PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Body Corporate for Lindor Community Title Scheme 29204 and Planit Consulting Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 054
PARTIES:	**BODY CORPORATE FOR LINDOR COMMUNITY TITLES SCHEME 29204 and PLANIT CONSULTING PTY LTD ACN 099 267 711** (appellant) **v** **GOLD COAST CITY COUNCIL** (respondent) and **KOMUNE PTY LTD ACN 094 641 817** (co-respondent)
FILE NO/S:	2230/17
DIVISION:	Planning and Environment
PROCEEDING:	Hearing
ORIGINATING COURT:	Planning and Environment Court of Queensland
DELIVERED ON:	30 November 2018
DELIVERED AT:	Brisbane, QEII
HEARING DATES:	12 – 16 and 26 – 28 March, 1 August, 18 and 25 October and 29 November 2018.
JUDGE:	Rackemann DCJ
ORDER:	**The appeal is allowed and the development application is refused**
CATCHWORDS:	PLANNING AND ENVIRONMENT – SUBMITTER APPEAL AGAINST APPROVAL of a high rise mixed use development – where the council approved the application but contended that the appeal should be allowed – extent of conflict with 2003 planning scheme – weight to be given to 2016 planning scheme – height and scale, density, site coverage, set backs, amenity, plot ratio, landscaped areas, minimum site area, podium and tower design, reasonable

expectations – whether sufficient grounds to justify approval notwithstanding conflict – whether height and density provisions overtaken by events – infill higher density development – character, amenity and consistency of built form, traffic benefit, open space, need and economic benefits, optimising development, whether conflict mitigated by 2016 planning scheme.

COUNSEL:	M Batty for the Appellant
	B Job QC for the Respondent
	C Hughes QC and J Lyons for the Co-Respondent
SOLICITORS:	Thomson Geer for the Applicant
	Corrs Chambers Westgarth for the Respondent
	McCullough Robertson for the Co-Respondent

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Introduction

[1] This submitter appeal is against the decision of the respondent Council to approve a development application by the co-respondent. The application is for a development permit for a material change of use to facilitate the development of a high rise mixed-use development. The proposed development is on land situated at 114 and 144 Marine Parade Coolangatta and more particularly described as lot 0 on SP160635 (lot 0) and lot 1 on SP235706 (lot 1). Although the Council approved the application, it advised on 7 March 2018 that it no longer supported approval and was of the view that the appeal should be allowed.[1]

The land and the locality

[2] The land comprises 2 allotments both of which are developed. Lot 0 is presently developed as the four-storey Beach Lodge apartments. Lot 1 is presently developed and operated as the ten-storey Komune resort and beach club. The land has an area of 1,740m^2 and is a rectangular shaped corner site with three street frontages: Marine Parade to the north, Hill Street to the east and Boundary Street to the south. As a result, it has only one adjoining neighbour, being the appellant's building to the immediate west.

[3] Marine Parade is the esplanade along the southern Gold Coast beaches of Kirra, Coolangatta and Greenmount. The subject land is situated at the eastern end of Marine Parade at the end of the Coolangatta esplanade and opposite the Coolangatta-Tweed Heads Surf Club. Development within Coolangatta, and along Marine Parade in particular, features high-rise building. There is however, a change in the scale of that development with buildings to the west of Clarke Street being significantly larger and taller than those to the east, where the relevant site falls.[2]

The proposal

[4] The proposed development is a 24 level (27 storeys for the purposes of the 2003 Planning Scheme) building comprising:

(a) a resort hotel containing a five star 100 suite resort (with each suite containing one bedroom);

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1 Exhibit 1.
2 Ex FG 10 para 20.

(b) an apartment component containing 94 residential apartments; and

(c) a restaurant, café and shop.

[5] The different elements of the proposed development are spread throughout the building as follows:

(a) at ground floor: retail and likely restaurant and café tenancies facing the ocean and the foyer for the five star hotel;

(b) at the podium level:

(i) a reflection pool along the Marine Parade and Hill Street boundary as well as other recreational areas including pool deck, day-spa deck, a lawn and market gardens;

(ii) a day-spa for residents and guests; and

(iii) a fitness/conference facility for hotel guests along with other resort facilities for hotel guests;

(c) at levels 3-5: the beach lodge units in which the residents of the existing beach lodge building will be accommodated;

(d) at levels 6-10: the accommodation rooms for the five star hotel;

(e) at levels 11-15: two and three bedroom apartments (4 x 2 bedroom apartments and 2 x 3 bedroom apartments);

(f) at levels 16-21: two and three bedroom apartments (2 x 2 bedroom apartments and 4 x 3 bedroom apartments);

(g) at level 22: four penthouses (each comprising three bedrooms), and

(h) at level 23 the active rooftop, which is open to the public and comprises:

(i) an infinity pool which faces the ocean;

(ii) lounge and dining areas;

(iii) a bar;

(iv) dining and function facilities; and

(v) a wedding and function area.

[6] The proposed building:

(a) has a maximum building height of 82.05 metres;

(b) has a podium of 9.45 metres in height;

(c) is of considerable width, being in the order of 50 – 51 metres for the tower;[3]

(d) has a total GFA of 19,714m^2 equating to a plot ratio of 11.33;

(e) has a site cover of:

(i) 97.1% at podium;

(ii) between 48.5% and 52.6% at tower levels; and

(iii) 65.8% at roof terrace;

(f) has varying building setbacks, including built-to-boundary sections at ground level;

(g) has a vehicular access from both Boundary Street and Hill Street but removes all vehicular access from Marine Parade;

(h) incorporates landscaping on the street, at the podium deck and on the roof deck;

(i) includes communal open space facilities at both podium and roof levels for the total of approximately 1,792 m^2; and

(j) has a total of 155 on-site car parking spaces.

The assessment regime

[7] The *Sustainable Planning Act* 2009 (SPA) was in force at the time the development application was made and at the time the appeal was commenced. The SPA continues to apply to the appeal notwithstanding that the *Planning Act* 2016 took effect in July 2017.[4]

[8] The application, being an impact assessable development application, is to be assessed having regard to ss 314(2) and (3) of the SPA and should be decided in accordance with ss 324 and section 326 of the SPA.

[9] Section 326 of the SPA provides that an assessment manager's decision must not conflict with a relevant instrument unless there are grounds to justify the decision. Relevant instruments include a Planning Scheme.

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3 Ex FG 8 para 18.

4 See *Planning Act* 2016 section 311.

[10] The appeal proceeds by way of a hearing anew[5] and the co-respondent bears the onus of establishing that the appeal should be dismissed.[6] The court must decide the appeal based on the laws and policies applying when the application was made but may give weight to any new laws and policies that the court considers appropriate. Accordingly, in this case, the appeal is to be decided based on the 2003 Planning Scheme but the court may give weight to the 2016 Planning Scheme.

The issues

[11] The issues in the appeal may be summarised as:

(a) the extent of conflict with the 2003 Planning Scheme;

(b) the weight to be given to the 2016 Planning Scheme and the extent of conflict with that scheme; and

(c) whether there are grounds which would justify a decision to approve the application notwithstanding conflict with an applicable planning instrument.

[12] At the heart of the alleged conflicts are matters concerning the height, scale, density, site cover, plot ratio and setbacks of the building and issues of amenity. The co-respondent accepts that there is conflict with the planning provisions, but disputes the extent of the conflict.

The 2003 Planning Scheme

(i) Higher order provisions

[13] The 2003 Planning Scheme is divided into seven parts. The second part concerns Desired Environmental Outcomes (DEOs). DEOs are expressed in terms of broad policy outcomes which seek to achieve ecological sustainability for the city as a whole.

[14] It was pointed out, for the co-respondent,[7] that its proposal, subject to not having unacceptable amenity impacts, would further some DEOs and objectives concerning development in and around Activity Centres maximising accessibility to places of

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5 Sections 495(1).

6 Section 493(2).

7 Para 110 of the submissions on behalf of the developer Komune Pty Ltd. That paragraph asserts an absence of unacceptable amenity impacts, but I have found an unacceptable impact on character and visual amenity.

employment, the enhancement of the tourism industry and the provision of a diverse range of housing choice.

[15] The appellant alleged conflict with a number of DEOs, but, in the course of submissions, was prepared to confine its case in relation to the 2003 Planning Scheme to conflict with the Coolangatta Local Area Plan (LAP).

[16] The respondent alleged conflict with DEO SOC.1 and Planning Objective 1.3. My ultimate conclusion is not dependent on my finding with respect to conflict with these provisions. The DEO provides as follows:

> "the establishment, conservation and enhancement of local character and the promotion of a distinctive local identity and sense of place for the various communities of Gold Coast City".

[17] I accept the submission on behalf of the co-respondent that the relevant community is that of Coolongatta. That community derives its local character, local identity and sense of place from precincts which are dealt with in the LAP (discussed later). For the reasons given later the proposal would not conserve or enhance local character.

[18] Planning objective SOC 1.3 is as follows:

> "to achieve a built form which highlights the basic structural elements of the city's development pattern and maintain clarity in character between the various component parts."

[19] It was submitted, for the co-respondent, that the words 'basic structural elements' and the fact that they support a city wide DEO "highlight a broad-brush application of this provision". It was contended that the proposal, being a high rise built form, highlights the basic structural element of development and character in this part of the city. As is observed later, on a city-wide level, Coolangatta is a major concentration of high-rise development on the edge of the city. The respondent did not address submissions in relation to whether the built form highlights 'the basic structural elements' of the city's development pattern. It was instead submitted, on its behalf, that the proposal does not maintain clarity in character between the various 'component parts', particularly precincts 1 and 2 of the relevant local area plan (discussed later). That contention, which depends on the meaning of 'component parts'; and whether they extend to individual precincts within a local area plan, was not addressed by the co-

respondent. Ultimately, it is unnecessary for me to express a concluded view in relation to this aspect the case. My ultimate conclusion is not dependent on whether there is conflict with this provision.

[20] Part 3 of the Planning Scheme adopts a broad city-wide strategy to achieve ecological sustainability. That planning strategy contains two major components: key strategies that apply across the entire city; and land use themes that apply to particular parts of the city. One of the key strategies is the city image and townscape strategy. The key elements and relationships of the city's landscape and form are shown on four city image planning strategy maps. As was pointed out for the co-respondent, they include: PS11 which shows Coolangatta/Tweed as a major concentration along the high-rise spine; and PS13 which shows Coolangatta/Tweed as "city edges – high-rise".[8] The proposal is consistent with those designations.

[21] Under the 2003 Planning Scheme 'high-rise' was defined to be any building with a height of five storeys or more above mean ground level. On a city-wide level, Coolangatta is a major concentration of high-rise development on the edge of the city. That is not to say however, that there may not be particular intents for particular precincts within Coolangatta at a more detailed planning level.[9]

(ii) The LAP

[22] The site falls within the Coolangatta LAP in the 2003 Planning Scheme. The purpose of such plans was to indicate that parts of the city were divided into special planning units with unique characteristics for the purposes of land use and development control. They identified areas of the city with a particular local identity, or development character, that would benefit from consistent planning guidance and development control. The Coolangatta LAP is comprised of:

(a) an intent provision for the local area;

(b) DEOs;

(c) a local area features statement;

(d) intent statements for various precincts;

(e) a table of development; and

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8 It also shows the "Coolangatta town centre" as a primary visual node. The subject site lies beyond the centre precinct pursuant to the local area plan (discussed later).

9 Discussed later in the context of the Local Area Plan.

(f) a place code.

