The three themes dealt with above reveal a planning policy that has at its core the promotion of development, which provides residents in Suburban Living Areas with access to a broad range of '*accessible*' Community facilities. The policy promotes the location of such facilities predominantly, but not exclusively, in identified centres and growth nodes[50]. The proposed development will not offend this planning policy because it is also recognised that such facilities may be provided where so indicated in the zoning pattern.

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44 s.3.1(1).
45 s.3.1(3).
46 s.3.4.1(1)(p).
47 Table following s.3.6.1(4).
48 This is consistent with Table 3.6.3.1 (SO26 and L26).
49 s.3.7.1(1)(g)(ii).
50 cf *Gracemere Surveying & Planning Consultants Pty Ltd v Peak Downs Shire Council & Anor* [2009] QCA 237 with respect to the ordinary meaning of '*predominant*' in the context of a planning scheme.

[93] The Strategic framework, particularly theme 5, expressly promotes Community facilities in Suburban Living Areas where indicated by, inter alia, the zoning pattern. The Land is included in the Low density residential zone that forms part of this Suburban Living Area. As is contemplated by provisions of the Strategic framework, the code for this zone anticipates that Community facilities, such as a Childcare centre, may locate on land in the zone. In the context of accessibility and locational considerations, this is subject to one qualification.

[94] Overall outcome (4)(c) of the zone code provides that '*development is not accommodated within this suburban setting unless on a well-located site of over 3,000m^2*'. The land is smaller than the prescribed minimum site area, but this does not inform whether the land is '*well-located*'. The zone code does not identify the features or characteristics that will inform whether a site is '*well-located*'. This is a question of fact and degree.

[95] I am satisfied the Land is '*well-located*' for the purposes of overall outcome (4)(c) of the Low density residential zone code. The Land is highly accessible in the road network, being located on a major road. Its high level of accessibility is reinforced by the fact that it adjoins and has easy practical access to a reserve. This provides a physical connector between the Land, surrounding schools and the principal retail and commercial centre for the suburb of The Gap. In this context, the town planning witnesses agreed, and I accept that '*…the subject land enjoys uninterrupted walking and cycling connection to...significant community facilities*'[51].

[96] The combination of these features comfortably satisfies me that the Land, relative to the location of surrounding facilities, is highly accessible and well-located to meet the need for Childcare facilities to serve the residents of The Gap.

[97] The Council and Co-respondents also rely upon two specific development codes in City Plan 2014 to contend the Land, and proposed development will not be appropriately located. The two codes are the Childcare centre code and the Community facilities code.

[98] The Childcare centre code is contained in s.9.3.4. It applies to assessing a material change of use for an impact assessable development application for a Childcare centre. The express purpose of the code is to '*assess the suitability of development*' to which the code applies[52].

[99] The purpose of the Childcare centre code is said to be achieved through a number of overall outcomes, including overall outcome (2)(a) which states that "*Development is located and designed to be conveniently accessible to users and maintains traffic safety*". The proposed development will be consistent with this overall outcome. For the reasons I have given in paragraphs [95] and [96], I am satisfied the development will be located and designed such as to be conveniently accessible to users. Further, no traffic safety issues are raised against the proposal. The only remaining traffic issue is directed at amenity concerns rather than any traffic planning, safety or design issue.

[100] Performance outcome PO1 of the Childcare centre code is directed at the locational characteristics of land where such a facility is proposed. It states:

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51 Ex.4, p.5, paragraph 16.

52 s.9.3.4.2(1).

"Development that is not located in the Community facilities zone or a zone in the centre zones category:

(a) must have good accessibility and be co-located with or in close proximity to other facilities;

(b) be located to minimise the introduction of non-local traffic into minor residential streets."

[101] The Council and Co-respondents contend the proposed development does not comply with PO1 because: (1) the development will not be co-located with, or in close proximity to other facilities; and (2) the development will not be located to minimise the introduction of non-local traffic into minor residential streets. For the purposes of this part of my reasons for judgment, I will focus on the first contention only. The second contention is dealt with later in the context of amenity considerations.

[102] The phrase '*in close proximity to other facilities*' is not defined in City Plan 2014. It is a phrase that should be given its ordinary meaning in the context in which it appears. Compliance with the provision turns on matters of fact and degree. Importantly, the phrase is not seeking to limit the relevant enquiry to whether development '*adjoins*' or is '*adjacent*' to other facilities. The provision admits of a broader geographical area than one limited to adjoining, or adjacent development.

[103] I am satisfied the Land, and proposed development if approved, will be in close proximity to other facilities in the locality. It will, as I have already said, be located close to schools and two designated centres, including the principal centre for The Gap. In context, the Land enjoys uninterrupted walking and cycling connection to the schools and principal centre. This level of accessibility is consistent with the development being within close proximity to other facilities for the purpose of PO1 of the Childcare centre code.

[104] The Community facilities code applies to assessing a material change of use for an impact assessable development application for a use in the Community facilities defined activity group. This includes a Childcare centre.

[105] The purpose of the Community facilities code is to assess '*the suitability of development…for community facilities*'[53]. The purpose of the code will be achieved through a number of overall outcomes. Three overall outcomes are relevant to the location of the proposed development, namely:

"*(2) The purpose of the code will be achieved through the following overall outcomes:*

…

(b) Development is integrated or co-located with other community facilities ***where possible*** *to create a multifunctional service hub.*

…

[53] s.9.3.5.2(1).

> *(e) Development ensures that the level of public and active transport, or private vehicular accessibility and car parking, for users of the facility is appropriate to the purpose, and **where possible**, the use is clustered within or in close proximity to centres well-serviced by public and active transport.*
>
> *(f) Development:*
>
> *(i) is appropriately located according to the type of proposed use;*
>
> *(ii) is highly accessible **and preferably integrated** and co-located with complimentary uses where possible; …"* (emphasis added)

[106] The above overall outcomes do not raise a new issue that is not otherwise dealt with above. It repeats the planning objective that development is to be integrated with, or co-located with other community facilities, but is softer in the expression of that policy. Those parts of the overall outcomes emphasised above reveal the planning policy is expressed as a '*preference*', and implemented '*where possible*'. The proposed development does not offend this aspiration, or statement of preference.

[107] Having regard to the matters set out above, the location of the proposed Childcare centre, on the evidence, has much to commend. It would be co-located with a large reserve with an extensive recreational space. It would be well-located in the road network such that it is highly accessible for patrons, and in close proximity to a range of important local facilities. In this way, the proposed development is in strong alignment with a number of elements of City Plan 2014. This is a matter that favours approval of the application, rather than refusal as contended by the Council and the Co-respondents.

