

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Stockland Development Pty Limited v Sunshine Coast Regional Council & Ors* [2022] QPEC 30

PARTIES: **STOCKLAND DEVELOPMENT PTY LIMITED (ACN 000 064 835)**  
**(Appellant)**  
v  
**SUNSHINE COAST REGIONAL COUNCIL**  
**(Respondent)**  
**AND**  
**JANE MARGARET BECK & ORS**  
**(Co-respondents by election)**

FILE NO/S: 2460/2020

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: The Planning and Environment Court, Brisbane

DELIVERED ON: 15 September 2022

DELIVERED AT: Brisbane

HEARING DATE: 18, 20-22, 25-28 July and 3-4 & 12 August 2022

JUDGES: Everson DCJ

ORDER: **Appeal dismissed**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal against refusal of a development application for a Variation Request and a Development Permit to Reconfigure a Lot to create a residential community featuring a large pumped saltwater lake  
  
PLANNING AND ENVIRONMENT – ASSESSMENT – compliance with the planning scheme – whether appellant has discharged the onus of demonstrating adverse ecological impacts can be adequately mitigated by the imposition of lawful conditions attaching to subsequent development approvals – whether the proposed development complies with the planning scheme

- CASES: *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257
- Barro Group Pty Ltd v Sunshine Coast Regional Council* [2022] QPELR 235
- Wilhelm v Logan City Council & Ors* [2020] QCA 273
- Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QCA 168
- Zappala Family Co Pty Ltd v Brisbane City Council & Ors* [2014] QCA 147
- LEGISLATION: *Planning and Environment Court Act 2016* (Qld)
- Planning Act 2016* (Qld)
- Planning Regulation 2017* (Qld)
- COUNSEL: R S Litster KC and J G Lyons for the appellants
- C L Hughes KC and M J Batty and B G Rix for the respondent
- SOLICITORS: Clayton Utz for the appellants
- Sunshine Coast Regional Council Legal Services for the respondent

## **Introduction**

- [1] This is an appeal against the decision of the respondent made on 23 July 2020 to refuse a development application for a preliminary approval for material change of use of premises (including a variation request to vary the effect of the Sunshine Coast Planning Scheme 2014) for residential, business, community, and sport and recreation uses and a development permit to reconfigure a lot (4 lots into 170 lots (169 residential and 1 community facility), new roads, park and balance lot, over 2 stages) (“the proposed development”) on land located at Pacific Paradise and more particularly described as lots 1 & 2 on RP 103117, lots 4 to 8 on RP 98356, lots 2 & 3 on RP 842858, lot 1 on RP 811523, lot 8 on RP 812125, lot 261 on SP 124274, lot 10 on SP 248472, lot 3 on SP 248471 and part of Godfreys Road (“the site”).
- [2] The site is heavily constrained, located on the flood plain on the northern side of the Maroochy River. A large freshwater wetland protrudes into the site from the southern half of the eastern boundary (“the central wetland”) and links to the Maroochy River Conservation Area which runs along the southern boundary of the site.<sup>1</sup> These are areas of high ecological significance.<sup>2</sup> The proposed development is to feature a large, pumped saltwater lake. Whether the appellant has demonstrated that the detrimental impacts of this saltwater lake system and associated development can be mitigated to an acceptable level having regard to the ecological significance of the central wetland is a pivotal issue in the resolution of this appeal. In addition, there are several other respects in which both the respondent and the co-respondents by election (who appeared unrepresented at the hearing of the appeal) argue that there are non-compliances with relevant planning controls.

## **The site and the surrounding area**

- [3] The site is a former cane farm, approximately 104 hectares in area. To the south is the Maroochy River and to the north is the residential suburb of Pacific Paradise, on the opposite side of the David Low Way. The site borders the Sunshine Motorway to the west and the existing Twin Waters residential development to the east (“Twin Waters East”).<sup>3</sup>

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<sup>1</sup> Exhibit 003.001, p 199.

<sup>2</sup> Exhibit 004.024, p 10, para 18.

<sup>3</sup> Exhibit 004.019, p 6, paras 11-12.