(A) The intent

[23] The statement of intent for the LAP is as follows:

> "The purpose of this local area plan (LAP) is to provide for the integrated and detailed planning of the Coolangatta central area, which is recognised as a regional centre in the Gold Coast system of activity centres, and the major centre for the southern part of the Gold Coast. It is intended to develop as an economically diverse, functional and robust centre providing for the needs of its local population and regional catchment, and continue to build on its role as an important tourist destination.
>
> Only high quality developments, which ensure that Coolangatta continues to evolve as the signature southern beach-side destination and major southern centre of Gold Coast city are preferred. New developments should respond to the natural physical environment of Coolangatta by including these attributes as key considerations of design. Proposals that provide for the rejuvenation of existing buildings are appropriate provided they contribute to the creation of a higher quality and more liveable built environment, and do not compromise future intended development opportunities in that locality.
>
> Coolangatta will be Gold Coast's pre-eminent southern beach-side destination and a magnet for foreshore leisure, community and cultural activities. It will be orientated to serve a wide range of ages and groups, be focused on the beaches and adjacent town centre and cater for holiday makers and residents alike. The environmental and physical features of the beaches (North Kirra Beach, Kirra Beach, Coolangatta Beach, Greenmount Beach and Rainbow Bay), including water quality, and the visual prominence of Kirra, Greenmount, Snapper Rocks and Point Danger Headlands will be recognised for

> their ecological, recreational and scenic values and for their contribution to the character, culture and lifestyle of Coolangatta".

[24] It was submitted for the co-respondent that there is much in the statement of intent with which the subject proposal is consistent, in that it would:

- contribute to an economically diverse functional and robust centre providing for the needs of its users;
- further the role of Coolangatta as an important tourist destination;
- provide a high quality mixed-use development to assist in ensuring Coolangatta will continue to evolve as the signature southern beach destination and major southern centre of the Gold Coast city;
- involve the rejuvenation of the existing aged buildings by their replacement with a higher quality more liveable environment for many residents and visitors;
- assist with Coolangatta being identified as the city's pre-eminent southern beach-side destination; and
- act as a "magnet" for leisure and cultural activities that serve a wide range of ages and groups and caters for both holiday makers and residents, through the provision of a range of accommodation types, a five-star hotel with a "wellness spa", wedding and conference facilities and attractive public rooftop facilities.

[25] The claims of contribution to the centre should be seen in light of the fact that the site is not within the centre precinct under the LAP. I otherwise accept the submissions.

[26] The intent also expresses a concern for the visual prominence of the Greenmount Headland. Mr Peabody, Mr Powell and Mr McGowan, did not consider that the proposal would detract from the prominence of Greenmount. Mr Peabody acknowledged[10] that the visual relationship of the proposal with Greenmount Hill was a matter for the visual amenity experts but, from an architectural perspective, considered[11] that the proposal was sufficiently separated so as not to overcrowd the skyline or dilute the appearance of Greenmount Hill. Mr Powell considered that "on weighing and balancing everything together" it was hard to see that the proposal would detract from the visual prominence of the hill. Mr McGowan opined[12] that the

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10 Ex FG 9 para 3.1.1.8, and 3.1.2.23(f).
11 T3 – 22.
12 Ex FG 8 paras 157(d) and 194(e), T2-47.

'abrupt transition' constituted by the proposal would still provide enough separation from the headland to maintain its prominence and would provide a more obvious form to punctuate the landscape feature. He considered that there was enough 'breathing space' between the proposal and the headland such that the qualities of the headland would not be eroded despite the building being 'relatively large'.

[27] The appellant, in light of the oral evidence and the submissions of the co-respondent, elected not to maintain an allegation of conflict with the intent of the LAP.[13] The respondent did not identify the intent as one of the provisions with which it alleged conflict.[14]

(B) The desired environmental outcomes

[28] The desired environmental outcomes include the following with which the appellants and the respondent alleged conflict:

> 3.5 The impacts of unit and tower development are managed so that the amenity of surrounding locations is not adversely impacted (refer to soc 5).

[29] The specific impacts of the development on residential amenity are considered elsewhere and are not undue, but for the reasons discussed later there will be an undue impact on character and visual amenity.

(C) The local features statement

[30] The local features statement includes the following:

> "Appropriate development will have regard to its setting and incorporate appropriate measures to mitigate offsite impacts (including visual amenity, identified view corridor protection and overshadowing impacts)".

[31] The appellants asserted that the proposal does not have appropriate regard to its setting (i.e. outside of the Coolangatta Centre in circumstances where the co-respondent seeks a built form that is more intense and taller than the built form in the centre) or incorporate appropriate measures to mitigate off-site impacts (i.e. visual

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13 Para 52 (a) of the further written submissions on behalf of the appellant.
14 See para 3 (a) of the submissions of the respondent.

amenity, in that the proposed development would be of an inappropriate height, bulk, scale, plot ratio etc.). For the reasons stated elsewhere I accept those contentions.

(D) Precinct intent

[32] The site falls within Precinct 2 (Point Danger, Rainbow Bay and Geenmount Hill) of the LAP. The statement of intent for Precinct 2 is as follows:

> "This precinct is intended to comprise a mix of permanent residential accommodation, visitor accommodation and local services that serve the resident and visitor population. Development is intended to be at a lesser intensity and scale than in the centre.
>
> Local services are intended to be of a scale which does not undermine centre uses, and does not create residential amenity impacts. These local services are intended to be concentrated in locations currently accommodating non-residential uses, highlighted on Coolangatta LAP map 8.2 – Precincts in the hashed areas of Precinct 2.
>
> The hashed areas in this precinct include the only land in the Precinct intended for local services to serve the needs of local residents and visitors. Uses, which are more suited to being located in the centre, are not appropriate. New development is intended to be mixed use and retain local service functions at ground level. Protection of existing vegetation and existing views/site lines across the bay is envisaged throughout the precinct."

[33] The intent for the Coolangatta centre (Precinct 1) is as follows:

> "This precinct offers the highest development potential in the Local Area Plan appropriate to a Regional Centre, particularly between Marine Parade and Griffith St; with uses preferred including a wide range of commercial activities, retail shops, offices, entertainment, community services, and tourist and residential accommodation. Car parking is to be designed so it does not form a dominant part of the streetscape. It is necessary to accommodate a transition between the centre core and the tourism residential

uses adjoining in **Precinct 2** therefore it has been divided into two sub-precincts:

- Sub-precinct 1a – Central Core
- Sub-precinct 1b – Transition Area"

[34] The intent for the Transition Area is as follows:

> "Land between MacDonald and Clarke Street is intended to provide a transition area between the centre and Greenmount Hill, with the focus on maintaining active street frontages of a continuous shopping strip along Griffith Street. High rise residential, resort development, and mixed use retail is appropriate, providing amenity impacts can be managed with the scale of development to be less than that found in central core area. Access to a lot should be limited to Marine Parade. Active street frontages is also desirable along Marine Parade."

[35] The intent for Precinct 2 is for development to be of a lesser scale and intensity than both the central core and the transition area of the centre. The proposal, which would be the largest development in Coolangatta, conflicts with the intent for Precinct 2. Indeed the co-respondent accepted that there is conflict with the expectation that development in Precinct 2 will be of a lesser intensity and scale than in the centre[15].

(E) Table of development

[36] The LAP includes a table of development. Pursuant to s 7.6.1 of chapter 2 of division 1 of part 6 of the town plan any use not listed in section A of the table of development should be considered undesirable or inappropriate in the LAP or LAP precinct. Some point was initially taken about 'restaurant' and 'shop' not being listed in section

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15 Submissions on behalf of the developer para 127(b)

A of the table of development for Precinct 2. However, both the appellant and the respondent abandoned reliance on any inconsistent use point.

(F) Place code

[37] The LAP includes a place code with performance criteria and acceptable solutions. Development that does not comply with an acceptable solution may present an alternative solution to demonstrate compliance with the relevant performance criterion in order to satisfy the requirements of the code. PC1 relates to building height, it provides as follows:

Building Height	
PC1 The height and scale of new buildings must: (a) be consistent with the height and scale of existing buildings; (b) reflect transition between precincts; (c) reflect the role of Coolangatta as a "Regional Centre"; (d) reinforce the distinctive high rise spine of the coastal strip and not negatively impact on neighbouring sites.	AS1 The maximum height of buildings in each precinct does not exceed the relevant maximum shown on **Coolangatta LAP map 8.2 – building heights.**

[38] LAP map 8.3 shows the subject site within a 10 storey maximum building height area. There is obvious non-conformity with the acceptable solution. Indeed, at 27 storeys as defined in the 2003 Planning Scheme, the proposal would not conform to the acceptable solution even if it were located within the centre where maximum building height is 25 storeys for precinct 1a and 15 storeys for precinct 1b. It was submitted for the co-respondent that the proposal nevertheless satisfies the performance criterion. It was submitted, for the appellants, that the 'primary' conflict with the performance criterion is with sub-paragraph (b) although there is, it was contended, also conflict with sub-paragraph (a). It was submitted for the respondent that there is conflict with sub-paragraph (b).

[39] It was submitted for the co-respondent that the proposal satisfies sub-paragraph (a). The proposal is not of a height and scale which is consistent with buildings within Precinct 2 where the subject site lies between Clarke Street and Hill Street. Indeed, I accept the evidence of Mr Mack that the proposal is not consistent with buildings within Precinct 2 more generally, it being of a height and scale substantially greater than even the high-rise buildings in precinct 2 at Rainbow Bay.[16] However, as was pointed out for the co-respondent, sub-paragraph (a) of the performance criterion is not limited in its focus to buildings within the same block or the same precinct. Indeed, the drafting does not provide any description of the location of the existing buildings with which the subject must be compared. This differs from other performance criteria which are expressly focused on the precinct in which the development is located. In such circumstances it is difficult to simply ignore the height of existing buildings beyond the precinct boundary. When regard is had to the height and scale of existing buildings in Coolangatta more generally, particularly in the centre where there are three buildings Sanbano (26 storeys), Northpoint (24 storeys) and Ocean Apartments (26 storeys) of similar height, the proposal can be seen to be broadly consistent for the purposes of sub-paragraph (a).[17]

[40] It was also submitted for the co-respondent that no conflict arises with sub-paragraph (b) because the site is not in a position of transition between precincts. I do not accept that application of the provision. The transition which is referred to is that achieved by having development of different height and scale in different precincts. Relevantly, for present purposes, the transition which development on the subject site should reflect is the transition from the centre and its two sub-precincts to the lesser height and scale of development in Precinct 2. As Mr McGowan accepted[18], the development of the proposal would not reflect such a transition. It rivals anything in Precinct 1. The proposal conflicts with PC1.

[41] It was submitted for the correspondent that any transition is compromised by the existence of the Reflections towers and by council's planning in the 2016 planning scheme. The Reflections towers are within precinct 1b and are not as tall as the tallest buildings in precinct 1a. Further the eastern most tower steps down to an extent at its

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16 See Mack T3-34.
17 See Powell, Ex FG 8 para 185, T3-26 line 4.
18 T2-54 line 35, T3 – 6 line 18. See also Powell Ex FG8 para 186, T3-19 line 44, Peabody T2-21 l 43 and Schneider FG10 para 291(b).

eastern end. The existence of this development does not mean that the proposal is not in conflict with PC1. The 2016 planning scheme is considered later. It also provides for a gradation in maximum building height with greater building heights in the centre than at the subject site. It provides for a 50% uplift in height, which if applied, has some potential to affect the transition, but it is subject to certain conditions and it does not contemplate development on the subject site to the height proposed.

[42] It was also submitted for the co-respondent that this provision needed to be considered in the context that issues in relation to height are in a state of 'flux' given that the council is reviewing the height mapping for the planning scheme area. For the reasons given later, the council's process in that regard has not progressed to the point where one would put the planning documents to one side.