<u>The nature of the need to be served by the proposed Childcare centre</u>

[108] The Low density residential zone code contemplates that land in the zone may be developed for non-residential purposes. One such purpose is a Childcare centre. An important qualification to this is contained in overall outcome (4)(k) of the zone code, which states:

> "*(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.*"

[109] Overall outcome (4)(k) calls for two distinct questions to be determined in this case: (1) will the proposed development serve a local community facility need only? and (2) is the proposed development of a bulk and scale that is compatible with, and will integrate with the built form intent for the Low density residential zone? This part of the reasons for judgment is directed towards the first of these questions only.

[110] The substance of overall outcome (4)(k) makes it clear that non-residential uses such as a Childcare centre are anticipated in the zone, but where they perform a particular function. They serve a local community facility need <u>only</u>.

[111] What is a local community facility need only?

[112] In context, it is to be understood as a '*local…need only*' for one of the uses falling within the defined activity group of Community facilities. The uses clustered in that activity group are diverse. They include cemetery, club, childcare centre, community car centre, community residence, community use, crematorium, educational establishment, funeral parlour, emergency services, health care service, hospital, major sport recreation and entertainment facility, and place of worship. The need to be examined is a planning need for such a use, which is multi-faceted, and includes matters touching upon community and economic need considerations.

[113] Whether development will serve a local need, or something more for the purposes of overall outcome (4)(k) is a question of fact and degree. It will be informed by a range of considerations, including the nature of the use proposed, and relevant context in City Plan 2014. That context includes the purpose of the Low density residential zone, which describes the nature and intended function of non-residential uses anticipated in the zone. They are described as including '*small-scale services, facilities and infrastructure'*, which includes social infrastructure, such as Community facilities[54]. The purpose of the zone confirms that uses of this character are intended to *'support local residents*'.

[114] The geographical area that encompasses the '*local residents*' is not limited by overall outcome (4)(k) to: (1) '*a walkable catchment*' of residents[55]; or (2) a location that is within '*walking distance*'[56] of local residents.

[115] The determination of the issue in this case is greatly assisted by the joint report prepared by the economists, which examines the need for the proposed development. They agreed a catchment area for the proposal, which reflects the geographical area they consider would have convenient access to a Childcare centre on the Land. The agreed catchment is coincident with the suburb of The Gap. This is not a walkable catchment given its size and topography.

[116] It was submitted on behalf of Ashvan that the catchment area agreed between the economists should be treated as the '*local area*' for the purposes of overall outcome (4)(k). I accept that submission having regard to three matters, taken in combination namely: (1) the purpose of the zone code, which anticipates that non-residential uses '*support local residents*'; (2) the extent of land included in the Low density residential zone in The Gap informs the geographical extent of the 'local area', which accounts for all but a limited number of lots in the suburb (that are included in centre, park or community use type zones); and (3) the inherent nature of The Gap, which the economists agreed is a relatively isolated urban pocket that operates as a cul-de-sac, with Waterworks Road connecting it to the central parts of Brisbane.

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54 Table following section s.3.6.1(4).

55 Compare overall outcome (4)(k) with s.6.2.1.2(4)(c) of the Low-medium density residential zone code and s.6.2.2.4(4)(b) of the Neighbourhood centre zone code.

56 s.6.2.1.2(4)(c).

[117] Overall outcome (4)(k) requires the need served by the development to be limited to a local need '*only*'. Read literally, this is expressed as an absolute and excludes a facility that would attract what the economists refer to in a retail sense as '*rogue trade*'. The economists agreed that the need for the Childcare centre should be examined assuming a small proportion of rogue trade, namely children attending the facility who reside outside of the catchment area. Ms Muelman and Mr Norling assumed that 5% of the children attending the facility would fall into this category. Mr Brown was not as generous. He assumed this would account for only 2.5% of the Children attending the facility.

[118] Whilst the language of overall outcome (4)(k) is expressed in absolute terms, I am not persuaded that the '*rogue trade*' assumed by the economists is to be treated as a feature that falls foul of the overall outcome. More specifically, it does not of itself establish that the proposed Childcare centre will serve more than a local need.

[119] Planning provisions, such as overall outcome (4)(k), have long been construed and applied by this Court in a practical, rather than a pedantic way[57]. There is good reason for this. It is unrealistic to expect, in modern times, that a facility such as a Childcare centre would not attract patrons from beyond its '*local area*'. In this respect, I agree with the tenor of the observation made in *Seven Eleven Stores Pty Ltd v Pine Rivers Shire Council* [2005] QPEC 070 where his Honour Judge Rackemann (at paragraph [10]) said:

> "*It is unrealistic, in dealing with facilities such as service station/shop uses, in the modern context, to expect that they will not be used by a proportion of people from beyond the local area. Catchment areas are not borders within which patrons are quarantined.*"

[120] Putting the '*rogue trade*' to one side, the question is whether the proposed Childcare centre will serve a local need only? I am satisfied this question should be answered in the negative having regard to three aspects of the evidence, taken in combination.

[121] First, the development, if approved and constructed, will be a large Childcare centre. Not only will it be large, but it would be comparable in size to the largest competing facility in the catchment area, which is approved to accommodate 116 children but will offer only 84 places. This centre is located on land that forms part of a designated centre. It is not unreasonable to expect Childcare facilities of this size in one of the two designated centres given the planning controls do not, unlike the Low density residential zone, require facilities of this kind to serve a local need only.

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57 *Phil Fletcher Planning & Investment Services Pty Ltd v Brisbane City Council* [1991] QPLR 16 at 18; *Mallcap Properties Ltd v Brisbane City Council* [1992] QPLR 208 at 209; *Provincial Securities Pty Ltd v Brisbane City Council* [2001] QPELR 143 at 147; *The Shell Company of Australia Ltd v Gold Coast City Council* [1993] QPLR 293 at 296; and *Cooloola Ratepayers & Residents Assoc Inc v Cooloola Shire Council & Ors* [2004] QPELR 544 at 547.

[122] Second, for the reasons which are discussed below, the proposed development, if approved and constructed, would see the supply of Childcare facilities exceed demand in The Gap. The evidence establishes there is a demand for additional Childcare facilities to serve the Gap. The demand, as assessed by the economists, falls short of a demand for a facility accommodating 114 children. At its most favourable for Ashvan, the evidence establishes there is additional demand in The Gap for Childcare facilities, but an approval would result in an oversupply of such facilities. The extent of the oversupply is in the order of 49 to 64 places[58]. This level of oversupply is material. By way of contrast, this level of oversupply exceeds the size of two existing Childcare facilities in the local area that each accommodate only 48 children.