- [4] At the time the development application was properly made, version 17 of the Sunshine Coast Planning Scheme 2014 (“the planning scheme”) was in effect.<sup>4</sup> Pursuant to the planning scheme, the site was subject to ten overlays including, relevantly, the Biodiversity, waterways and wetlands overlay, the Flood hazard overlay and the Heritage and character areas overlay. It was within the Maroochy North Shore local plan area. Most of the site was within the Emerging community zone. Parts of the site were within the Low density residential zone, the Community facilities zone and the Open space zone.<sup>5</sup>

### **The proposed development**

- [5] The proposed development seeks approval for a master planned community to be called Twin Waters West. Development on the site is proposed to occur pursuant to the Twin Waters West Plan of Development.<sup>6</sup> This prescribes a number of variations to the planning scheme which are summarised as follows:

1. varying the levels of assessment for future development applications within the Low density residential zone, Medium density residential zone, Community facilities zone and Open space zone;
2. varying the permitted building heights for the Medium density residential zone and the Community facilities zone to permit development up to 12 metres;
3. varying a number of design provisions for dwelling houses within the proposed development; and
4. varying the permitted residential densities by overriding AO22 of the Maroochy North Shore local plan code.<sup>7</sup>

- [6] Six precincts of Low density residential zoned land are proposed. Two precincts of Medium density residential zoned land are also proposed. A Community facilities zone is also proposed near the northern boundary. The balance of the site will comprise the Open space zone and the large, pumped saltwater lake, which is

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<sup>4</sup> Exhibit 003.001, p 2.

<sup>5</sup> Ibid.

<sup>6</sup> Exhibit 007.001.

<sup>7</sup> Ibid, p 10.

designed to flow from the existing Twin Waters East saltwater lake at the eastern boundary and exit into the Maroochy River beyond the southern boundary of the site.<sup>8</sup>

- [7] In the first joint expert report of the town planners, the proposed development is summarised as comprising 584 residential allotments taking up approximately 54 hectares, two medium density sites taking up approximately 4.5 hectares, community and commercial uses taking up approximately one hectare, and open space taking up approximately 27 hectares and the central lake.<sup>9</sup>
- [8] The central, saltwater lake is designed to create a counter-clockwise flow and ultimately discharge via a 900mm diameter pipe to an outfall in the Maroochy River, although a northern weir will also allow water to flow back into the existing Twin Waters lake system.<sup>10</sup> The proposed saltwater lake is designed to have a total volume of 1.05 million cubic metres and the daily pump inflow is proposed to be 43,200 cubic metres.<sup>11</sup>
- [9] As noted above, the development application also includes an application for a development permit to reconfigure a lot. It is proposed to create 169 residential lots, a community facility lot, new roads and parks which are described as stage 1 and stage 2 of the proposed development.<sup>12</sup>

### **The statutory assessment framework**

- [10] Pursuant to the *Planning and Environment Court Act 2016* (Qld) (“PECA”) the appeal is by way of hearing anew,<sup>13</sup> and the appellant must establish that the appeal ought to be upheld.<sup>14</sup> The PECA addresses the nature of an appeal and relevantly provides in s 46:

- “(2) The Planning Act, section 45 applies for the P&E Court’s decision on the appeal as if –
- (a) the P&E Court were the assessment manager for the development application; and

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<sup>8</sup> Ibid, p 23.

<sup>9</sup> Exhibit 004.019, p 7, para 18.

<sup>10</sup> Exhibit 004.013, pp 50-51, para 165.

<sup>11</sup> T6-36, ll 25-46.

<sup>12</sup> Exhibit 004.019, p 7, para 3.1; Exhibit 007.002.

<sup>13</sup> *Planning and Environment Court Act 2016* (Qld) (“PECA”), s 43.

<sup>14</sup> Ibid, s 45(1)(a).

- (b) the reference in subsection (8) of that section to when the assessment manager decides the application were a reference to when the P&E Court makes the decision.”

[11] As the proposed development was impact assessable, s 45 of the *Planning Act 2016* (Qld) (“PA”) provides that the assessment must be carried out against the relevant assessment benchmarks in a categorising instrument which, in the circumstances before me, are the relevant provisions of the planning scheme.<sup>15</sup> It must also be carried out having regard to any matters prescribed by regulation.<sup>16</sup> In this regard, s 31 of the *Planning Regulation 2017* (Qld) (“PR”) states that the assessment must be carried out having regard to a number of matters to the extent the decision-maker considers them relevant, including the common material,<sup>17</sup> which is defined in Schedule 24 to include any properly made submissions about the application. Furthermore, pursuant to s 31 of the PR, impact assessment must be carried out having regard to the relevant parts of the State Planning Policy (“SPP”) to the extent it is not identified in the planning scheme as being appropriately integrated in the planning scheme.<sup>18</sup> In this regard, s 2.1 of the planning scheme identifies that aspects of the SPP relating to natural hazards have been reflected in the planning scheme.<sup>19</sup> Although no party submits that aspects relating to flooding are not appropriately integrated in the planning scheme, I have been provided with three versions of the SPP, dated December 2013, April 2016 and July 2017.<sup>20</sup> In my view, the broad obligations to mitigate the risks to people and property of a flood are appropriately reflected in provisions of the Flood hazard overlay code in the planning scheme which I will consider in due course.