[43] PC2 of the LAP deals with accommodation density. It provides as follows:

Accommodation Density	
PC2 Accommodation density must be consistent with the character and intent of the precinct in which the development is located.	AS2.1 The dwelling density is one dwelling per lot; OR AS2.2 The maximum dwelling density in any precinct does not exceed the relevant accommodation density (RD number) shown for that precinct on Coolangatta LAP Map 8.4 – maximum residential density.

[44] According to map 8.4 the land is located in Precinct RD-7. In that precinct the maximum residential density is one bedroom per 25m^2 of site area. The density of the proposed development equates to one bedroom per 5.44m^2 of net site area[19] which is more than four times the density of the acceptable solution.

[45] The proposal is also in conflict with the performance criteria in that it is not consistent with either the character or the intent of the precinct in which it is located. Mr Peabody could not point to anything within Precinct 2 that has a density of anything like what is proposed and conceded that the proposal was not consistent with

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19 Ex FG 9 pg 24 para 3.1.3.2

the character of Precinct 2.[20] Insofar as the intent of the precinct is concerned, it was accepted, on behalf of the co-respondent, that the proposal is in conflict with the intent for development to be at a lesser intensity and scale than in the centre.[21] It is noteworthy that the density is more than double that which would be compliant with the acceptable solution in the Coolangatta Centre.

[46] Mr Peabody expressed the view[22] that the proposal "responded to the unique situation of the site with three street frontages" which afforded the opportunity to allow for a greater density without impacting on the amenity of the neighbouring context. However, in cross-examination he conceded that there were a number of other lots in the locality with the same feature.[23] Further, the test is one of consistency with character and intent rather than amenity generally and, in any event, the excessive density of the proposal by reference to the character and intent of the precinct within which it falls is an aspect of the development which contributes to its detrimental impact on character and visual amenity[24] (discussed later).

[47] In this context, I accept Mr Mack's opinion that the density of the proposal is conspicuously out of step with the character and intent of the precinct within which it is located.[25] Both Mr Peabody[26] and Mr Schneider[27] acknowledged conflict with the performance criterion. However, Mr Peabody expressed the view[28] that the design outcome is consistent with the character and intent of what he referred to as the 'esplanade precinct', which takes in the land along the esplanade including that in the centre. That precinct is however, a construct of his own. It is not reflected in the planning scheme. The performance criterion requires attention to the precinct in which the development is located under the planning scheme which, in this case, is precinct 2. The proposal is in conflict with PC2.

[48] PC3 of the LAP deals with site coverage and provides as follows:

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20 T2–22 ll 23-27.
21 Submissions on behalf of the developer para 146(a).
22 FG 9 pg 25 para 3.1.3.11.
23 T2-31 – T2-32.
24 See also Adamson Ex FG10 para 179.
25 Ex 9 pg 24 para 3.1.3.7, see also Adamson Ex FG 10 para 179.
26 T2–34.
27 Ex FG 10 pg 53 para 291(c).
28 Ex FG 9 paras 3.1.3.9 and 3.1.3.12.

Site Coverage	
PC3 Site coverage must be consistent with the character and intent of the precinct in which it is located.	AS3.1.1 The maximum site coverage for any development does not exceed the following: Precinct 1a — 90 percent for the first three storeys and 40 per cent thereafter Precinct 1b — 75 per cent for the first three storeys and 40 per cent thereafter Precinct 2 — 40 per cent Precinct 3 — 10 per cent Precinct 4, 5, 6, 7 and 8 — 40 per cent; OR AS3.1.2 In **Precincts 2, 4, 5, 6, 7** and **8**, the maximum site coverage for a detached dwelling does not exceed 50 per cent.

[49] The applicable acceptable solution site cover is 40%. The proposal has a site coverage of 97.1% for the podium element, 48.5% to 52.6% for the tower element and 65.8% for the roof terrace. The proposal therefore departs from the acceptable solution. Indeed the site cover is greater even than that provided for in the acceptable solution in respect of Precinct 1a which has the highest site cover for the first three storeys.

[50] There is also conflict with the performance criterion.[29] Insofar as the character of the precinct is concerned, the co-respondent did not point to any other development in the precinct which could be said to have a site coverage consistent with that proposed. In the joint report of the architects, Mr Peabody opined[30] that the proposal was consistent with the character and intent of the 'esplanade precinct', but that is not the subject of the provision. Mr Peabody again relied upon the 'unique situation' of the site with its three street frontages in affording the opportunity for greater site cover

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29 See Adamson Ex FG 10 para 191.
30 Ex FG 9 para 3.1.4.12.

without adversely affecting the amenity of the neighbouring context,[31] but the site is not unique in having three street frontages, the test is not a general amenity test and, in any event, the excessive site cover relative to the character and intent of the precinct in which the site falls contributes to the proposals adverse impact on character and visual amenity (discussed later).

[51] Mr Mack said that the site cover is inconsistent with the character of the precinct.[32] I accept his evidence on this. Indeed Mr Peabody conceded in cross-examination that the site cover is not consistent with the character of Precinct 2.[33] Again the proposal conflicts with the intent for development of a lesser intensity and scale than in the centre. The proposal conflicts with PC3.

[52] Setbacks up to 3 storeys are dealt with in PC4 of the LAP which provides as follows:

Building setback (up to 3 storeys)	
Mixed use or commercial buildings – all precincts **PC4** Building bulk must be greatest within the first 3 storeys, graduating to towers above, to ensure that the resulting built form is not bulky and visually intrusive. Setbacks must contribute to an interesting streetscape, visual amenity, and the perception of spaciousness, whilst not interrupting the streetscape appearance.	**Mixed use or commercial buildings – all precincts** **AS4.1** The building has a: (a) frontage setback that may vary and achieve an average of 1.5 metres for the first storey and a further 3 metres for the second and third storeys; (b) zero side or rear setbacks up to a height of three storeys.

[53] The proposal departs from AS4.1 and so it is necessary to assess the proposal against PC4. The building does have its greatest bulk in the first three storeys and graduates to the tower above, but the resulting built form is still bulky and visually intrusive and the negligible setbacks do not contribute to an interesting streetscape, visual amenity, or the perception of spaciousness[34] and would interrupt the streetscape appearance. In this respect:

(a) the podium of the proposed development has a site cover of 97% (i.e. it occupies almost all of the land);

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31 Ex FG 9 para 3.1.4.11.
32 Ex FG 8 para 73, Ex FG 9 para 3.1.4.4.
33 T2-23.
34 See Adamson Ex FG 10 para 202, 222.

(b) the setbacks of the proposal are generally zero metres at ground to Marine Parade and zero metres at podium to Marine Parade;

(c) setbacks of the proposal to the Lindor boundary are one metre at ground level and one metre at podium;

(d) setbacks of the proposal are generally zero metres at ground to Hill Street and zero metres at podium to Hill Street;

(e) the setbacks of the proposal are generally zero metres at ground to Boundary Street and zero metres at podium to Boundary Street;

(f) Mr McGowan acknowledged that:

(i) the overall bulk of the proposal would be substantial;[35]

(ii) there are no buildings outside of Precinct 1 that would be as bulky as the proposed development;[36]

(iii) the bulk of the building is a function of both its height and width;[37] and

(iv) on pure numbers the proposed development would be the bulkiest building in the whole of Coolangatta.[38]

[54] The proposal is one of considerable bulk and its excessive height, bulk, scale and intensity produces a building which is both bulky and visually intrusive[39] as can be appreciated from the photomontages.

[55] The provision calls for setbacks to contribute to certain things. One of those is a perception of spaciousness. In the architects' joint report Mr Peabody expressed the view[40] that the wider envelope of the podium element with the tower element further setback will, at street level, enhance the perceptions of spaciousness with the tower element physically separated and not appearing to be overbearing to the streetscape. That however, overlooks the effect of the podium itself, and its relative lack of setback, on a perception of spaciousness. In the course of cross-examination Mr Peabody expressed the view that the podium and its relationship with the streetscape did offer a sense of spaciousness through materials, detail and articulation of the

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35 T2-61.
36 T2-61.
37 T2-61.
38 T2-62.
39 Ex FG 10 paras 202 and 222(a).
40 Ex FG 9 para 3.1.6.15(d).

ground shop front plane[41], but the provision calls for setbacks which contribute to a perception of spaciousness. This part of PC4 envisages the use of setbacks but effectively none is provided to the street frontage. The proposed development would not have setbacks that contribute to a perception of spaciousness. Similarly, there is nothing about the minimal setbacks which contributes to visual amenity.

[56] Insofar as the streetscape is concerned, Mr Peabody[42] saw the extent of variation of setbacks at each level as contributing to an interesting streetscape and the composition of the podium and tower elements, including the setback arrangements, as enhancing the streetscape appearance and defining the edge of the 'esplanade precinct' whilst activating the streetscape with restaurant, café and shop facilities. As has already been observed however, the 'esplanade precinct' is not recognised by the planning scheme. The subject site falls within a part of Marine Parade between Clarke and Hill Streets where development generally has similar building setbacks to road frontages and contains landscaping including trees at street level.[43] In context, the setbacks would not positively contribute to an interesting streetscape but would interrupt the streetscape appearance.[44]

[57] The proposal conflicts with PC4.

[58] Setbacks above 3 storeys are dealt with in PC6 which provides as follows:

Building Setback (Above Three Storeys)	
Mixed Use or Commercial Buildings – All Precincts PC6 The upper storeys of buildings must not cause adverse impact on neighbouring sites. The development opportunities of neighbouring sites must be considered when assessing impacts of development.	**Mixed Use or Commercial Buildings – All Precincts** AS6.1 Above three storeys, the tower setback at least 3 metres from all podium edges which have a street frontage. AS6.2 The tower is setback 2 metres from inside the podium edge for the initial two storeys plus 0.5 metres for every 3 metres (or part thereof) measured to the outermost projection of the remainder of the tower.

[59] The proposal departs from the acceptable solutions[45] and so requires assessment against the performance criterion. The adverse impacts upon neighbouring sites

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41 T2-40.
42 Ex FG 9 para 3.1.6.15(c) and (e).
43 Ex FG 10 para 237.
44 Ex FG 10 para 207, 222(b).
45 T2-40

which could be said to arise from setbacks and which were relied upon were those relating to impacts on views and overshadowing on occupants of Lindor in those respects. For the reasons discussed elsewhere there are no significant adverse impacts on Lindor in those respects. The proposal does not conflict with PC6.

[60] Amenity is dealt with in PC 24 as follows:

Amenity Protection	
PC24 A new use must not detract from the amenity of the local area, having regard, but not limited, to the impact of: (a) noise; (b) hours of operation; (c) traffic; (d) lighting; (e) signage; (f) visual amenity; (g) privacy; (h) odour and emissions.	AS24 No acceptable solution provided.

[61] It has already been noted that the proposal has only one neighbour (Lindor). As Mr Ovenden acknowledged,[46] specific amenity impacts, such as noise, can be managed through the imposition of conditions on any approval. Traffic issues raised by the appellant were not pursued as reasons for refusal. Ultimately, the two specific impacts on residential amenity upon which some reliance was placed were: impacts on views; and overshadowing. It was conceded in the appellant's submissions however, that the court would not refuse the proposal solely on the basis of those impacts.

[62] Understandably, Lindor has been developed to take advantage of its northerly aspect to the beach. Those expansive and attractive views would not be interrupted by the proposal. The proposal would have some impact on secondary views to the east, but the extent of the effect (compared to a building which adopted the acceptable solutions) does not represent a significant diminution of overall amenity.