[123] Third, the evidence establishes that the oversupply referred to above will have an economic consequence that is relevant to whether the development will serve a local need only. Mr Brown, (the economist called by the Council) in the need joint report said:

> "*…for a centre of the scale proposed and in its subject location it would need to draw significant enrolments from beyond the identified Catchment Area to be viable. Hence, the operators of the proposed centre might not intend for it to serve a larger catchment, the market dynamics at the local level would require the centre to pursue enrolments from further afield.*"

[124] This evidence is a strong indicator that the development, if approved, will serve more than a local need. On Mr Brown's evidence, which I accept, the operators of the proposed development may be forced, due to market conditions, to pursue enrolments beyond the agreed trade area, being the local area. That this may occur is reinforced by the report prepared by C&K submitted with the development application. That report suggests the catchment area for the proposed development will extend outside of The Gap and into the adjoining suburb of Ashgrove.

[125] I am not persuaded the proposal will serve a local community facility need only for the purposes of overall outcome (4)(k) of the Low density residential zone code. It will, if approved and operated, function in a way that is not promoted, or anticipated in the Low density residential zone.

Built form considerations: bulk and scale

[126] The Council and Co-respondents contend the proposed development is of a bulk and scale that would unacceptably impact on the character and amenity of the area. The planning scheme provision central to this aspect of the appeal is overall outcome (4)(k) of the Low density residential zone code. This provision requires, in part, that development is to be of '*a bulk and scale that is compatible with and integrates with the built form intent for the Low density residential zone*'.

[127] This provision does not call for new development to '*replicate*' the bulk and scale of a dwelling house. Rather, the provision requires consideration to be given to matters of '*compatibility*' and '*integration*' with '*the built form intent'* for the zone, which is informed by the zone code.

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[58] See paragraph [185] of these reasons for judgment.

[128] The Low density residential zone code includes four provisions that inform the built form intent for non-residential uses in the zone, namely:

(a) the purpose of the zone, which speaks of providing for, inter alia, '*small-scale services, facilities and infrastructure*'[59];

(b) overall outcome (4)(c), which requires development in the zone, other than a dwelling house, not be accommodated in the '*suburban setting'* save where *'on a well-located site of over 3,000m^2*';

(c) overall outcome (4)(i)(i), which requires small-scale non-residential uses to, inter alia, '*have a gross floor area of less than 250m^2*'; and

(d) overall outcome (5)(a), which requires development in the zone to be '*of a form and scale that reinforces a distinctive subtropical character of low rise, low density buildings set in green landscaped areas*'.

[129] Not all of the above planning provisions apply to the proposed development. Overall outcome (4)(i) applies to a '*small-scale non-residential use*'. The proposed Childcare centre does not fall within this defined activity group[60]. As to the three remaining planning provisions, they require non-residential built form to be consistent with the suburban setting, and be located on a site over 3,000m^2. The suburban setting is that described in overall outcome (5)(a). As I have already said in paragraphs [12] and [19], this provision fairly describes the existing character and amenity of the area, including Goldie Street.

[130] The requirement for development to be consistent with the suburban setting is complimented by overall outcome (4)(c) of the zone code, which requires development (that is not a dwelling house) to be on a well-located site with a minimum area of 3,000m^2. The prescribed minimum site area is not accompanied by a statement of planning purpose. The purpose must be ascertained from reading the zone code as a whole. In my view, the planning purpose of the minimum site area is to ensure there is sufficient space, or breathing room around non-residential uses to achieve an appropriate setting[61], and to support the high level of comfort reasonably expected in the zone[62]. This planning purpose was identified by Ms Morrissy in the town planning joint report where, in discussing overall outcome (4)(c), she said[63]:

> "[it] *intends to ensure that non-residential development within the LDR zone is on sufficient land area to provide generous and high quality boundary landscape buffers, and establish an appropriate balance between built form, impervious areas and landscaping consistent with the intended character of the LDR Zone of low scale buildings located within green landscaped areas.*"

[131] Against the background of the above planning provisions, the following question is to be considered: Will the proposed Childcare centre be of a bulk and scale that is compatible with, and integrate with, the built form intent of the zone? Having regard to the evidence, this question is answered in the negative.

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59 s.6.2.1.1(1)(b).
60 Ex.7, p.238, Table SC1.1.2.B – Defined activity groups.
61 Described in s.6.2.1.1(5) of the zone code.
62 s.6.2.1.1(4)(g).
63 Ex.4, p.17, paragraph 85.

[132] One measure or metric for the bulk of a building is its gross floor area. The built form proposed will have a gross floor area of 1,000m^2 spread over three allotments. There is no encouragement in the zone code for a building of this size, nor is there any other building in Goldie Street that approaches this size. The architectural design measures discussed in paragraphs [25] and [27] above are laudable, but do not break up the bulk of the built form such as to render it compatible with the built form intent of the zone. In this way, the proposal will not be of a bulk that is compatible with the desired built form intent of the zone.

[133] There are two particular features of the proposal that are incompatible with the built form intent of the zone. First, the proposed building is large and is non-residential in its appearance. The architecture of the proposed development will be perceived as a large non-residential development in a residential area. This sits uncomfortably with overall outcome (5)(a) of the Low density residential zone code.

[134] Second, the proposed development includes an extensive hardstand area for car parking. The area is in the order of 230m^2, [64] and will be visible from parts of Goldie Street and Payne Road. The hardstand area is a non-residential feature of the development that serves to reinforce its scale, being beyond that which is anticipated in the zone.

[135] The requirement for there to be integration with the built form intent of the Low density residential zone contemplates that new development is to be, inter alia, appropriately sited and landscaped in the manner contemplated by the zone code. The extent to which an appropriate landscape solution can be provided is, in part, a function of the size of the Land relative to the footprint of the development. Here, the Land is less than the minimum site area of 3,000m^2 as prescribed in overall outcome (4)(c). Whilst it can be accepted that a departure from this stated minimum is not of itself fatal in this case[65], it nonetheless is a symptom that the area of land available to accommodate the proposed built form, and to provide a setting that integrates with the built form intent of the zone is compromised.

[136] As a matter of impression, the proposed development will not achieve the desired setting for the Low density residential zone. The built form, and hardscape areas are large and leave insufficient site area to achieve a setting that provides generous and high quality boundary landscape buffers, and to establish an appropriate balance between built form, impervious areas and landscaping. This is a symptom of the proposal being an overdevelopment of the Land. In this regard, I accept Ms Morrissy's evidence, who said:

> "*The proposal represents a large building spanning nearly three residential lots, where the combination of the building scale, hardstand areas and reduced landscaping outcomes (along the side boundary to 6 Goldie Street and the Goldie Street frontage of the site) result in an unintended built form and character outcome in the LDR zone*."