[12] Significantly, as the development application was impact assessable, in the determination of the appeal, the assessment undertaken by me may be carried out having regard to any other relevant matter, other than a person’s personal circumstances, financial or otherwise.<sup>21</sup> In determining the appeal, a wide discretion is conferred upon the Court pursuant ss 60 and 61 of the PA. So far as the reconfiguration of a lot component of the development application is concerned, the

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<sup>15</sup> *Planning Act 2016* (Qld) (“PA”), s 45(5)(a)(i).

<sup>16</sup> *Ibid*, s 45(5)(a)(ii).

<sup>17</sup> *Planning Regulation 2017* (Qld) (“PR”), s 31(1)(g).

<sup>18</sup> *Ibid*, s 31(1)(d)(ii).

<sup>19</sup> Exhibit 003.001, p 30.

<sup>20</sup> Exhibits 006.002, 006.003 and 006.004.

<sup>21</sup> PA, s 45(5)(b).

Court, after carrying out the assessment, must decide to either approve all or part of the application or approve all or part of it, but impose development conditions on the approval, or refuse the application.<sup>22</sup> So far as the part of the development application that is a variation request is concerned, s 61 relevantly provides:

- “(2) When assessing the variation request, the assessment manager must consider—
- (a) the result of the assessment of that part of the development application that is not the variation request; and
  - (b) the consistency of the variations sought with the rest of the local planning instrument that is sought to be varied; and
  - (c) the effect the variations would have on submission rights for later development applications, particularly considering the amount and detail of information included in, attached to, or given with the application and available to submitters; and
  - (d) any other matter prescribed by regulation.
- (3) The assessment manager must decide—
- (a) to approve—
    - (i) all or some of the variations sought; or
    - (ii) different variations from those sought; or
  - (b) to refuse the variations sought.”

[13] In undertaking this task, the observations of Mullins JA in *Abeleda & Anor v Brisbane City Council & Anor*, although in the context of the application of s 60 alone, are nonetheless equally instructive when considering the task of the decision-maker pursuant to both ss 60 and 61 of the PA:

“[42] ...The decision-maker under s 60(3) of the Act is still required to carry out the impact assessment against the assessment benchmarks in the relevant planning scheme and can take into account any other relevant matter under s 45(5)(b). The starting point must generally be that compliance with the planning scheme is accorded the weight that is appropriate in the particular circumstances by virtue of it being the reflection of the public interest (and the extent of any non-compliance is also weighted according to the circumstances), in order to be considered and balanced by the decision-maker with any other relevant factors.

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<sup>22</sup> PA, s 60(3).

[43] In view of the fact that s 60(3) of the Act reflects a deliberate departure on the part of the Legislature from the two part test under s 326(1)(b) of the SPA, it is no longer appropriate to refer in terms of one aspect of the public interest “overriding” another aspect of the public interest before a development application that is non-compliant with the assessment benchmarks can be approved. The decision-maker may be balancing a number of factors to which consideration is permitted under s 45(5) of the Act in making the decision under s 60(3) of the Act where the factors in favour of approval (or approval subject to development conditions) have to be balanced with the factors in favour of refusal of the application. The weight given to each of the factors is a matter for the decision-maker in the circumstances, particularly having regard to the purpose of the decision in the context of the Act and the obligation imposed on the decision-maker under s 5(1) of the Act to undertake the decision-making in a way that advances the purpose of the Act: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41.”<sup>23</sup>

[14] The purpose of the Act is stated to be to establish:

“...An efficient, effective, transparent, integrated, coordinated, and accountable system of land use planning ..., development assessment and related matters that facilitate the achievement of ecological sustainability”.<sup>24</sup>

[15] The term “ecological sustainability” is defined as a balance that integrates, among other things, “the protection of ecological processes and natural systems at local, regional, State and wider levels”.<sup>25</sup>

[16] Mullins JA further observed in *Wilhelm v Logan City Council & Ors*:

“[77] ...The change in the decision-making regime has not affected the fundamental nature of a planning scheme as the reflection of the public interest in the appropriate development of land.”<sup>26</sup>

[17] The applicable principles for the construction of planning documents were considered by the Court of Appeal in *Zappala Family Co Pty Ltd v Brisbane City Council*, notably that the same principles which apply to statutory construction apply to the construction of planning documents,<sup>27</sup> and that such documents need to be read as a

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<sup>23</sup> [2020] QCA 257.

<sup>24</sup> PA, s 3(1).

<sup>25</sup> Ibid, s 3(2)(a).