[63] The proposal would cast a greater shadow than one which adopted the acceptable solutions. That would affect the eastern balconies off the main bedrooms of the Lindor apartments to some extent. Those balconies would however, be out of shadow by 10:30 am in the winter solstice. Further, there are other balconies which offer access to sunlight. The impact is not significantly adverse.

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46 T5-67.

[64] It was also contended by the appellant and the respondent that the proposal would have an adverse impact in terms of character and visual amenity. That impact would arise, it was contended, from the excessive height, bulk, scale, plot ratio, site cover and density of the proposal. It was submitted for the co-respondent that the proposed development would simply be another high-rise-development in a locality replete with this form of development and accordingly would be harmonious with the character of the locality.

[65] The approach of the co-respondent and its witnesses focused on the large and tall buildings which exist in the Coolangatta centre and the relationship the proposal would have with that development. Mr Peabody saw the context and character of the land as having a stronger connection with what he referred to as the 'esplanade precinct' along the length of Marine Parade, between Kirra and Greenmount, which is predominantly in the centre, than with the areas of Greenmount Hill, Rainbow Bay and Point Danger within precinct 2.[47] That connection to the 'esplanade precinct' is not however, reflected in the planning documents (which treat the centre quite differently to the land in Precinct 2) or in the existing development (which features a change in the scale of development to the east of Clarke Street).

[66] Whilst I have accepted, for the purpose of PC1(a) of the Place Code that the proposal is broadly consistent with the height and scale of the existing buildings in Coolangatta, I also accept Mr Mack's evidence that there is a strong distinction between development in the centre in Precinct 1 and that to the immediate east in Precinct 2, where development is at a lesser scale and intensity.[48] The development of the proposal on the subject site would, as he pointed out, be out of scale with its context and appear as a visual outlier outside the (tall) high rise building cluster of the centre[49] and would erode the sense of place both within Precinct 2 between Clarke and Hill streets and in Precinct 1.[50] I accept that the proposal would have a detrimental impact in terms of character and visual amenity of the local area. Impacts would flow from the excessive scale and intensity (including height, density, site cover and plot ratio) of the proposal given its location.[51] I accept Mr Adamson's opinion that the

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47 Ex FG 9 para 2.27.
48 Ex FG 8 para 192(a).
49 Ex FG 9 para 3.1.1.13.
50 Ex FG 9 para 3.1.1.12, see also Ex FG 8 para 122.
51 Adamson T5-89

proposal is out of character with its location given the height of buildings between Clarke and Hill Streets.[52] I also accept Mr Ovenden's opinion that the proposal would have a significant impact on character based on what is intended.[53]

[67] The plot ratio is dealt with in PC34 which provides as follows:

Plot ratio	
Plot ratio PC34 The bulk of the development proposal must be proportional to the character of the local area, with some bonus in floor space available where identified public benefits are provided and/or exhibits and an unusually high standard of urban design. Building bulk will generally be greater within **Precinct 1** with a lesser building bulk being permitted in peripheral commercial and tourist accommodation precincts where development is intended to be less intensive. The intent of this section is to allow for a built form that addresses the street at ground level, with tall, narrow structures above third floor level, to enable sunlight penetration and views to be achieved.	**All precincts** AS34.1 The basic plot ratio described before each precinct in the **Table to Performance Criterion PC34** are not exceeded; or AS34.2 The basic plot ratio is exceeded by the incorporation of bonus element, in a development consistent with the provisions of **Planning Scheme Policy 18 – using the urban design bonus provisions**, provided the maximum plot ratios described in each precinct in the **Table to Performance Criterion PC34,** are not exceeded.

[68] Reference to the table for performance criterion 34 reveals that the basic plot ratio for Precinct 2 is 2:1 with the maximum plot ratio being 4:1. Relevantly, the basic plot ratio for development even in the centre is 3:1 with a maximum plot ratio being 6.5:1. The proposed development has a plot ratio of around 11.3:1. As such, the proposed development significantly departs from the Acceptable Solution as it is of the order of three times that envisaged.

[69] I turn to the Performance Criterion. The proposal, which is to put what would be the bulkiest building in the whole of Coolangatta outside of precinct 1, sits uncomfortably with that part of the performance criterion which provides that

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52 Ex FG 10 para 246.
53 Ex FG 10 para 251, 256.

building bulk will generally be greater within precinct 1. It was pointed out, on behalf of the co-respondent, that the word 'generally' admits of the prospect of buildings of similar bulk outside of precinct 1. However, as Mr Schneider acknowledged[54] (in the course of conceding what he considered to be conflict), the proposal has a plot ratio which exceeds even that planned for precinct 1. Indeed, Mr Peabody was unaware of any other building in the LAP area which has a plot ratio greater than the proposal,[55] although he thought that the bulk of the proposal was similar to the bulk of the buildings in the balance of the area in the 'esplanade precinct' including, in particular, precinct 1.[56] Reliance was placed on evidence that the Reflections Tower 1 is similar in width to the proposal (although not as tall) and the Reflections Tower 2 (also not as tall) is slightly wider whilst the proposed development is about as tall as Sanbano (which is far more slender[57]). Reference was also made to the height and bulk of buildings elsewhere in the local area, including those within Greenmount, although Mr McGowan conceded in cross examination that there are no buildings outside precincts 1a or 1b that are as bulky as the substantial bulk of the proposal[58]

[70] As already noted, Mr McGowan acknowledged that on pure numbers the proposal would be the bulkiest building in the whole of Coolangatta. The site is located between Clarke Street and Hill Street within precinct 2 where development is and is expected to be of a lesser scale and intensity. That is part of the character of the local area. In the circumstances I prefer the opinion of Mr Adamson (to that of Mr Peabody[59]) that the bulk of the development proposal is not proportional to the character of the local area.[60]

[71] As to the second paragraph of the performance criterion, the built form addresses the street at ground level. Mr Peabody acknowledged that the development is not a narrow structure above the third floor[61] although it is narrower on its east/west axis and there are no undue impacts in terms of the loss of sunlight penetration or views such that the gravity of any conflict with the second paragraph is reduced.

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54 Ex FG 10 para 291(e).
55 T2-30 l 23.
56 T2-43 l 30.
57 T2-62 l 28.
58 T2-61 l 41.
59 T2-42.
60 See Adamson Ex FG 10 para 233.
61 T2-29, 30

(iii) High rise residential and tourist accommodation code

[72] The issues in the appeal included conflicts with the High Rise Residential and Tourist Accommodation Code (HRR and TA code). The appellant did not rely upon those conflicts at the conclusion of the case, but the respondent continued to rely upon conflict with some provisions of the code. My ultimate conclusion is not dependent on my finding of conflict with the code.

[73] The purpose of the code is to ensure that high rise developments are at a scale and intensity which maintains open character within high rise areas of the city. Through the application of the code high rise developments are, amongst other things, to contribute positively to the local, and wider city character. High rise developments are to ensure that adverse impacts on surrounding public spaces are maintained at acceptable limits.

[74] PC11 and its acceptable solution relates to landscape work. It provides as follows:

Landscape Work	
PC11 The development must include landscaped areas adjoining the frontages of the site which enhance the streetscape and contribute to the desired character of the area.	AS11 The development includes a landscaped area of average width of 3 metres, with a minimum width of 1.5 metres, which: (a) adjoins all frontages of the site; (b) is landscaped so as to be of the same level as, and integrated with, the footpath; (c) comprises deep planting of at least 50 per cent of this site area.

[75] The relative lack of setbacks is such that AS11 is not met. The proposal conflicts with PC11 in that it does not include landscaped areas adjoining the frontages of the site. The landscaping proposed is in the road reserve. Mr Adamson contrasted the proposal with properties fronting Marine Parade from Clarke Street to Hill Street and further to the east which have no podium levels, generally have similar building setbacks to road frontages and separation from adjoining residential properties. Those properties generally have sufficient landscaping including trees at street level,

which provides a residential character and amenity.[62] That is consistent with the desired character of the area which is described in the intent for precinct 2 in the LAP as comprising a mix of permanent residential accommodation, visitor accommodation and local services that serve the resident and visitor population. The setbacks exhibited by the proposed development are such that no substantial planting could be provided on the subject site in order to fulfil the performance criterion.[63] Mr Ovenden was also of the view that landscaping was insufficient.[64] I prefer the opinions of Mr Adamson and Mr Ovenden to that of Mr Schnieder who considered that the performance criterion was met. The proposal conflicts with PC11.

[76] PC12 deals with the minimum site area. It provides as follows:

Minimum Site Area	
PC12 The site must have an appropriate area to accommodate the proposed use, landscape buffer areas, and ancillary amenities and facilities.	AS12.1 The development is an apartment, residential hotel, serviced apartment building or hostel accommodation exceeding four storeys in height, and the site has a minimum area of 600m^2. AS12.2 The development is a resort hotel, and the site has a minimum area of 2,500m^2.

[77] The proposal does not adopt the acceptable solution. The excessive site cover, lack of real setbacks and consequent absence of landscaping on the site at ground level along the road frontages are indicative of an inadequate site area for the scale of development proposed. There is conflict with PC12.

The 2016 Planning Scheme

[78] The 2016 Planning Scheme is a matter of weight. It commenced on 2 February 2016, some six weeks after lodgement of the development application. The application therefore progressed whilst the 2016 scheme was in force. The scheme has been the current scheme for more than two years. It is entitled to substantial weight. That was the opinion of Mr Ovenden and Mr Schneider.[65] Mr Adamson considered that it should be given equal weight.[66] It was submitted for the co-respondent however, that the significance of any conflicts with the 2016 Planning Scheme in terms of building

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62 Ex FG 10 para 237.
63 Exhibit FG 10 paras 238, 239.
64 Exhibit FG 10, para 242.
65 Exhibit FG 10, para 55.
66 Ex FG 10 para 53.

height and density should be tempered in light of a building height study which the Council is undertaking. That work was commissioned in May 2015 with the purpose of providing a policy framework to guide development of medium and high rise developments along the southern coastal strip.

[79] The existence of the study demonstrates that the Council has been actively investigating a review of planning heights across the city. At this stage however, no amendments to the City Plan have been formulated for public consultation. Mr Schneider acknowledged[67] that the planning for updated building height limits was not sufficiently progressed to guide assessment of development applications. He saw the building heights in the planning scheme as being overtaken by events and used a 'first principles' assessment of height. Whether the planning scheme provisions in relation to building height have been overtaken by events is considered further later but I do not consider that the building height study has overtaken the current planning scheme. The planning scheme should continue to regulate development at this time[68]. As Mr Ovenden said: matters are not advanced enough to put the current planning framework to one side.[69] In any event, the study provides does not support the proposal. As Mr McGowan accepted, the study contemplates medium height buildings for the subject land and its block, compared to tall buildings within the centre of Coolangatta.[70]

[80] Reference was made on behalf of the co-respondent to, amongst other things, a planning committee agenda report of 11 October 2017 which referred to a number of matters including the following:

(a) during the preparation of the City Plan multiple studies were not able to be completed due to the required timeframes to complete the City Plan;

(b) those studies included a city wide building height strategy;

(c) building height has not been reviewed since 2003;

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67 Exhibit FG 10, para 144.

68 Exhibit FG 10, para 108.

69 Exhibit FG 10, para 67.

70 Exhibit FG 8, para 158(c) and T3-12 to T3-13. The site is identified as having a height of 55m. the co-respondent pointed to a proposal for new heights to be introduced prior to the 50% bonus provision being removed as providing a window for a building of similar height to that proposed. The process is however, at much too early a stage to put any weight on such a possibility.

(d) there are a number of anomalies between zoning height and density across the city; and

(e) determining a sustainable city shape is a complex body of work that will result in fundamental changes to the City Plan.