[137] The opinion expressed by Ms Morrissy, as a matter of impression, is made good having regard to the photomontages prepared for the proposal.

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64 Ex.4, p.15, paragraph 73.

65 Morrissy: T4-32, Line 35 to 40.

[138] Whilst I am not persuaded the proposed built form complies with overall outcome (4)(k), this in fairness needs to be qualified. The evidence establishes that the bulk and scale of the proposal will be imperceptible from the adjoining reserve. From this view point it will appear as a two-storey structure in a green landscaped setting, as is reasonably anticipated in the zone. It will present as low rise, low density development in a landscaped setting. The same can also be said for some, but not all views of the development from Payne road. The development when viewed from the south-west will appear in a green landscaped setting, against the backdrop of the adjoining reserve.

[139] The view of the proposed development from parts of Goldie Street, and from Payne Road to the south and east will not however be consistent with a subtropical, low rise, low density character with buildings set in a green landscaped setting. Viewing points at these locations will be dominated by built form and a hard stand area, namely an at grade carpark. The backdrop to the hard stand area will be a non-residential building that will be visible behind a narrow strip of vegetation. This is an unintended built form and character outcome in the Low density residential zone.

[140] The Childcare centre code and Community facilities code include provisions that are relevant to bulk and scale considerations. I have had regard to each of the provisions raised by the Council and Co-respondents in these codes directed to bulk and scale issues. Neither of the codes raise a new or different planning issue that is not otherwise covered by an examination of overall outcomes (4)(c), (4)(k) and (5)(a) of the Low density residential zone code.

[141] As a consequence of the above, it is unnecessary for me to deal with the Childcare centre code and the Community facilities code further in this context.

[142] In the result, the proposed built form is not of a bulk and scale anticipated in the Low density residential zone. It will not comply with the built form outcome envisaged by overall outcome (4)(k) in the zone code. The consequence is that the proposal will be out of character and have an unacceptable impact on the amenity reasonably expected in the Low density residential zone. The amenity reasonably expected in the Low density residential zone is expressly stated in overall outcome (4)(g) of the zone code as being a '*high*' level of comfort.

Interface issues: Goldie Street and Payne Road

[143] The interface between the proposal, being a non-residential use, and surrounding development is a planning consideration that needs to be examined having regard to at least three aspects of City Plan 2014. It firstly emerges as a consideration under overall outcome (4)(c) of the Low density residential zone code, which speaks of development being located on a site of 3,000m2. As I have already said, the underlying planning purpose for the stated minimum site area is to achieve, inter alia, 'breathing space' around development. This will assist in achieving a sensitive transition between residential and non-residential uses in the zone.

[144] This is reinforced by the Childcare centre code, which in overall outcome (2)(b) requires development to be '*sited and designed to minimise adverse impacts on the amenity of nearby residential dwellings*'. This, in turn, is supported by Performance outcome PO2 in the same code, which requires development to be of a nature, scale, design and construction to prevent '*adverse impacts on the amenity of nearby sensitive uses*'.

[145] The Community facilities code is also relevant in this regard. Overall outcome (2)(f)(v) of the code requires development to sensitively transition to surrounding uses. This is complimented by overall outcome (2)(k) of the same code, which states:

> "*Development achieves satisfactory standards in managing the potential adverse impacts on the health, safety and amenity of adjoining sensitive uses, predominantly through* ***maintaining adequate buffering*** *between these land uses.*" (emphasis added)

[146] I do not accept Ashvan's submission that the proposed development, as presently designed, will sensitively transition to, or buffer the adjoining dwelling house in Goldie Street. The evidence relied upon by Ashvan in this respect principally comprised an architectural elevation of the northern façade with the proposed boundary treatments. The elevation was marked Exhibit 31, and was supported by some general assertions from Mr Buckley that the landscaping illustrated in the document was achievable.

[147] Exhibit 31 is underwhelming. It does little to satisfy me that the adjoining residential use would be appropriately buffered from the proposed Childcare centre. It does not illustrate there would be, as required, a sensitive transition to Goldie Street or the adjoining dwelling house.

[148] The exhibit depicts, for a large part of the common boundary, a fence and a 1.5m wide landscape strip with tall trees. The size of the trees shown is said to reflect that which can be expected after a 5 year period has elapsed post-construction. The width of this landscape strip is narrow, providing little by way of separation or space between the proposal and adjoining use[66]. It is also unclear from the elevation the extent to which this boundary treatment will screen the proposed development, particularly the proposed at-grade carpark from view to the north[67]. The screen that is proposed in this location reduces in width to accommodate a retaining wall that is required for the car parking area and a ramp providing access to the basement carpark. The retaining wall will reduce the effective width of the landscaping strip at this location.

[149] The extent of the proposed screening on the common boundary as depicted in Exhibit 31 is, in my view, insufficient to demonstrate compliance with, inter alia, Performance outcome PO16 of the Community facilities code[68]. This provision requires development to not impose adverse visual amenity impacts on surrounding sensitive uses.

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66 Confirmed by sections E and F.
67 Ex. 31.
68 Ex.7, p.179.

[150] The elevation of the common boundary depicted in exhibit 31 suggests that the adjoining property to the north will have a clear view of the tallest part of the built form of the proposal, seen above the top of a 2.4m high acoustic fence[69]. Whilst I have serious misgivings about the accuracy of this elevation given the extent of landscaping on the adjoining land, particularly along the boundary, this elevation taken at face value is not consistent with one reasonably anticipated in the Low density residential zone.

[151] The combination of the matters set out in paragraphs [147] to [150] do not support a conclusion that the proposal will provide a sensitive transition or buffer to the adjoining land to the north, which is developed with a sensitive use, namely a dwelling house.

[152] The transition from the development to Goldie Street is also problematic. The development plans indicate that limited landscaping is proposed where it shares an interface with the suburban character of Goldie Street. The interface comprises a large hardstand area for at-grade car parking, which is to be partially screened by landscaping planted in a 1.4m wide strip. As the photomontages confirm, the at-grade car parking will be visible from parts of Goldie Street and Payne Road. Visually, the car parking area will be a dominant feature of the Goldie Street frontage of the Land, contrary to Performance outcome PO19 of the Community facilities code. The development in this way will be inconsistent with the level of amenity and character reasonably expected in Goldie Street.