<sup>26</sup> [2020] QCA 273.

<sup>27</sup> [2014] QCA 147 at [52].



whole, in a way which is practical and “as intending to achieve a balance between outcomes.”<sup>28</sup>

[18] While I must assess the proposed development against or having regard of the planning scheme in effect when the development application was properly made, I may give the weight I consider appropriate to subsequent amendments.<sup>29</sup> The parties before me have all agreed that version 17 of the planning scheme contains the appropriate assessment benchmarks and the appeal has been conducted on this basis. Numerous provisions of the planning scheme have been identified for my consideration, many of which merely restate in lower order provisions, assessment benchmarks further up in the hierarchy. The statement of Bowskill CJ in *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* that the decision-maker is not required to expressly make a finding about every assessment benchmark that might be referred to in the course of an appeal is instructive.<sup>30</sup> The observation of the Court of Appeal in this regard is entirely consistent with s 31(2) of the PR and the identification of the disputed issues in the appeal at the commencement of the hearing pursuant to s 25(c) of Practice Direction 2 of 2020. Essentially, the Court only considers matters to the extent that they are relevant to the determination of the dispute before it.

[19] The hierarchy of provisions within the planning scheme is addressed in s 1.5. Essentially, the strategic framework prevails over all other components to the extent of any inconsistency for assessable development requiring impact assessment. Thereafter, overlays prevail over all other components, local plan codes prevail over zone codes and zone codes prevail over use codes and other development codes.<sup>31</sup> Section 5.3.3 sets out the rules which apply in determining requirements for assessment benchmarks for assessable development.<sup>32</sup> Assessable development requiring impact assessment is to have regard to the whole of the planning scheme to the extent relevant and assessable development requiring code assessment that complies with the purpose and overall outcomes of the code complies with the code. Further, code assessable development that complies with the performance outcomes

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<sup>28</sup> Ibid, at [56].

<sup>29</sup> PA, s 45(7) and (8).

<sup>30</sup> [2022] QCA 168 at [16].

<sup>31</sup> Exhibit 003.001, p 27.

<sup>32</sup> Ibid, p 99.

or acceptable outcomes of the code complies with the purpose and overall outcomes of the code.<sup>33</sup>

- [20] I will deal with the individual assessment benchmarks relevant to each of the identified issues in dispute when addressing the particular issue in dispute.

**The issues in dispute**

- [21] At the commencement of the hearing of the appeal, the parties tendered an agreed list of issues in dispute. This was subsequently amended as the issues narrowed in the course of the hearing.<sup>34</sup>

- [22] Broadly, the issues in dispute can be summarised as follows:

1. Ecology:
  - (a) the adequacy of the proposed buffers to environmentally significant areas including the central wetland and linkages for fauna;
  - (b) the adequacy and practicality of measures proposed to protect the ecology of the central wetland, Maroochy River and Maroochy Conservation Park from unacceptable impacts caused by changes to surface water quality and saline intrusions; and
  - (c) whether the proposed lake system and pipe outlet into the Maroochy River will cause unacceptable ecological impacts.
2. Water quality:
 

whether the proposed lake will cause unacceptable on-site and off-site water quality impacts.
3. Flood emergency management:
 

whether the proposed Flood Emergency Management Plan adequately mitigates risks to the safety of people from flooding.
4. Residential character:
 

whether the proposed residential development is reflective of, consistent with, sympathetic to, or in keeping with the scale, intensity and configuration of the established and prevailing low density residential character of the adjoining Twin Waters residential community.

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<sup>33</sup> Ibid p 99.

<sup>34</sup> Exhibit 008.015.

5. Settler's Park:
  - (a) whether there will be unacceptable impacts for Settler's Park as a recreation park, cultural heritage site and/or gateway entry feature; and
  - (b) whether the proposed development acceptably provides for the protection and enhancement of Settler's Park.
6. Community expectations:
 

whether the expectations of the community reflected in the level and content of adverse submissions, favour refusal of the proposed development, to the extent that a submission relates to an issue in dispute in the appeal.
7. Relevant matters:
 

whether the proposed development ought to be approved having regard to numerous relevant matters nominated by the appellant.

## **Ecology**

- [23] Unsurprisingly, the planning scheme gives effect to the purpose of the Act which seeks, amongst other things, to achieve ecological sustainability, as noted above.<sup>35</sup> This is firstly reflected in the following provisions of the strategic framework:

### **“3.7.1 Strategic outcomes**

The strategic outcomes for the natural environment theme are the following: -

...