[81] It was submitted that conflict with the 2016 Planning Scheme particularly in relation to height or density must be viewed in the context that:

(a) the question of building height is in a state of flux;

(b) building heights were not reviewed for the purpose of implementing the 2016 Planning Scheme and have not been reviewed since at least 2003, and

(c) the Council admits that there are significant inconsistencies between zoning, height and density across the city.

[82] As Mr Ovenden observed however, ongoing planning studies are not unique. They represent the evolving nature of planning and they do not always line up with the planning scheme drafting and adoption process. He observed this is particularly so for large local governments and for studies at such a significant scale with significant city wide implications such as the building height study. The existence of such studies alone does not warrant abandonment of key elements of the planning framework that underpins the scheme in effect at the time.[71] I agree.

[83] Further, the 2016 Planning Scheme was not simply a case of carrying forward the provisions of the 2003 Scheme. Notable changes to the regime (discussed later) were made. In my view, the 2016 Scheme remains of significance and should be given substantial weight, notwithstanding the work which is being undertaken on the building height study.

(i) The strategic framework

[84] The co-respondent pointed out that its proposal would have economic advantage which would support the specific outcomes for the Coolangatta major centre (s 3.4.2.1) and the tourist economy (s 3.5.4.1). It should be noted however that s 3.5.4.1(2) seeks tourist-related development which, amongst other things, is consistent with the intended intensity and built form of the area. The intentions in

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[71] FG 10 para 107.

relation to intensity and built form are dealt with later in the context of the more detailed provisions of the planning scheme.

[85] Section 3.3 of the strategic framework relates to creating liveable places. Section 3.3.1 are the strategic outcomes which include the following:

> "(3) Housing is provided in a form, height and scale consistent with the function, amenity and desired future character of local areas and centres, and promotes a sense of community, cohesion and wellbeing. Housing is attractive and well designed."

Insofar as height is concerned, the planning scheme includes building height overlay maps. Section 3.3.2 deals with Urban Neighbourhoods and includes the following specific outcomes:

> "(9) Increases in building height up to a maximum of 50 per cent above the building height overlay map may occur in limited circumstances in urban neighbourhoods where all of the following outcomes are satisfied:
>
> (a) a reinforced local identity and sense of place;
>
> (b) a well-managed interface with, relationship to and impact on nearby development, including the reasonable amenity expectations of nearby residences;
>
> (c) a varied, ordered and interesting local skyline;
>
> (d) an excellent standard of appearance of the built form and street edge;
>
> (e) housing choice and affordability;
>
> (f) protection for important elements of local character or scenic amenity, including views from popular public outlooks to the city's significant natural features;
>
> (g) deliberate and distinct built form contrasts in locations where building heights change abruptly on the building height overlay map; and
>
> (h) the safe, secure and efficient functioning of the Gold Coast Airport or other aeronautical facilities
>
> …

(10) Increases in building height beyond 50 per cent above the building height overlay map, are not anticipated in urban neighbourhoods.

Note: No criteria have been identified for building heights which are more than 50 per cent above the building height overlay map, because such increases are in conflict with City Plan."

[86] The Building Height Overlay Map under City Plan 2016 shows a height of 38 metres for the subject site. The site does not qualify for consideration for an increase in maximum building height up to 50% because as, Mr Peabody[72] and Mr Schneider[73] acknowledged, it fails at least criterion 9(g). Further, I accept Mr Mack's evidence that the proposal fails 9(a) in that it would diminish the sense of place. Mr Peabody's' evidence was that the proposal would reinforce local identity and sense of place by positively contributing to defining the extent of the 'esplanade precinct' but, as has been observed, that precinct is no part of the planning scheme and development to the east of Clarke Street is of a different scale to that to the west. It was submitted for the co-respondent that the proposal would meet the criterion by providing high quality residential and 5 start hotel development on a desirable and well located beach front site and by assisting to ensure that Coolangatta continues to evolve as the signature southern beach destination and major southern centre of the Gold Coast Centre. It is the built form of the proposal however, that in context, would have the effect of diminishing the sense of place.

[87] Even if the proposal had met the pre-conditions, the proposed height of 82 metres would still be 1.4 times what could be achieved even if the bonus provision was available. The proposal therefore finds itself in conflict with the City Plan. The co-respondent acknowledged conflict with 3.3.2.1(10). There is also conflict with s 3.3.1(3) with respect to the height of the proposal which is not consistent with the amenity and desired future character of the local area.[74]

[88] The submissions for the co-respondent again referred to building height being in a 'state of flux' and to the prospect of a building of a similar height being achievable if

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72 T2-26.

73 T5-27

74 The desired future character of the local area, in relation to height, may be gleaned from the height maps read in conjunction with the provisions which allow for a 50% uplift subject to prerequisites being met.

ultimately a new building height of 55 meters is adopted before the 50% uplift provisions are abolished. As already observed, the council's review of building heights is not advanced enough to put the current planning scheme to one side nor to place weight on the hypothetical development opportunity referred to.

(ii) High Density Residential Zone Code

[89] The subject site is within the high density residential zone so the development is subject to the High Density Residential Zone Code. The purpose of that code is to be achieved through a number of overall outcomes which include the following:

> (b) housing is provided at a form, scale and intensity that is appropriate for the zone and each particular locality it is in where the following outcomes are satisfied:
>
> …
>
> Design and amenity
>
> (v) whether intended outcomes for building form/city form and desirable building height patterns are negatively impacted, including the likelihood of undesirable local development patterns to arise if the cumulative effects of the development are considered;
>
> (vi) retention of important elements of neighbourhood character and amenity, and cultural heritage;
>
> (vii) whether adjoining residential amenity is unreasonably impacted;
>
> …
>
> (d) Built form –
>
> (i) has a building height that does not exceed that indicated on the Building Height Overlay Map;
>
> (ii) is set back from side and rear boundaries to protect the amenity of adjoining uses
>
> (iii) is set back from road frontages to promote an urban setting and interface with the street; and
>
> (iv) has varying site cover to reduce building dominance and provide for landscaping.

[90] It is of note that compliance with the Building Height Overlay Map is one of the overall outcomes under the 2016 Planning Scheme.

[91] Insofar as overall outcome 2(b)(v) is concerned the co-respondent again referred to the circumstances surrounding the building height study, building height being in a 'state of flux' and the prospect of a building of similar height being acceptable if a new building height of 55m were adopted prior to abolition of the provisions allowing a 50% uplift. The desirable building height patterns for the purposes of the provision should however, be taken to be those provided for by the planning scheme. The overlay map provides for the tallest buildings on Marine Parade to be located in the designated centre with a gradation away from the centre, particularly towards Rainbow Beach. The proposal does not reflect this pattern. It is significantly taller than the height which would apply even if the 50% uplift from the height shown on the overlay map to the 2016 scheme were applied. As was said by Mr Ovenden:[75]

> "this is not a development concept that is nibbling at the margins. The proposal is stepping significantly outside the current building height provisions of the Scheme, on a site that sits outside the core of the Coolangatta Centre. It is currently in an area that is intended to transition to lower scale residential uses (from the core)".

The proposal would negatively impact desirable building height patterns.

[92] Overall Outcome 2(b)(vi) relevantly seeks retention of important elements of neighbourhood character and amenity. There is a clear planning strategy in the 2016 planning scheme (as there was in the 2003 Planning Scheme) for development of the greatest height and intensity to be located in the centre, with height and intensity reducing outside the centre.[76] This is reflected in important elements of neighbourhood character and amenity. In circumstances where the proposal would be larger and more intense than the form of development present in the centre, the proposal does not retain important elements of neighbourhood character and amenity.

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75 FG10 para 159.

76 The highest maximum height on the building overly map applies in the centre. The greatest density on the residential density overlay map (which applies to accepted development subject to requirements) applies in the centre. The centre zone code does not otherwise have performance outcomes and acceptable outcomes governing setbacks, site cover and density as applies in the High Residential Density Zone Code. Those metrics are relatively unconstrained in a zone code which, for assessable development, consists only of the purpose and overall outcomes of the code.

[93] Overall Outcome 2(b)(vii) relates to whether adjoining residential amenity is unreasonably impacted. For the reasons already given I do not consider that adjoining residential amenity would be unreasonably impacted in terms of loss of views or overshadowing. The proposal would however result in a detrimental impact on character and visual amenity.

[94] The proposal conflicts with Overall Outcome 2(d)(i) because it has a building height which does exceed that indicated on the Building Height Overlay Map.

[95] Insofar as Overall Outcome 2(d)(ii) is concerned, the setback to the adjoining neighbour does not result in any specific undue amenity impact.

[96] In respect of Overall Outcome 2(d)(iii), the ground level of the proposed development has a setback that reduces to as little as 0 meters along Marine Parade. A 0 metre setback is also provided to the Hill Street and Boundary Street frontages (as a minimum). The level 1 podium element generally has a setback of zero metres also. The proposal would not be setback from road frontages to promote an urban setting and interface with the street.

[97] Overall Outcome 2(d)(iv) seeks a built form with varying site cover to reduce building dominance and provide areas for landscaping. The provision provides no guidance as to the nature or extent of any variation of site cover and reduction of building dominance or any provision of landscaping by reference to which compliance or non-compliance is to be judged. The provision should be construed as requiring a variation of site cover to reduce building dominance and provide for landscaping to more than a trivial or insignificant extent. The proposal does have varying site cover, but does not significantly reduce building dominance in context. The building remains, as I have found, one of excessive height, scale and intensity which is bulky and visually intrusive in its context notwithstanding the variation of site cover. The podium element, which has a site cover of 97.1%, is not a feature which assists in reducing building dominance. The provision of landscaping is not insignificant albeit that I have found it to be inadequate in the context of other provisions.

[98] Setbacks are dealt with in Performance Outcome 1 of the Code which provides as follows:

PO1 Setbacks	AO1 Setbacks are as follows:

<table>
<tr><td rowspan="10">(a) Assist in the protection of adjacent amenity;
(b) Allow for access around the building;
(c) Contribute to streetscape character; and
(d) Provide separation between buildings to maintain view corridors.
Note: building setbacks may also be influenced by shadow provisions in 9.4.4 General Development Provisions Code</td><td>Setback</td><td colspan="2">Minimum distances measured in metres (m)</td></tr>
<tr><td rowspan="2">Front</td><td>Height</td><td>Setback</td></tr>
<tr><td>up to 23m</td><td>4m</td></tr>
<tr><td>for that part exceeding 23m</td><td>6m</td></tr>
<tr><td rowspan="3">Side and rear</td><td>up to 4.5m</td><td>1.5m</td></tr>
<tr><td>for that part between 4.5m – 7.5m</td><td>2m</td></tr>
<tr><td>for that part exceeding 7.5m</td><td>an extra 0.5m is added for every 3m in height or part thereof over 7.5m</td></tr>
<tr><td>Between on site habitable buildings (where not attached)</td><td colspan="2">Double the applicable side setback</td></tr>
<tr><td colspan="3">OR
Setbacks for Dwelling houses on small lots …</td></tr>
</table>

[102] In the absence of more meaningful setbacks for the large podium there is departure from the Acceptable Solution. Insofar as the Performance Outcome is concerned, the setback does not unduly adversely impact upon the residential amenity of the adjacent Lindor development. Further, it does not unduly detrimentally affect the maintenance of the view corridors. Whether it allows for access around the building was not put in issue in the particulars. For the reasons discussed in the context of the setback provisions of the 2003 planning scheme however, the setbacks would not contribute to streetscape character in this part of Coolangatta.[77] I do not accept that it would contribute to an intended streetscape character.[78] There is conflict with PO1.

[103] PO2 deals with site cover. It provides:

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[77] See also Adamson, Ex FG10 para 203, 204.
[78] Ex FG10 para 292(k).