Amenity considerations

[153] It is well established that a community's reasonable expectation as to amenity should be informed by an objective reading of the applicable town planning controls. The applicable planning control here is City Plan 2014, which provides that the community has a reasonable expectation of a '*high level*' of comfort, quiet, privacy and safety[70] in the Low density residential zone.

[154] It can be accepted in this case that the proposed development will not give rise to any unacceptable amenity impacts by reason of atmospheric emissions (noise, light and air). Neither the Council nor Co-respondents suggested otherwise. Rather, the amenity case advanced against the proposed development targeted issues of setting; building bulk and scale; the scale of the proposed use; and the lack of transition provided to surrounding development. In addition, issue was taken with two particular features of the proposal that were said to give rise to unacceptable amenity impacts, namely the proposed hours of operation, and traffic access arrangements.

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69 Ex. 31.

70 s.6.2.1.1(4)(g).

[155] Performance Outcome PO1 of the Community facilities code deals directly with hours of operation. The Performance outcome requires development to ensure that hours of operation are controlled to not impact upon the amenity of nearby sensitive uses. The hours of operation are also required to be consistent with reasonable community expectations for the use, and the purpose of the zone. The corresponding acceptable outcome, AO1.1, requires development for a non-residential use to have hours of operation which are limited to 7:00 am to 6:00 pm. Here the opening hours for the proposed Childcare centre will be 7:00 am to 6:30 pm. It will also operate before and after these times. The development application confirms that staff will arrive earlier than 7:00am, and depart after 6:30pm. Cleaners are expected to depart after centre staff, around 8:00pm[71].

[156] As a general proposition, I accept Ashvan's submission that proposed operating hours can ordinarily be regulated by conditions to mitigate impacts to an appropriate level. That general proposition does not however provide a complete answer here. The hours of operation, coupled with the poor interface treatment with the adjoining dwelling and Goldie Street will, as the evidence shows, result in development that is not consistent with the high level of amenity expected in the Low density residential zone. This will give rise to an unacceptable impact on the amenity of Goldie Street. This is so even accounting for the impact Payne Road has on the southern end of the street as discussed in paragraph [21].

[157] The traffic engineers called by the Council and Co-respondents considered that the location of the proposed access warranted refusal of the application. This, with respect, was for amenity reasons rather than traffic engineering reasons.

[158] The proposal provides for vehicle access to the development from Goldie Street. All traffic movements to and from the proposal must therefore enter Goldie Street. They will do so for a short distance along the frontage of the Land, and enter at a location parallel to the boundary with the adjoining residence to the north. The number of traffic movements anticipated for the proposed development will be equivalent to 107 vehicles during the weekday morning peak. This number of traffic movements would represent a marked increase in Goldie Street. At present, the traffic movements in the street equate to approximately 14 vehicle movements in the peak hour. The increase in the number of traffic movements in Goldie Street is pause for concern.

[159] The significance of this numerical increase takes on particular importance once it is appreciated that the development will introduce non-residential traffic into a residential cul-de-sac. At first blush, this is inconsistent with a well-recognised town planning and traffic engineering principle: development should ordinarily minimise the introduction of non-residential traffic into a residential street[72]. This general principle is reflected in two applicable Performance outcomes in City Plan 2014.

[160] Performance Outcome PO1 of the Childcare centre code states, in part:

> *"Development that is not located in the Community facility zone or a zone in the centre's zone category:*
>
> *…*

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71 See paragraph [33](f).

72 See for example *Retirement Properties of Australia Pty Ltd v Maroochy Shire Council & Anor* [2008] QPEC 61, [56].

(b) be located to minimise the introduction of non-local traffic into minor residential streets.

[161] Similarly, Performance Outcome PO25 of the Community facilities code states:

> "*Development must be located to minimise the introduction of non-local traffic into residential streets which are minor roads.*"

[162] Is the development located to 'minimise' the introduction of non-local traffic into Goldie Street?

[163] The ordinary meaning of 'minimise' involves reducing something to the smallest extent practicable. I am not satisfied the proposal will, in this sense, minimise the introduction of non-local traffic into Goldie Street. Every traffic movement generated by the proposal will be introduced into Goldie Street, being a minor residential street. The increase in the number of vehicles in the street will represent a marked increase for a residential cul-de-sac. This would be one of a number of unacceptable impacts the proposed development would have, if approved, on the amenity of Goldie Street.

[164] Ashvan contends that: (1) the proposal will introduce only 'local' traffic into Goldie Street, which is traffic in the local area served by the development; and (2) the proposed development 'minimises' the introduction of non-residential traffic into Goldie Street by locating the access point as close as is practicable to the intersection with Payne Road. This location, it is submitted, will mean that vehicles travel only a short distance along the Goldie Street frontage of the Land, and not the full length of Goldie Street.

[165] I reject the first point advanced by Ashvan. 'Local traffic' in this context does not mean traffic generated in the local area that informs the assessment against overall outcome (4)(k) of the zone code. In context, local traffic means traffic that is entering Goldie Street for a purpose that is directly associated with an existing residential use in the street. It is unlikely that any traffic generated by the proposal will have such a purpose.

[166] The second point advanced has some superficial attraction, but loses its force once it is appreciated there is no lawful, or practical control proposed by Ashvan that could restrict vehicles utilising Goldie Street to the north of the Land. Such a control would be impractical, but necessary given two matters: (1) the number of carparks provided for the development will not accommodate all of the parking demand for the proposal, with overflow parking anticipated in the street – given the short distance between the driveway and the corner, the reality is that some of the parking demand may be taken up to the north of the proposed driveway on Goldie Street; and (2) patrons driving to the proposed facility will be committed to turning into Goldie Street before realising that the on-site carpark is full, and will then, in all likelihood, park in Goldie Street – given the short distance from the driveway to the corner, this parking demand may be taken up to the north of the proposed driveway[73]. In circumstances where vehicles (entering or leaving the development) will not be precluded from driving or parking on Goldie Street north of the Land, I am not satisfied that the development has been designed to minimise the introduction of non-residential traffic into a residential cul-de-sac.

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[73] Ex.15, paragraph 2.5.

[167] For completeness, I note that Ashvan relied upon provisions of the Road Hierarchy Overlay code in City Plan 2014 to support the location of the proposed access on Goldie Street. In particular, reliance was placed upon Performance outcome PO1 and its accompanying acceptable outcomes in that code, which contemplate that access for non-residential development is taken via the lowest order of road in the hierarchy. It can be accepted that Ashvan has demonstrated compliance with this provision of the overlay code, but this does not advance the matter in amenity terms. The provision of the overlay code to which reference was made is, in terms, directed at issues of traffic safety and road function. It is not directed at amenity considerations.