- (f) The natural environment is protected and enhanced in a way that maintains and improves biodiversity, ecological processes, habitat and habitat connectivity, landscape character and amenity, economic and community wellbeing, resilience and capacity to evolve and adapt to the predicted impacts of climate change.

...

The elements and specific outcomes for the natural environment theme are the following: -

### **3.7.2 Element 1- Natural habitats and biodiversity**

#### **3.7.2.1 Specific outcomes**

- (a) Development is located, designed, constructed and operated to avoid, as far as practicable, or where avoidance is not practicable, minimise and mitigate, adverse impacts on the

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<sup>35</sup> PA, s 3(1) and (2).

*ecologically important areas* identified conceptually on **Strategic Framework Map SFM 5 (Natural environment elements)** which include remnant and regrowth native vegetation, riparian areas and natural *waterways*, *wetlands* and waterbodies.

...

- (d) Ecological *buffers*, fauna fencing, supplementary planting to prevent edge effects and other measures as appropriate are provided to mitigate adverse impacts from development on land adjacent to an *ecologically important area*.
- (e) The network of ecological linkages identified conceptually on **Strategic Framework Map SFM 5 (Natural environment elements)** is established and maintained by undertaking ecological rehabilitation works in degraded areas (including where as part of a biodiversity offset arrangement), and ensuring unimpeded fauna movement.

...

#### 3.7.4.1 Specific outcomes

- (a) Natural *waterways* and *wetlands* are maintained predominantly in their natural state with development providing for rehabilitation and enhancement to improve their ecological functioning and water quality.
- ...
- (c) Where adjoining a natural *waterway* or *wetland*, development provides for ecological *buffers* and other measures to protect and improve ecological functioning and water quality.
  - (d) The quality of ground and surface water is protected and enhanced in a manner that ensures its long-term environmental values and sustainability.
  - (e) The health of *waterways* and *wetlands* on the Sunshine Coast is protected and enhanced by applying *best practice* standards to the quality and quantity of groundwater, surface water and wastewater discharge.
  - (f) Constructed water bodies are not created except where maintained as private assets and used for other than water treatment purposes.”<sup>36</sup>

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<sup>36</sup> Exhibit 003.001, pp 77-79.

[24] Thereafter, the central wetland and the linkage to the adjoining Maroochy River Conservation Area together are mapped pursuant to the strategic framework as Core Habitat Areas.<sup>37</sup>

[25] As noted above, the site is subject to the Biodiversity, waterways and wetlands overlay. In the Biodiversity, waterways and wetlands overlay code, s 8.2.3.2 states that the purpose and overall outcomes relevantly include:

**“8.2.3.2 Purpose and overall outcomes**

(1) The purpose of the Biodiversity, waterways and wetlands overlay code is to ensure that: -

(a) *ecologically important areas* are protected, rehabilitated and enhanced; and

(b) ecological connectivity is improved.

(2) The purpose of the Biodiversity, waterways and wetlands overlay code will be achieved through the following overall outcomes: -

(a) development protects and enhances *ecologically important areas* and ecological connectivity;

(b) development protects and establishes appropriate *buffers* to waterways, *wetlands*, native *vegetation* and significant fauna habitat;

...

(d) development is located, designed and managed to avoid or minimise adverse direct or indirect impacts on ecological systems and processes;”<sup>38</sup>

[26] The term “Ecologically important area” is broadly defined in Sch 1 of the planning scheme to include “a natural *waterway* or *wetland*” or “an area of remnant or non-remnant native *vegetation* identified on a Biodiversity, Waterways and Wetlands Overlay Map”.<sup>39</sup> It is uncontentious that the central wetland comes within the broad definition of “Wetland” in the planning scheme.<sup>40</sup> The central wetland, its associated linkages and the adjoining Maroochy River Conservation Area are identified as Native Vegetation Area on Overlay Map (i),<sup>41</sup> and as Wetlands on Overlay Map (ii).<sup>42</sup>

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<sup>37</sup> Ibid, p 81.

<sup>38</sup> Ibid, p 211.

<sup>39</sup> Ibid, p 347.

<sup>40</sup> Ibid, p 358.

<sup>41</sup> Ibid, p 559.

<sup>42</sup> Ibid, p 561.