Site cover	
PO2 Site cover (a) is balanced between built form and green areas for landscaped private open space; (b) contributes to neighbourhood character and amenity; (c) promotes slender bulk form; (d) promotes an open, attractive and distinct skyline; and (e) facilities small, fast moving shadows.	AO2 Site cover does not exceed 50 per cent for dwelling houses and dual occupancy; OR For all other uses, site cover does not exceed accumulative total of: (a) 50% of net site area up to 8 storeys. (b) 40% of net site area from 9 to 15 storeys; and (c) 30% of net site area or 750m^2 per building, whichever is the lesser, above 15 storeys.

[104] The proposal at 97.1% site cover for the podium, 48.5% to 52.6% for the tower and 65.8% for the roof terrace is well in excess of the Acceptable Outcome.

[105] Insofar as the performance outcome is concerned although landscaping is proposed,[79] the almost complete site cover results in a lack of balance between built form and green areas for landscaped private open space.[80]

[106] The site cover of the proposal does not contribute to neighbourhood character and amenity. Mr Peabody's reliance on the 'esplanade precinct' and the site's three street frontage has already been noted. It must be remembered however, that the part of the esplanade in which the subject site is situated has both a built form and a planning intent which differs from that which applies in the centre. That is reflected in the neighbourhood character and amenity. The site cover is another aspect of a development which by its form would, I am satisfied, not contribute to neighbourhood character and amenity but would detract from the character and visual amenity of the neighbourhood.[81]

[107] Although the proposed tower element is narrower along its east/west axis, the site cover does not promote a slender bulk form even for the tower component.

[108] The proposal conflicts with PO2.

[109] Height is dealt with in PO3 which provides as follows:

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79 There is also to be landscaping in the road reserve.
80 See Adamson Ex FG 10 paras 238 and 240(a).
81 See Adamson, Ex FG10 para 193, 194.

Height	
PO3 Building height and structure height does not exceed 9m or that shown on **Building height overlay map.**	**AO3** No acceptable outcome provided.

[110] In the 2016 Scheme the building height overlay map is referenced in the performance outcome rather than in the acceptable outcome. It shows that:

(a) buildings in the former Precinct 1a, which had a maximum height of 25 storeys, have a maximum height of 84 metres;

(b) buildings in the former Precinct 1b have a maximum height of 54 metres; and

(c) buildings in the former Precinct 2 have a maximum height of 38 metres.

[111] The proposed development has an overall height of 82 metres and is in conflict with PO3.

[112] Density is dealt with in PO4 which relevantly provides as follows:

Density	
PO4 … Density does not exceed that shown on Residential Density Overlay Map …	AO4 No acceptable outcome provided.

[113] The 2016 scheme references the density overlay maps in the performance outcome rather than an acceptable outcome. The Residential Density Map specifies a residential density of one bedroom per 25m^2 of site area. The proposal conflicts with the Performance Outcome.

(iii) The High-Rise Accommodation Design Code

[114] At the conclusion of the case only the respondent relied on the High Rise Accommodation Design Code. My ultimate conclusion is not dependent on my findings of conflict with that code. The purpose of that code is to responsibly encourage diverse, innovative and engaging sub-tropical high-rise forms that enhance the city skyline. That purpose is to be achieved through a number of Overall

Outcomes. The respondent contends that the proposal conflicts with the following two Overall Outcomes:

> "(c) tower development mitigates negative visual and physical impacts through appropriate setbacks and design; and
>
> (d) where they occur (in accordance with zone intentions), podiums are designed to engage with the street and be of a scale that is complementary to adjoining and nearby buildings."

[115] Sub-paragraph (c) relates to the tower (rather than the podium) component of the proposal. I have found that the setback of the tower is such that it will not have any specific adverse impact on its neighbour. I also accept that there is no difficulty with the standard of the design, although the proposal would nevertheless have a negative visual impact for the reasons which have been given.

[116] Insofar as subparagraph (d) is concerned, Mr Adamson and Mr Ovenden considered that a podium was not envisaged by the High Density Residential Zone given its purpose, and PO's 1 (setback), 2 (site cover) and 6 (land uses).[82] It was however, pointed out for the co-respondent that figures 6.2.3-1 and 6.2.3-3 contemplate some form of podium development being achievable in the zone. It is unnecessary to resolve that debate however because, in any event, the podium is not of a scale which complements both adjoining and nearby buildings given its location. Mr Schneider saw the scale of the podium as complementing the existing 'character and rhythm' of development along the esplanade,[83] but it is difficult to accept that the scale complements the adjoining building or the nearby buildings[84].

[117] Podiums are further dealt with in PO1 which provides as follows:

Tower base (podium)	
PO1 Where podiums are envisaged by the zone, tower base form respects the framework of established built form, adjacent streets, parks and public or private open spaces.	AO1.1 Tower base heights: (a) are well proportioned to frame adjacent parkland and onsite open space; (b) match neighbouring low set built form; or

82 Exhibit FG 10, paras 223 and 225.

83 Ex FG 10 para 292(q)(ii).

84 Ex FG 10 para 223. I do not take the 'nearby' buildings for the purposes of this provision to extend to those in the centre.

	(c) are no greater than 10.5 metres in height where no neighbouring low-set built form exists.
	AO1.2 Tower base setbacks: (a) match adjacent established setbacks; and (b) continue public open space areas provided along street frontages.

[118] The height of the podium is no greater than 10.5m and so there is compliance with AO1.1. There is however noncompliance with AO1.2 with respect to tower base setbacks as the setbacks do not match adjacent established setbacks. The properties fronting Marine Parade from Clarke to Hill Streets have no podium levels, and generally have similar building setbacks to road frontages with landscaping including trees at street level. I do not accept the submission on behalf of the co-respondent that sub-paragraph (a) is only relevant where there are adjacent established podium setbacks.

[119] Turning to the performance criterion, leaving the debate about whether podiums are envisaged by the zone to one side, the subject podium does not respect the framework of the established built form in the area east of Clarke Street in which it lies and which has been described above. As Mr Adamson said[85] the design would be out of context and character on the subject site.

[120] PO4 deals with tower form design. It provides as follows:

Tower form design	
PO4 Slender tower form promotes: (a) open, attractive and distinct skyline; (b) small, fast moving shadows; (c) view corridors between nearby tower; (d) efficient interior climate control; and (e) balconies as an extension of indoor living space.	AO4.1 Tower floor plate is limited to 750 m² per tower (includes all services, lift and stairwell annexe, etc). Note: balconies are excluded from calculations to encourage larger private outdoor space areas.
	AO4.2 Tower form provides a unique profile when compared to nearby existing and proposed towers of similar height.

[85] Ex FG10 para 224, see also para 223.

[123] As to AO4.1, there is no definition of 'floor plate' other than that it includes the things in brackets and excludes balconies in accordance with the note. The visual amenity JER indicates that the site cover for the tower levels is between 48% and 51% of the 1740m^2 site area. Applying the smallest site cover percentage would yield 835m^2. If GFA (which excludes certain areas including building services and access between levels) were used then the figure is 756m^2 at level three and the exceedance is minor. As to AO4.2, there was some disagreement as to whether there are any existing or proposed nearby towers of a 'similar height'. The proposal is one with a unique profile when compared with the existing towers in the centre which may be described as having a similar height, but those towers are not 'nearby' in my view.

[124] Turning to the performance criterion, although narrower along its east/west axis, the development is not a slender tower. The visual amenity experts identified the tower as having 'considerable width' in the order of 50 metres.[86] It is difficult however to see the development as meaningfully compromising the matters referred to in the performance outcome. I would not refuse the development on the basis of conflict with this provision.

Reasonable expectations

[125] Reasonable expectations are governed by the planning scheme. A landowner must reasonably expect that a parcel of land may be developed in accordance with the applicable planning scheme. It was pointed out, on behalf of the co-respondent, that expectations based upon the maximum height shown in the maps under the 2003 Planning Scheme must be tempered by the fact that they were only referred in acceptable solutions and so were not, in truth, absolute maximums.[87] There are however, a number of provisions of the planning scheme from which I have found the proposal departs. In my view, the proposal does not fit within the bounds of reasonable expectations having regard to the planning scheme provisions.

Grounds

[126] The co-respondent nominated many grounds to warrant approval notwithstanding conflict. The nominated grounds were, in the main, recited by Mr Schneider in the

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86 See FG 8, para 18.

87 See *Main Beach Progress Association Incorporated & Ors v Gold Coast City Council & JJ Foundation Pty Ltd* (2008) 164 LGERA 233.

joint report by the town planners, although there were some notable exclusions. He confirmed that he made changes where he considered it appropriate to do so and only included those grounds which he could support. Ultimately, the co-respondent was prepared to further limit the grounds relied upon to the following grounds set out in its further submissions:[88]

> "(aa) most important is the self-evident fact, as summarised in para [17] of the Developer's submissions on the Bell decision:
>
> > "The drafters of the scheme could not have anticipated the need, in the public interest, to allow the number of storeys in this development to accommodate an active street frontage; the relocation of existing residents of the old apartment building; the inclusion of a five star hotel and spa; and the multiple levels of residential apartments required to provide a range of living opportunities."
>
> (a) the provision of the only five-star hotel within this preeminent tourist destination (as intended by Mr Cannon: see Exhibit 17 paras 14, 17-33 and as conditioned by the Council: see Exhibit 31 p.598 condition 103);
>
> (b) the proposal will add to the choice of tourist and resident accommodation in this important major centre;
>
> (bb) the proposed development furthers enhanced employment and investment opportunities in an Activity Centre and around an Employment Cluster;
>
> (c) the proposal provides a high quality residential and hotel development on a desirable and well located beach front site. It is very much in the public interest that advantage is taken of the opportunities afforded by such sites within reasonable and appropriate limits and subject of course to

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88 Footnotes and references to submissions deleted.

avoiding unreasonable impacts (which this proposal does, assisted by the remarkable site) in a very effective manner;

(cc) the proposed development enhances the tourism industry and furthers the role of Coolangatta as an important tourist destination. The proposed development will provide increased opportunity for visitors and tourists to enjoy the Coolangatta area and will provide enhanced dining, retail, health and recreational facilities that will be available to the public;

(d) the proposal contributes to the planning objectives (in both the scheme and the South-East Queensland Regional Plans) to accommodate growing populations in in-fill development and development which contributes to housing choice – here, not only does the development provide a modern attractive apartment living option, but within it, it provides a choice of apartment living options;

(dd) the proposed development provides for an increase in population density;

(e) there are no unacceptable character or amenity impacts that arise from approval of the proposed development including in relation to residential amenity, visual amenity and local character amenity; this is a relevant consideration;

(ee) the proposed development provides significant and attractive open space that will be made available to the public and that will provide greater public and private visual access to 'significant landscape features';

(f) the proposal brings traffic benefits in removing vehicular crossovers to Marine Parade including improved vehicular servicing, and increased safety and operation of Marine Parade for pedestrians, cyclists and vehicles;

(g) the Council's own 2003 planning scheme intentions are rendered difficult, if not impossible, to achieve, having regard to existing development and approvals (this is dealt with further in the statement of Mr Schneider);

(h) some of the conflicts with the 2003 planning scheme are moderated by changes that occur pursuant to the 2016 planning scheme; and

(i) the seriousness of the conflict with the 2016 planning scheme with respect to relevant matters, and the weight to be accorded to that scheme are seriously moderated by the unusual circumstances with respect to the preparation of that scheme.

(j) the proposed development in terms of height, bulk and built form is consistent with the existing, planned, and likely, built form of Coolangatta Beach."