[168] In light of the matters discussed in paragraphs [126] to [167], I accept the submissions made on behalf of the Council and the Co-respondents that the subject proposal will, if approved, have an adverse and unacceptable impact on the amenity of Goldie Street. The nature of the impact on amenity is the product of a number of issues taken in combination. This was aptly described by Ms Morrissy in the town planning joint report where she said[74]:

> "*In isolation…, the areas of non-compliance regarding extended operating hours, reduced side boundary buffer landscaping, additional acoustic barrier height, reduced frontage landscaping and the introduction of non-local traffic into a minor street may not result in unreasonable impacts to the level of amenity expected by residents. However, in my opinion, these issues cumulatively result in an unreasonable impact to the high level of amenity expected by residents within the LDR Zone of Goldie Street*."

[169] I accept Ms Morrissy's evidence.

Need

[170] Ashvan submits there is a strong town planning, community and economic need for the proposed development[75]. This submission is advanced in circumstances where there are existing Childcare facilities that serve the suburb of The Gap.

[171] To examine the issue of need, I was assisted by the evidence of three economists – Ms Muelman for Ashvan, Mr Brown for the Council and Mr Norling for the Co-respondents. They agreed a catchment area for the proposed Childcare centre in their joint report. That area is the suburb of The Gap.

[172] The economists also agreed about the existing supply of Childcare facilities in the catchment. It was agreed that, for the 2019 calendar year, 274 Childcare places are located in the catchment. Three existing Childcare centres in the catchment provide 191 of those places. The balance is made up by a fourth Childcare centre that was substantially constructed at the time of the hearing but not yet operational. This is the centre in which one of the Co-respondents has a financial interest. It has an approval, granted by the Council in February 2018, to accommodate 116 children. At present, it is intended that the facility will not operate to its approved capacity. It will accommodate in the order of 84 children.

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74 Ex.4, p.23, paragraph 117.
75 Ex.33, paragraph 86.

[173] Having regard to the evidence of the economists, a useful indicator of the need, if any, for additional Childcare facilities in the catchment is the current occupancy rate. Mr Norling, summarised what, if anything, may inferred from market occupancy rates. In the need joint report he said[76]:

> "*JN regards a market having an occupancy rate of between 80% to 85% as being healthy, with sufficient choice being available to parents and Centres likely to be able to operate at sustainable levels. Occupancy rates above 85% indicate a supply-constrained market, with occupancy rates below 80% indicating an oversupplied market. Occupancy rates below 70% indicate that some operators may be encountering stress and some operations may not be sustainable in the longer term;*"

[174] I accept Mr Norling's evidence.

[175] Mr Norling and Mr Brown agreed that the current occupancy rate among the three existing and operational Childcare facilities in The Gap is in excess of 90%. Having regard to Mr Norling's evidence set out above, this indicates a supply constrained market. In practical terms, Mr Norling said that his assessment of the current occupancy rate (at 94%) meant it would be very difficult for a parent to place a child in one of the existing facilities. The nature of the difficulty experienced by parents was explored by Mr Batty in the following passage of cross-examination with Mr Norling[77]:

> "*Mr Norling, …do I take it then from a community and public's perspective that there are disadvantages of the occupancy rate being at 94 per cent? – From a community perspective there are disadvantages, yes, but great advantages if you're an operator.*
>
> *Yes, and just to be clear, can you just articulate for me what the disadvantages are just so that we-re perfectly clear about that? – So the disadvantages are that there simply aren't enough vacancies over the days and the age groups that some – a new parent bringing a child into the area can choose from. So they might be stuck with – you know – he might approach a – the father might approach a child care centre. He's got a zero to 24 month old and that child care centre's got – the six percent vacancy is in the four year – three and four year age groups, so – and with the zero to 24 month old there's no – there's no supply to cater for that person – for that child.* ***So at 94 percent parents will miss out. Parents will suffer***." (emphasis added)

[176] The addition of the newly constructed Childcare centre will, on the evidence, do little to alleviate this position. Mr Norling and Mr Brown concluded that the addition of the new facility, providing 84 places, would reduce the current occupancy rates to 89% and 87% respectively. These rates continue to indicate a supply constrained market where, to use Mr Norling's words, '*parents will miss out*' and '*parents will suffer*'.

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76 Ex.5, paragraph 48(g).

77 T2-21, Line 38 to T2-22, Line 4.

[177] Against this background, I am comfortably satisfied that the catchment area agreed by the economists would benefit from additional Childcare facilities. They are facilities of importance to the catchment area given its demographics. It has a high proportion of families with working parents who are likely to have a legitimate need for access to conveniently located Childcare facilities.

[178] Need, in planning terms, is widely interpreted as indicating a facility that will improve the ease, comfort, convenience and efficient lifestyle of a community[78]. I accept, as a general proposition, that a Childcare centre operated by C&K on the Land will improve the physical well-being of the community in this way. The new facility would: (1) introduce a new, and well-recognised Childcare operator into the catchment area; (2) provide additional choice, competition and convenience for the population of the catchment area; and (3) provide a well-located, modern and attractive facility for the benefit of the community.

[179] These matters establish there is a general need for additional Childcare facilities in the catchment. They do not, either individually or collectively, establish there is a strong, clear and pressing need[79] for the development. Whether a need has been demonstrated for the development requires a closer examination of the evidence with respect to the supply-demand balance that assumes the application is approved and operational.

[180] The proposed development, if approved and constructed, would contribute an additional 114 Childcare places to the available supply in the catchment. The available supply would increase from 271 places to 385, assuming the facility that was under construction at the time of the hearing is limited to 84 places. The change to the demand-supply balance and occupancy rates as assessed by each of the economists can be tabulated as follows:

	Demand for places (2021)	Supply of places (2021)	Occupancy rate %
Ms Muelman[80]	281	385	73%
Mr Brown[81]	238	385	62%
Mr Norling[82]	244	385	63%

[181] Against the background of Mr Norling's evidence, which is set out in paragraph [173], the above figures for the year 2021 reveal one of two scenarios is predicted: (1) Ms Muelman's figures suggest the market would be over supplied with Childcare places given the estimated occupancy rate is less than 80%; and (2) Mr Brown's and Mr Norling's figures suggest the market will be materially oversupplied to the point that the five facilities providing Childcare services may encounter stress, and some may not be sustainable in the long term. Neither scenario is consistent with there being a strong, clear and pressing need[83] for the development.

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78 *Isgro v Gold Coast City Council & Anor* [2003] QPELR 414 at 418 [21].
79 Ex.33, paragraph 90 and following.
80 Ex.5, p.14, Table 5.
81 Ex.5, p.17, Table 6.
82 Ex.5, p.13, Table 4.
83 Ex.33, paragraph 90 and following.