On the latter map they are surrounded by a significant Riparian Protection Area, extending considerably into the site. Thereafter, the following performance outcomes and acceptable outcomes for assessable development in Table 8.2.3.3.2 are identified as relevant assessment benchmarks:

<b>“PO1</b>	<p>Development protects the physical and ecological integrity and biodiversity of <i>ecologically important areas</i> through protection and retention of: -</p> <p>(a) existing terrestrial habitat areas; and</p> <p>(b) existing riparian, <i>waterway</i> and <i>wetland</i> habitat areas.</p>		
<b>PO2</b>	<p>Development on or adjacent to land containing an <i>ecologically important area</i> is designed and constructed to: -</p> <p>(a) prevent any direct or indirect impacts on the <i>ecologically important area</i>;</p> <p>(b) enhance and restore the <i>ecologically important area</i>;</p> <p>(c) retain, enhance and restore known populations and supporting habitat of significant flora and fauna species; and</p> <p>(d) minimise the impacts of construction and ongoing use on native fauna.</p>	<b>AO2.1</b>	<p>Any building, structure or works is set back from a native <i>vegetation</i> area identified on a Biodiversity, Waterways and Wetlands Overlay Map, a minimum of:-</p> <p>(a) 50 metres where the native <i>vegetation</i> area forms part of the <i>protected estate</i> (e.g. National Park or Conservation Park) or is <i>Council Environmental Reserve</i>; ...</p> <p>Note- a greater setback distance may be required where the native <i>vegetation</i> area is also identified as a <i>waterway</i> or <i>wetland</i> on a Biodiversity,</p>

			Waterways and Wetlands Overlay Map.
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...

<b>PO7</b>	Ecological linkages are protected and enhanced and have dimensions and characteristics that: - <ul style="list-style-type: none"> <li>(a) effectively link <i>ecologically important areas</i> on and/or adjacent to the <i>site</i>; and</li> <li>(b) facilitate unimpeded, safe and effective movement of terrestrial and aquatic fauna traversing the corridor or accessing and/or using the <i>site</i> as habitat.</li> </ul>		
<b>PO8</b>	Development provides for <i>ecologically important areas</i> to be restored and enhanced so as to contribute towards a functional and connected network of viable habitat areas.		
<b>PO9</b>	Development provides and maintains adequate vegetated <i>buffers</i> and setbacks to protect and enhance the environmental values and integrity of natural <i>waterways</i> and <i>wetlands</i> , having particular regard to: - <ul style="list-style-type: none"> <li>(a) fauna habitats;</li> <li>(b) wildlife corridors and connectivity;</li> <li>(c) adjacent land use impacts;</li> </ul>		
	...		
<b>PO10</b>	Development on land adjacent to a <i>waterway</i> or <i>wetland</i> maintains an appropriate extent of public access to <i>waterways</i> and <i>wetlands</i> and minimises edge effects.	<b>AO10</b>	Development adjacent to a <i>waterway</i> or <i>wetland</i> provided that: - <ul style="list-style-type: none"> <li>(a) no new lots directly back onto the riparian area; and</li> <li>(b) new public roads are located between the riparian <i>buffer</i> and the proposed</li> </ul>

			development areas.” <sup>43</sup>
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[27] As noted above, the site is within the Maroochy North Shore local plan area and is therefore subject to the Maroochy North Shore local plan code. In s 7.2.18.3(2)(o), the following overall outcome appears:

“Land included in the Emerging community zone (Twin Waters West) is master planned and developed in a coordinated manner that: -

- (i) protects and enhances significant environmental and riparian areas, including *ecologically important areas*;<sup>44</sup>

[28] Thereafter in Table 7.2.18.4.1, which lists performance outcomes and acceptable outcomes for assessable development, PO6 states that “Development on land with a frontage to the Maroochy River facilitates the provision of a local ecological linkage as identified on **Figure 7.2.18A...**”<sup>45</sup> This figure shows the central wetland, its associated linkages and the Maroochy River Conservation Area as designated “Conservation and Rehabilitation Area”.<sup>46</sup> Subsequently, there are performance outcomes which contemplate a saltwater lake being constructed on the site, including PO26 which states:

“Development in the Emerging community zone provides for an extension of the exiting Twin Waters waterway system and the establishment and the management of channels and waterbodies in a manner that: -

...

- (c) protects *ecologically important areas* and other significant environmental areas.”<sup>47</sup>

Subsequently PO35 states:

“Development in the Emerging community zone provides for:

- (a) the protection, buffering, connection and rehabilitation of *ecologically important areas* (including the Maroochy River and the Maroochy River Conservation Area) and the Conservation and

<sup>43</sup> Ibid, pp 214-218.

<sup>44</sup> Ibid, p 189.

<sup>45</sup> Ibid, p 191.

<sup>46</sup> Ibid, p 199.