[127] Insofar as the 'grounds' address conflict with the 2016 Planning Scheme they are matters which go to conflict with a document which is a matter of weight. Section 326 of the SPA is engaged in relation to conflict with the 2003 Planning Scheme.

[128] It may be noted that one of the grounds which was not pursued was that the planning scheme provisions are not soundly based. Mr Schneider did not support that ground, given that it was not included in his recital of the grounds.[89] Neither Mr Peabody nor Mr McGowan suggested that there was anything unsound about the obvious approach of the planning schemes to the issue of height and scale including the transition from the centre.[90] The planning schemes are, I am satisfied, soundly based.

Overtaken by events (grounds (g) and (i))

[129] Mr Schneider contended that the planning schemes, insofar as the building height overlay and residential density mapping is concerned, have been overtaken by

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89 T 5-50 line 30.
90 T2-35, T2-59, T2-63, T3-11.

events.[91] In that regard, he pointed to: the approval of developments in excess of what was shown on the maps; the fact that the Council is carrying on a building height study; and the decision to carry the controls through, without change, from the 2003 Scheme to the 2016 Scheme.

[130] To support his proposition about existing approvals he provided a table of 20 'selected approvals' within the locality which he suggested exceeded the maximum designated heights or densities under the 2003 and 2016 schemes. The fact of some approvals in excess of the height or densities shown on the relevant maps does not necessarily lead to the conclusion that the planning schemes have been overtaken by events. Both the 2003 and 2016 planning schemes admit of the prospect of development exceeding the limits shown on the maps where relevant tests are satisfied. In the case of the 2003 Planning Scheme the maps are referred to in the acceptable solution and so there is the opportunity to establish compliance by addressing the performance criterion. The 2016 Planning Scheme allows for an uplift in height by 50%where certain tests are met. Further, cross-examination about the table established the following:

(a) Most of the identified developments pre-dated the 2016 Scheme.

(b) Only two of them were lodged and decided under the 2016 Scheme, namely numbers 2 and 9. Number 2 is a four-storey development that is only 1.3 metres above the overlay mapping in the 2016 scheme. Whilst Mr Schneider pointed to number 9 as being two-storeys over the 2003 Scheme acceptable solution, the 2003 Scheme did not apply to the application. Under the 2016 Scheme, the proposal is two metres lower than the 29 metre height identified on the overlay mapping.

(c) Numbers 4 and 11 were lodged under the 2016 Scheme, but are not yet decided.

(d) Number 8 was lodged under the 2003 Scheme as a development application (superseded Planning Scheme). It is the subject of a submitter appeal.

(e) Numbers 16, 17 and 19 were lodged under the 1994 Planning Scheme regime. Number 17 was decided under that regime, and numbers 16 and 19 were decided after the 2003 Scheme came into force. Further:

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91 T5-8, Ex 16 para 4.

(i) Number 16 is the Kirra Surf Site which is three-storeys over the height envisaged by the 1994 Scheme. It was contained within both the resort residential, and the special facility zoning;

(ii) Number 17 was contained in the comprehensive development zone, which corresponds with the Centre Precinct under the 2003 Scheme;

(iii) Number 19 is one of the Reflections towers. It was decided when version 1 of the 2003 Scheme was in force. At that time, the height control was 20 storeys. 19 storeys was approved, and in fact the eastern most side of the building tapers down by way of a substantial reduction in storeys.

(f) Site 20 is the other Reflections building. It was lodged under version 1.0 of the 2003 Scheme and approved when version 1.1 was in force. The Acceptable Solution building height at that time was also 20 storeys. That is what was approved.

(g) The balance of the sites were all lodged under the 2003 regime, but under various iterations of it. Further:

(i) Site one at Greenmount was approved four-storeys above the Acceptable Solution height. It is fourteen-storeys and 44.7 metres in height and which is much lower than the proposal. It is only seven metres above the height of the 2016 overlay and well within any 50 per cent bonus.

(ii) Site 3 has a height of 28 metres compared to 29 metres on the 2016 Overlay.

(iii) Site 5 is lower in height than nominated in either Scheme.

(iv) Site 18 is Sanbano which is within the 2016 overlay height.

(h) The balance comprise sites 6, 7, 10, 12, 13, 14 and 15. Site 12 is within Precinct 1 and the balance are in Precinct 7 (including many in the local services designation). 13, 14 and 15 would fall within any 50 per cent increase in height under the 2016 Scheme.

(i) Although Mr Schneider did not seek to rely on developments in Rainbow Bay other than sites1 and 11, some reference was made to them in the course of the hearing. Mr Schneider confirmed that the

majority of those buildings are from the era of the 1994 scheme when 20 storeys was permissible in most of that area.[92]

[131] Other than Sanbano, all of the selected developments are considerably lower in height than the proposal. Further, the evidence shows that there is a decrease in intensity of built form moving east of the centre, particularly in the area of Coolangatta to the east of Clarke Street where the subject site lies. I am not satisfied that it has been demonstrated that the planning schemes have been overtaken by events.

[132] I also do not consider that the fact that the Council has carried forward the height and density overlay mapping from the 2003 Planning Scheme, whilst it undertakes a height study, means that its planning strategy has been overtaken by events or that the weight to be accorded to the current scheme should be seriously moderated. The study is merely the first step in the Council considering matters in relation to height. Its position in relation to any proposed amendments to the scheme is yet to be determined and no planning scheme amendments have been put on public notification. There is no event which has overtaken the planning strategy. The Council in the meantime has carried forward the planning strategy and indeed has, in material respects, strengthened it by referring to the overlay mapping in the relevant Performance Outcomes and also in an Overall Outcome and in the Strategic Framework provisions. As was observed earlier, I am of the view that the provisions of the 2016 Planning Scheme remain of significance and should be given substantial weight notwithstanding the work which is being undertaken on the building height study.

The SEQRP and infill higher density development (grounds (d) and (dd)

[133] Reference to the South-East Queensland Regional Plans (SEQRPs) does not greatly assist. The 2009 SEQRP has been identified as being appropriately advanced by the Strategic Framework of the 2016 Planning Scheme. Under the SEQRP 2017, the site is depicted within the Regional Economic Cluster, but these areas are subject to more refined planning.

[134] The 2017 SEQRP provides that its goals, elements, strategies and sub-regional directions are to be implemented through local government planning schemes. It is

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92 T5-44 line 44 to T5-47 line 33 and Ex 34.

also stated that SEQs Centres are varied, and therefore warrant more detailed planning by local government to determine the best outcomes for these localities, including the most desirable form and distribution of density. Further still, the 2017 SEQRP relies on local planning schemes to determine the most suitable zone for each land parcel within the urban footprint. Local government planning schemes are to provide the finer grained local policy in advancing the relevant matters of State and regional significance. While local governments are required to ensure that planning schemes reflect the 2017 SEQRP, the co-respondent does not point to anything in the 2017 SEQRP with which the 2016 Scheme is inconsistent.

[135] The co-respondent pointed to the SEQRP's for planning objectives of accommodating growing populations in in-fill development and development which contributes to housing choice. These are objectives which find reflection in the planning schemes. It may be accepted that the proposal supports high level objectives in that it involves high density infill development which would make efficient use of infrastructure and contribute to housing choice, but that does not mean that the extent of development is appropriate in the face of conflict with the more detailed provisions of the planning scheme.

Character, Amenity and Consistency of Built Form (grounds (e) and (j))

[136] The proposal's impact on amenity has been considered elsewhere. It was submitted, for the co-respondent, that exceedances of development parameters would not be accompanied by any adverse amenity impacts. Much was made of the fact that the site enjoys 3 street frontages and only has 1 adjoining neighbour (Lindor). It would not have a significant impact on residential amenity in terms of specific impacts such as loss of views or overshadowing but the inconsistency with both the existing and planned character associated with placing what would be the largest building in Coolangatta where it is not intended would give rise to impacts on character and visual amenity.

[137] Much was sought to be made of the proposal's consistency with the character of the so called 'esplanade precinct', but that overlooks the obvious planning strategy of not treating all land along the esplanade in the same way. The proposal is inconsistent with the existing, planned and likely built form and character of the part of esplanade in which it is located.

[138] In discerning what he perceived to be the planning intent for the site, Mr Schneider concluded that there was an intention for there to be a "renewal and transformation" for the Coolangatta urban neighbourhood. In that regard he referred to s 3.2.2 of the 2016 Planning Scheme which refers to around two thirds of dwellings over the next 20 years being accommodated in "renewed and transformed centres and key inner city urban neighbourhoods" and that areas "will be targeted for renewal and transformation". These passages of strategic intent do not establish that the subject land is identified or targeted for renewal and transformation but, in any event, Mr Schneider does not identify how a broad intention for renewal or transformation translates to support for a building of the height, bulk and scale proposed given the more detailed provisions of the Planning Scheme. Indeed he acknowledged[93] that it would be unusual for the intent for renewal and transformation to be seen to be encouraging development that is nearly half as high again as development that attracted the 50% bonus provisions in the strategic framework of the 2016 Planning Scheme.

Traffic benefit (ground (f))

[139] Should the development proceed there would be a benefit in traffic terms by the removal of all existing ingress and egress manoeuvres (including reverse manoeuvres) across the Marine Parade frontage for the likely benefit in safety for cyclists, motorists and pedestrians.[94]

Open space (ground (ee))

[140] The proposal would provide some open space which would be usable for public and private visual access to significant landscape features.

Need and economic benefits (grounds (aa), (a), (b), (bb), (cc))

[141] Mr Duane's conclusions in respect of need were as follows:

> "10.1 Overall, the research in relation to economic need indicates that there is strong economic need for the subject development for a variety of reasons, including:

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93 T 5-22 lines 1-5.
94 Exhibit 15, paras 29-32.

(a) the Gold Coast LGA, including the suburbs immediately surrounding the subject site, are projected to grow over the next 20 years. In a growth area, there is need for diversity and choice of household product in multi-unit developments such as that proposed;

(b) in addition, the Gold Coast and Coolangatta are designated as major tourist precincts which are projected to accommodate substantial tourist populations on the Gold Coast over time. Beachside developments are important components of catering for the tourist market;

(c) the location of the site means that multi-unit development will help reinforce a compact form of settlement, resulting in improved efficiencies and use of existing infrastructure in the surrounding area;

(d) the proposed site is well located to infrastructure, and the efficient use of infrastructure in rapid growth areas is important to ensure a sustainable economic return;

(e) the proposal is for 27 storeys (24 of use). In view of the surrounding development plus infrastructure etc. in the area, there is a reasonable expectation from the local community that a new development approval would be similar to these facilities. While some of these matters include town planning issues (beyond my discipline), I am able to say as an economist that pressure to maximise (within reason) the development site such as the subject land will continue given it is difficult to amalgamate larger parcels of land and the scarcity of future development land within the Coolangatta area;

10.2 In summary, the subject development represents an opportunity, of which there are a limited number, to consolidate residential and tourist development in a location

which provides a high degree of residential and tourist amenity and which is served by significant levels of private and public infrastructure, supporting residential/tourist uses.

10.3 The subject development represents an opportunity that contributes to the stated planning objectives, particularly in South East Queensland Regional Plan 2009 and 2017, ofaccommodating significant population growth in infill development in locations served by all necessary infrastructure and, in particular, public transport. Increasing population density in such areas not only achieves planning goals but achieves greater economic efficiency in terms of the use of existing and proposed infrastructure which in turn benefits the community generally.

10.4 The subject proposal represents orderly development within the suburb of Coolangatta.

10.5 The proposal will add a 5 star resort of which there is not currently one provided in the Coolangatta market in close proximity to the airport. In addition, it would provide a wedding venue and function facilities together with a day spa providing a significant point of difference with other facilities provided in the immediate area.