[182] This creates a difficulty for Ashvan's need case. An approval would lead to an oversupply of Childcare places. It is unlikely this oversupply would be corrected or alleviated for a considerable period of time given:

(a) the catchment area is an isolated urban pocket where only modest population growth is forecast at an annual average rate of 0.6%; and

(b) there has been a general decline in the number of births per annum in the catchment, and that decline is projected to continue for the foreseeable future.

[183] The extent to which an approval of the proposed development would lead to an oversupply can be considered in qualitative and quantitative terms.

[184] In qualitative terms, the extent of the oversupply was described by Mr Norling as '*significant*'. This is consistent with Mr Brown's evidence who said an approval of the proposed development would force occupancy rates below that which is considered an acceptable balance of supply and demand for a protracted period.

[185] In quantitative terms, the extent of the oversupply measured as '*Childcare places*' was less clear than the qualitative evidence. I infer from the evidence that: (1) Mr Brown assessed the oversupply to be in the order of 49 places[84]; and (2) the evidence suggests Mr Norling's calculations result an oversupply in the order of 64 places[85]. The extent of the oversupply as assessed by Mr Brown and Mr Norling, in context, is fairly described as significant given the size of existing facilities in the catchment area.

[186] I accept Mr Brown and Mr Norling's evidence in preference to that of Ms Muelman, who adopted a different position.

[187] Ms Muelman's assessment of the supply-demand balance resulted in an occupancy rate of 73%. Unlike Mr Norling and Mr Brown she was not troubled that this level of occupancy reflected a significant oversupply. She said this occupancy level was reasonable and within generally acceptable target occupancy rates for long day care centres.

[188] Ms Muelman's evidence sits uncomfortably with a report prepared by her firm, Urban Economics, described as '*Demographic and Development Impact analysis: Queensland Childcare Centres*'[86]. In that report it was concluded that '*the average breakeven point for childcare centres is in the order of 75%*' occupancy rate[87]. Table 5 of the Joint report reveals Ms Muelman concluded that the occupancy rate in the catchment after the proposed development was approved would be less than this breakeven point of 75%. It was not satisfactorily explained by Ms Muelman how an occupancy rate less than a break event point of 75% was 'reasonable' or 'within a generally acceptable target occupancy rate'. This, in my view, undermined the reliability of her evidence.

[189] This is not the only difficulty I have with Ms Muelman's evidence.

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84 This is calculated by deducting Mr Brown's assessment of the need for additional Childcare places in the catchment (being 65 places stated at T2-64, Line 20 to 24) from the 114 places proposed.

85 Assuming a supply of 385 places at 80% occupancy, less an assessed demand for 244 places.

86 Ex.24.

87 Ex.24, p.38.

[190] Ms Muelman's evidence with respect to resulting occupancy rates (assuming the proposed Childcare centre was approved) was founded upon two important assumptions. The assumptions are reflected in Table 5 of the need joint report and largely explain the difference between her assessment in comparison to that of Messrs Brown and Norling.

[191] First, Ms Muelman assumed the number of children attending long day care centres in The Gap would increase from 50% in 2018 up to 55% in 2021. Second, Ms Muelman assumed the extent of '*escape expenditure*' from the catchment for Childcare places would reduce from 40% in 2018, down to 15% in 2021. These assumptions were intended to, inter alia, make allowance for the '*impact and effects of the changes to the child care sector as a result of the Jobs for Families Package introduction*'. Taken to their logical extension, the assumptions suggest an approval, coupled with changes to the childcare sector, would materially alter the way the community chooses to meet its needs for Childcare facilities in The Gap. The change may involve some members of the community electing to alter existing Childcare arrangements (which may be longstanding) to enrol their children in local facilities such as the proposal.

[192] I am not satisfied that it is appropriate to assess the demand for Childcare facilities in the catchment based on these assumptions. They are assumptions about future trends in the catchment, which have not been verified by evidence born of experience '*on the ground*'. For example, there is no evidence from C&K to verify the assumptions are sound having regard to its experience in the industry. Further, there is no evidence of any local members of the community to support the proposition that the shift in approach referred to above is likely to happen in reality. The absence of such evidence gives me little comfort that the two important assumptions made by Ms Muelman are realistic, and appropriate in the circumstances[88].

[193] It has been said that town planning need is premised on a basic assumption; there is a latent unsatisfied demand which is either not being met, or is not being adequately met by the planning documents in their present form[89]. The evidence establishes there is an unsatisfied demand for Childcare facilities in the catchment area. It has not been established that this demand cannot be met, or adequately met by City Plan 2014 in its present form.

[194] City Plan 2014 recognises the community has a legitimate need, in a land use sense, for Childcare centre facilities. It has made provision for this need in the zoning pattern. This is made clear at s.3.7.1(1)(g)(ii) of the Strategic framework. This provision states that Brisbane's Suburban Living Areas will include Community facilities, as indicated in the zoning pattern[90]. This area includes the Low density residential zone. Community facilities, as I have said, are a defined activity group that include Childcare centres.

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88 cf *Glenella estates Pty Ltd v Mackay Regional Council & Ors* [2010] QPEC 132, [50], citing *Gaven Developments Pty Ltd v Scenic Rim Regional Council* [2010] QPEC 51, [25] – [26].

89 *Indooroopilly Golf Club v Brisbane City Council* [1982] QPLR 13 at 32-35; *Williams McEwans (Supra),* at 35.

90 Ex.7, p.87.

[195] The zoning pattern for The Gap anticipates, and makes provision for additional Childcare facilities in three zones. The Gap has land included in the District Centre zone and Community facilities zone[91]. The making of a material change of use for a Childcare centre is code assessable in both of these zones. A Childcare centre use is also anticipated in the Low density residential zone. The extent to which the need, if any, may be met in the Low density residential zone is subject to an express qualification. The facility must comply with overall outcome (4)(k) of the zone code[92].

[196] The evidence established, as a matter of agreement between the economists, that the need, if any, for further additional Childcare services in The Gap could not realistically be met on land included in the District Centre zone and Community facilities zone[93]. This leaves the need, if any, to be met on land in the Low density residential zone, subject to the qualification referred to in overall outcome (4)(k).

[197] Having regard to the evidence of Mr Brown and Mr Norling, I am not satisfied that it has been established there is a latent unsatisfied demand for additional Childcare facilities in the catchment area that cannot be met by City Plan 2014 in its present form. The Low density residential zone provides for the need to be met in the catchment area, subject to a qualification. The need evidence falls short of establishing there is a demand for additional Childcare facilities that exceeds a local need of the kind envisaged by overall outcome (4)(k).