<sup>47</sup> Ibid, p 195.



rehabilitation areas identified on **Figure 7.2.18A...**<sup>48</sup>

- [29] For the sake of completeness, there are also relevant assessment benchmarks identified in the Reconfiguring a lot code. Section 9.4.4.2(2)(c)(iii) seeks to avoid adverse impacts on, *inter alia*, “wetlands and other *ecologically important areas* present on, or adjoining the *site*,”<sup>49</sup> and in Table 9.4.4.3.1, PO2 again seeks both the protection and enhancement of “*ecologically important areas*”.<sup>50</sup>
- [30] There are also similar provisions in the Vegetation management code which did not assume any particular significance in the hearing of the appeal.
- [31] A number of ecologists gave evidence in the course of the appeal. Mr Caneris gave evidence on behalf of the appellant in respect of terrestrial fauna. Dr Daniel gave evidence on behalf of the appellant in respect of terrestrial and freshwater flora. Dr Thorogood gave evidence on behalf of the appellant in respect of marine flora and fauna and freshwater fauna. Ms Thorburn gave evidence on behalf of the respondent in respect of marine and freshwater flora and fauna, and Mr Agnew gave evidence on behalf of the respondent in respect of terrestrial fauna. Mr Donald gave limited evidence on behalf the co-respondents, principally concerning the habitat of the water mouse.
- [32] In their second joint-expert report, it was stated that they agreed:

“... that the freshwater wetland on the site (the central wetland) and the freshwater wetlands in the Maroochy River Conservation Area were high ecological significance (HES) wetlands and Matters of State Environmental Significance (MSES) and Local Environmental Significance (MLES). Two days after the completion of JER1 on 6 December 2021, the ‘Coastal Swamp Sclerophyll Forest of New South Wales and South East Queensland’ ecological community was listed as an Endangered threatened ecological community (TEC) under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).”<sup>51</sup>

- [33] Subsequently, it was stated that patches within the central wetland “meet the key diagnostic characteristics of the TEC, and... [as] such, the central wetland contains

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<sup>48</sup> Ibid, p 198.

<sup>49</sup> Ibid, p 264.

<sup>50</sup> Ibid..

<sup>51</sup> Exhibit 004.024, p 10, para 18.

patches of vegetation that are MNES”, which I interpolate means Matters of National Ecological Significance.<sup>52</sup>

[34] I am satisfied that the mapping of the central wetland and the other environmentally significant areas is justified. I accept the evidence of Mr Agnew that there are “at least 160 native vertebrate fauna species which are either known to occur or could utilise the central wetland habitats”.<sup>53</sup> I also note that investigations carried out by Mr Caneris and Dr Daniel, while disclosing a small band of regrowth at certain points, confirms the environmental significance of the central wetland and the accuracy of its mapping in the planning scheme.<sup>54</sup> The mapping they have undertaken also demonstrates that the development footprint extends into the Conservation and Rehabilitation Area mapped pursuant to the Maroochy North Shore local plan.<sup>55</sup>

[35] While the planning scheme contemplates a constructed waterbody in the form of an extension to the existing Twin Waters waterway,<sup>56</sup> the size of the saltwater lake and its proximity to the central wetland is entirely the consequence of the design the appellant has chosen to adopt. The lake is to be located extremely close to the northwest corner of the central wetland. From his perspective, Dr Daniel expressed the view that the buffer to the central wetland needed to be somewhere between one and five metres and that was all that was required.<sup>57</sup> In circumstances where Dr Daniel had previously acknowledged that it was paramount that the central wetland be protected, I found his evidence in this regard surprising to say the least.<sup>58</sup>

[36] Mr Caneris acknowledged the relevance of buffers in providing a corridor for fauna movement, a habitat along the outer edges of the ecologically important area, and in protecting the central wetland from edge effects.<sup>59</sup> He conceded that his evidence was premised on making the buffers work within the Plan of Development proposed.<sup>60</sup> This is consistent with what he said in the second joint report:

“...The reduced buffers on the western edge are a result of design constraints and primarily based on design requirements

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<sup>52</sup> Ibid, para 20.

<sup>53</sup> Exhibit 004.024, p 21, para 59.

<sup>54</sup> Ibid, p 8, para 12 and Plan 1, p 56.

<sup>55</sup> Ibid; Exhibit 003.001, p 199.

<sup>56</sup> Exhibit 003.001, pp 195-196, Maroochy North Shore local plan code, PO 26, 27 and 28.

<sup>57</sup> T9-59, ll 30-45.

<sup>58</sup> T9-52, l 25 - T9-53, l 6.

<sup>59</sup> T9-83, ll 35-45.