10.6 As I understand it, a compliant development would result in a much smaller facility and would not provide the same level of benefits as the subject proposal."

[142] Mr Schneider opined that there is a planning need for the proposal. In that regard he observed that significant development opportunities in the Coolangatta area and in precinct 1 of the LAP area in particular are currently constrained by a number of factors including:

(a) the presence and age of existing developments;

(b) the large size, and limited number, of landholdings along the Marine Parade esplanade;

(c) the small and fragmented pattern of land holdings along Griffith Street;

(d) the topography and natural features of the land area; and

(e) the town planning framework.

His analysis within precinct 1 led him to conclude that there are currently limited opportunities for redevelopment within that precinct.[95]

[143] Mr Duane surveyed the underutilised land in the area. Of the sites currently developed for less than four storeys most do not sit on the beachfront and many are small in size and would require amalgamations. Of those which are currently developed for more than four storeys but less than ten storeys few are under a single ownership along Marine Parade and most beachside land has the complication of community titling.

[144] There was a degree of tension between the co-respondent's case on visual amenity which emphasised potential future developments in the locality[96] and its case on planning need, which focused on the limited opportunity for redevelopment. I accept that there are limitations and complications associated with securing redevelopment opportunities, but that is not to say that no such opportunities will be realised.[97]

[145] In coming to his conclusions, Mr Duane's report dealt with the following matters:

(a) the planning framework;
(b) information about the Gold Coast economy and tourism market;
(c) information about the Coolangatta tourist market;
(d) population in growth trends in the Gold Coast Local Government Area and particularly in Coolangatta;
(e) supply;
(f) the proximity of the land to infrastructure;
(g) matters relating to amenity; and
(h) economic benefits.

[146] Mr Duane concluded his review of the planning framework by stating that the proposed development responds to the planning context. For the reasons already given however the proposal finds itself in conflict with both the 2003 and 2016 planning schemes. Mr Duane observed that, reflecting the planning context, Coolangatta is a very popular area particularly with residents and tourists as it is close to public transport and a range of facilities. It is an attractive location where under-

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95 Ex 16, paras [50]-[54].
96 Ex 11 figure 3.
97 See Ovenden T5-64.

utilised land, such as the subject site, is being developed for a range of different types of accommodation and residential densities resulting in increased population density. For these reasons, there will continue to be economic pressure for development in the locality to increase population and tourist density.

[147] Mr Duane concluded that the attractiveness of the Coolangatta locality and its proximity to important infrastructure means that inevitably economic pressure will continue to drive development of these sites for greater density. He also concluded that given the planning documents clearly indicate ongoing high-density residential and tourist accommodation facilities in the major centre of Coolangatta and its prominence as a destination for such facilities it is reasonable to expect ongoing development for these types of facilities within the local community. A level of economic pressure for high density residential and tourist accomodation development within the major centre of Coolangatta may be accepted. What is at issue however, is whether it is in the public interest to allow that pressure to give rise to the subject development, of the intensity and scale proposed, in a location outside of the centre precinct.

[148] Mr Duane's conclusion in relation to the Gold Coast economy and tourism was that significant tourism activity is occurring on the Gold Coast and is predicted to continue over time with Coolangatta being one of the key coastal precincts for tourism facilities. That is unsurprising.

[149] Insofar as the Coolangatta local area hotel and tourist market is concerned, Mr Duane concluded that in light of the growing residential and tourist market on the Gold Coast, there is an ongoing need for increased tourist facilities, particularly at beachfront locations such as the subject site which he said essentially represented one of the last opportunities to reinforce Coolangatta as a major tourist accommodation facility providing a wide range of different star ratings. In this part of the report, Mr Duane makes much of the intention to operate the facility as the only 5 star hotel in the locality. Whilst the table in his report shows that there are a number of high quality 4 and 4.5 star facilities available to the public at the upper end of the market, I accept that a 5 star facility would be of benefit. It is however, only one component of the proposal.

[150] Mr Duane next considered the population growth projected over the period to 2036 and concluded that there was a need for some 9,700 dwellings or 485 new dwellings per year in the local area, which he then compared with the subject proposal of 94 units as representing only 0.9% of future demand.

[151] Insofar as Mr Duane's 9,700 dwellings is concerned, it should be borne in mind that he agreed in cross-examination that:

(a) His local area includes Coolangatta, Currumbin, Tugun and Tweed Heads, with the smallest proportion of growth occurring within Coolangatta.

(b) Within this local area, the Cobaki Lakes development is in an approved master plan community which is intended to provide 5,500 dwellings. That reduces the future demand to 4,200 dwellings.

(c) The predicted demand represents not only units but also dwellings.

(d) The predicted demand is further reduced on the basis that, as Mr Duane identified, there are 1,561 dwellings which are already approved or under construction.[98] Further, those developments are limited to those of 20 dwellings or more. There will, of course, be additional supply in terms of smaller scale developments, including dwelling houses.

(e) The product of that exercise leaves a 'demand' of 2,639 dwellings over the 20 year period, or 130 per year.[99]

[152] In terms of the need being met, City Plan 2016 has been prepared to cater for a 20 year horizon, and it is intended to be reviewed periodically to ensure that it responds appropriately to the changes of the community at a local, regional and state level.[100] Mr Duane's report acknowledged that he did not carry out an exercise of matching demand and supply looking at other sites that are available for development over time. Rather, he viewed it as economically sensible to develop the site looking at all the attributes it possesses as well as demand within the local area. He identified the site as designated for residential development, sitting within a planned precinct with higher density development close by and as currently underutilised in an economic

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98 Exhibit 14, Table 6.1, p 66.
99 T6-16.
100 Exhibit 6, p 2, s 1.1(5)

sense. Of course the precinct within which the site falls under the 2003 Planning Scheme did not envisage development of the scale and intensity proposed.

[153] Insofar as infrastructure is concerned, Mr Duane observed that there is a substantial amount of infrastructure which the subject development would make greater economic use of due to increased population/tourist density and greater economic efficiency. He opined that the proposed development would involve efficient use of existing and proposed infrastructure throughout the surrounding region to the benefit of the community. I accept that the proposal would make economic and efficient use of infrastructure.

[154] Insofar as amenity is concerned, Mr Duane expressed the opinion that a combination of the factors referred to in his report mean that the subject proposal is ideally placed to provide a high level of amenity to those who wish to live and visit Coolangatta. I accept that is so.

[155] Insofar as economic benefits are concerned, Mr Duane concluded that the combination of the proposed uses across residential, tourist, restaurant, wedding venue/function venue and day spa with recreational deck would provide a significant benefit to the local economy and provide a new destination for higher end travellers within the Coolangatta market. I accept that the proposal would be of economic benefit.

[156] I accept that the proposal would add to the choice of tourist and residential accommodation in Coolangatta, further enhance employment and investment opportunities in Coolangatta and enhance the tourism industry and further the role of Coolangatta as an important tourist destination. It would provide increased opportunity for visitors and tourists to enjoy the Coolangatta area and would provide enhanced dining, retail, health and recreational facilities that would be available to the public.

[157] I accept that the proposal responds to a level of need for further tourist and residential development in the locality and would be of economic benefit. It is not however, a need which the Planning Scheme fails to recognise. The Scheme makes provision for tourist and residential development to occur. What it does not contemplate is development of the scale and intensity proposed in the precinct in which the subject site falls.

[158] It was submitted, for the co-respondent, that the drafters of the Scheme could not have anticipated the need, in the public interest, to allow the number of storeys in its development to accommodate its various components. It is difficult to conclude that there is some deficiency in the provision made by the planning scheme or some public interest in departing from the Planning Scheme so as to allow development of the number of storeys proposed on this site in circumstances where Mr Duane did not carry out an exercise of matching demand and supply. Further, the Planning Scheme does make provision, in the designated centre, particularly in the centre core sub-precinct 1(a)[101] for development more akin to the number of storeys proposed. I accept that there are limitations and complications associated with securing redevelopment opportunities in the centre, but that is not to say that no such opportunities will be able to be realised or that the subject site ought to be permitted to be developed as if it fell within the centre.

[159] Mr Duane observed that a 'compliant development' on the subject site would result in a much smaller facility and would not provide the same level of benefit as the subject proposal. More development is however not always better development or development which is appropriate in the circumstances. The economic benefits of development must be balanced with other planning considerations. The balance is struck in the planning scheme documents.[102]

[160] I do not consider that the extent to which the proposal addresses a level of demand or need or that the proposal would provide economic benefit is sufficient to overcome the nature and extent of the conflict in this case.

Optimising development (ground (c))

[161] It was submitted, for the respondent, that it is in the public interest that development of a strategically located piece of available and developable land, such as the subject site, be developed to its optimum potential consistent with reasonable protection of local character and amenity considerations. It was submitted that it is a nonsense to suggest that a 'compliant' proposal could achieve the same benefits and that the site would be wasted by such limited development. I accept that it is not in the public interest for the development potential of a site to be wasted, particularly where

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101 and in the same area under the 2016 Planning Scheme.
102 *VG Projects v Brisbane City Council* [2016] QPLR 404 at [111].

development is otherwise addressing a public need. However, the proposal in this case goes beyond reasonable and acceptable optimisation of development potential and would, I am satisfied, have a detrimental effect on the existing and planned character and visual amenity of the area.

Conflict moderated by the 2016 scheme (ground (h))

[162] Reference was made to changes to the treatment of a shop and restaurant under the 2016 Planning Scheme but it is unnecessary to dwell on that since, as has been noted, the appellant and the respondent abandoned the inconsistent use point in any event.

[163] The co-respondent referred to the bonus provisions of the 2016 Scheme with respect to height as permitting a building of up to approximately 18 storeys to be developed on the subject site.[103] It has been observed however, that there are conditions on the availability of the bonus, the proposal would not qualify for the bonus and, in any event, the proposal is much taller than would be permitted even if the bonus was applied.

[164] The co-respondents also referred to issues relating to height being in a state of 'flux' given that the council is reviewing the height mapping and submitted the height standards are much more likely to increase than decrease. For the reasons already discussed the work in the height study is at much too early a stage to put the current planning to one side.

Conclusion on conflict and grounds

[165] I have found that the proposal conflicts with a number of provisions of the 2003 and the 2016 Planning Schemes. The extent of conflict with both is significant. Conflict with the 2003 scheme triggers a consideration of s 326 of the SPA. Consideration of the 2016 Planning Scheme is a matter of weight. In *Bell v Brisbane City Council* [2018] QCA 84 McMurdo JA said:[104]

> "Section 326(1)(b) will be engaged only where there is a tension between the application of the relevant instrument, here a planning scheme, and the public interest. If that tension exists, it will be for the decision maker to consider whether there are sufficient grounds, in the

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103 Ex FG 8 para 140.
104 At [66].

> public interest, to depart from the instrument. Necessarily, cases where that tension exists will be exceptional, because a planning scheme must be accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land."

[166] The consideration of whether there are sufficient grounds must proceed on the premise that it is in the public interest that the planning scheme, in each relevant respect, be applied, unless the contrary is demonstrated.[105] I am not persuaded that the co-respondent's grounds considered individually or collectively, demonstrate the contrary. The provisions with which the proposal finds itself in conflict are soundly based, have not been overtaken by events and have not been demonstrated to fail to anticipate development in the public interest. I do not consider that there are sufficient grounds to justify approval notwithstanding the conflict with the 2003 Planning Scheme and I consider that the 2016 Planning Scheme, with which there is also significant conflict, should be given substantial weight.

Conclusion

[167] The co-respondent has not discharged its onus. The appeal is allowed and the development application is refused.

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105 *Bell v Brisbane City Council* supra at [75]