[198] Finally, in this context, it is to be observed that Ashvan relied upon nine features of the evidence to support the submission there is a strong and pressing need for the development. The nine features can be identified as follows:

(a) the proposed development, if approved, would deliver additional choice, competition and convenience for the population of the catchment area agreed by the economists;

(b) the demand for Childcare services in the catchment area agreed by the economists exceeds supply to the point where '*parents will miss out*' and '*parents will suffer*';

(c) there is no land available in the catchment area that is included in a zone where the use would be code assessable, meaning the need for the use must be met on land in the Low density residential zone;

(d) there is a strong need for Childcare facilities generally in Brisbane;

(e) the proposal would, if approved, bring with it an operator that is not presently represented in the catchment area;

(f) locational features of the land emphasise the strength of the need for the proposed development;

(g) the proposed development would employ 21 equivalent full time workers;

(h) the proposed development would be a modern and attractive facility; and

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91 Ex.5, p.11, paragraph 41.
92 Overall outcome (4)(k) of the Low density residential zone code.
93 Ex.5, p.11, paragraph 42.

(i) there is significant leakage of demand out of the catchment area at present, which is consistent with an undersupply of facilities.

[199] Each of the matters set above are established on the evidence and are consistent with the general proposition there is a need for additional Childcare facilities in the catchment. They are not however sufficient to establish there is a strong and pressing need for the development, which cannot be met, or adequately met by City Plan 2014 in its present form. Further, it has not been established on the evidence that the nine benefits set out above only accrue where the subject proposal is approved, as distinct from a Childcare centre on the Land that complies with City Plan 2014, namely one that serves a local need only.

Exercise of the planning discretion

[200] Ashvan advances two alternative positions in support of an approval under s.60(3) of the PA. Its primary case assumes there is '*strong alignment*' between the proposed development and City Plan 2014. I accept this is correct with respect to the locational considerations discussed above, but otherwise reject this contention. The proposed development does not align with City Plan 2014 in that it is not anticipated in the Low density residential zone, and will not support the high level of comfort and amenity reasonably expected by the community that resides in that zone. An approval would sit uncomfortably with the adopted planning controls in force at the time the application was properly made.

[201] The alternative case advanced by Ashvan proceeds on the footing that the Court would be satisfied an approval should be granted in the face of non-compliance with City Plan 2014 because of four factors. It is not clear from Ashvan's submissions whether all, or some of the factors must be established to succeed. In any event, the four factors relied upon are:

(a) there is a town planning, economic and community need for the proposed development;

(b) approval of the proposed development would not result in any unacceptable impacts;

(c) approval of the proposed development would result in improved pedestrian and vehicular facilities for the community; and

(d) any non-compliance with City Plan 2014 can be cured by the imposition of conditions.

[202] I accept that each of the four factors advanced by Ashvan are relevant matters for the purposes of assessing the application under s.45(5)(b) of the PA. The extent to which they have been made out, or inform the exercise of the discretion is another matter.

[203] Ashvan has not established the contentions in subparagraphs (a) and (b).

[204] I accept the submission in subparagraph (c). It is based on Mr Trevilyan's evidence, who was retained by Ashvan. He expressed the view that the proposed development would, if approved, improve pedestrian and bus stop facilities in the locality for the benefit of the public. I accept this evidence. It is a matter that favours approval, but is of limited weight in the circumstances.

[205] I do not accept the submission in subparagraph (d).

[206] The evidence fell well short of establishing how, and in what way, a condition could be imposed to correct serious departures from the adopted planning controls. The nature and extent of the departure from City Plan 2014 is such that the proposed development, as presently designed, will not function in a way that is anticipated in the zone. Further, it will not be of a bulk or scale anticipated in the zone and there are difficulties associated with the location of the proposed access. Any condition contemplated by the submission would involve a substantial re-design of the proposed development to address these matters, about which there is no evidence. It is not the Court's function to re-design a proposal. Its function is to pass judgment on the development proposed[94].

[207] Given the matters set out in paragraphs [201] to [206] above, I am not satisfied Ashvan has discharged the onus with respect to its alternative case.

[208] I am satisfied, consistent with the Council's and Co-respondents' cases that the proper exercise of the town planning discretion in this appeal requires the application to be refused. This is so having regard to the following matters.

[209] As I have said, the exercise of the planning discretion ought withstand scrutiny having regard to, inter alia, applicable planning scheme provisions, and relevant planning principle. Here, an approval would not withstand scrutiny against such considerations for three reasons: (1) an approval would result in development that is not anticipated in the zone and thereby contrary to the adopted planning controls applying to the land; (2) there is no suggestion that the Council has diverted from the applicable planning scheme provisions applying to the Land and locality, or the Land has been given a designation that was, and remains invalid; and (3) an approval, if acted upon, would have unacceptable impacts on the amenity of the local area, including an adjoining residential property that is entitled to expect a high level of comfort.

[210] The three reasons set out above, in combination, are consistent with a conclusion that a rigid, rather than flexible approach, to the application of the planning scheme and the exercise of the discretion ought be adopted. To do otherwise would, in my view, be contrary to proper town planning practice, and unlikely to advance the purpose of the PA.

[211] In addition, the outcome of this appeal is not altered in Ashvan's favour by the evidence that establishes there is a demand for additional Childcare places in The Gap. This evidence is deserving of some weight in the exercise of the discretion given it relates to the demand for important social infrastructure. In giving this evidence weight, it raises for consideration whether, on balance, the demand must yield to the effect of the proposal on amenity, and other town planning considerations[95].

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94 By analogy *Wingate Properties Pty Ltd v Brisbane City Council* [2001] QPELR 272 at 276 [21].

95 Similar to the question posed in *Chartres Constructions Pty Ltd v Randwick Municipal Council* (1972) 25 LGRA 193 at 195.

[212] In the result, I am satisfied that the demand must yield in the circumstances of this case to amenity and planning considerations. There is good reason for this. There is no nexus between the identified demand and the size and scale of the proposed development. The absence of such a nexus is, in my view, telling. This because the demand does not support the size and scale of the facility proposed. This is in circumstances where it is the size and scale of the proposal that is the underlying explanation for the unacceptable impacts on amenity, and resulting non-compliance with City Plan 2014.

Conclusion

[213] Ashvan has not discharged the onus.

[214] The orders of the Court will be:

1. The appeal is dismissed.

2. The decision of the Respondent's delegate of 1 June 2018 to refuse the Appellant's development application is confirmed.