<sup>60</sup> T9-86, ll 30-40.

associated with the lake width (to achieve the required water conveyance) and road width for a collector roadway”.<sup>61</sup>

- [37] The proposed buffer to the central wetland reduces to as little as six meters in the north-western interface with the saltwater lake. Mr Caneris acknowledged that he was previously engaged as a consultant on behalf of the appellant.<sup>62</sup> I found his approach flawed as he sought to justify what the appellant had designed rather than assess what was appropriate from an ecological perspective. The absence of him holding any tertiary qualifications when giving evidence about matters of a scientific nature concerning the intended relationship between fauna and the physical environment was also a factor which concerned me in terms of the evidence he gave. I did not find his evidence at all convincing so far as it related to the adequacy of the buffers proposed. I preferred the evidence of Mr Agnew and Ms Thorburn. They comprehensively analysed the functions that the buffers contemplated for the site are proposed to perform.<sup>63</sup> They were of the opinion that the buffers were insufficient.<sup>64</sup> Mr Agnew stated in the second joint report:

“The proposed setbacks, of as little as 6m in width, do not minimise exposure of fauna and fauna habitat to negative edge effects introduced by an extended construction phase or by a highly urbanised environment.”<sup>65</sup>

- [38] Even Dr Thorogood conceded that the buffering between the central wetland and the adjacent Medium density residential zone which was proposed by the appellant was “a suboptimal outcome” and “not the outcome that I would recommend”.<sup>66</sup>
- [39] Not only does the proposed development fail to comply with PO35 of the Maroochy North Shore local plan code but it completely ignores the requirement running through the planning scheme to both protect and enhance the central wetland, including adjacent fauna linkages and habitat. In this regard, there was an absence of any serious attempt on the part of the witnesses called by the appellant to demonstrate how the proposed buffers would also enhance the health of the central wetland from an ecological perspective. Dr Daniel conceded his approach had been focused on

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<sup>61</sup> Exhibit 004.024, pp 22-23.

<sup>62</sup> T9-77, ll 20-35.

<sup>63</sup> Exhibit 004.024, p 15-16, para 41. “Buffer” is a defined term in Table SC 1.2.2 of the planning scheme (Exhibit 003.001, p 345) but is defined so broadly as to not offer any site specific guidance.

<sup>64</sup> Ibid, pp 51-52, paras 236 and 239.

<sup>65</sup> Ibid, p 24, para 74.

<sup>66</sup> T10-17, ll 20-25.

merely protecting the flora and biodiversity values of the central wetland.<sup>67</sup> I found the glib statement of Dr Daniel in his individual report that a weed management plan conducted at the margins of the central wetland, conditioned as part of a development approval, would result in an enhancement of the ecologically important areas, unconvincing.<sup>68</sup> Equally I found his assertion in cross-examination that if you protect the central wetland, you are enhancing it, to be disappointing and unhelpful.<sup>69</sup>

[40] The buffers proposed by the appellant simply do not comply with what is contemplated by the planning scheme in respect of the ecologically important areas on and adjoining the site and in particular with the Conservation and Rehabilitation Area shown in Figure 7.2.18A of the Maroochy North Shore local plan.<sup>70</sup> There is no justification for this non-compliance.

[41] However, the biggest threat to the central wetland arises as a consequence of saline groundwater leaching into the freshwater wetland from the proposed lake.<sup>71</sup> This issue arises in circumstances where natural groundwater flow is in a south-easterly direction across the site and a proposed lake is likely to cause an interception of the freshwater groundwater flowing from the west toward the central wetland.<sup>72</sup> Ultimately, the appellant proposes a system of bio-retention basins and infiltration basins “for water quality and aquifer hydration purposes”.<sup>73</sup> The concept was only finalised in the individual report of Dr Johnson, an engineer engaged by the appellant. Utilising a groundwater model developed by a specialist engineer, Dr Merrick, who also gave evidence on the behalf of the appellant, Dr Johnson proposed a total basin area of four thousand square metres with two thirds of it to be placed in the buffer around the central wetland.<sup>74</sup> This concept was shown in a plan prepared by Dr Merrick and it broadly indicates recharge trenches lining all of the edges of the central wetland where they are proximate to the constructed saltwater lake. A line of recharge trenches is also indicated at the interface of the site and the Maroochy River Conservation Park.<sup>75</sup> Essentially, it is proposed that rainwater will be harvested from

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<sup>67</sup> T9-41, ll 40-47.

<sup>68</sup> Exhibit 005.019, p 26, para 95.

<sup>69</sup> T9-49, ll 40-46.

<sup>70</sup> Exhibit 003.001, p 569.

<sup>71</sup> Exhibit 004.017, p 20, para 4.4.1.

<sup>72</sup> Ibid, p 17, para 4.2.1.

<sup>73</sup> Exhibit 005.022, p 14.

<sup>74</sup> Ibid

<sup>75</sup> Ibid, p 15.

the developed parts of the site to recharge the central wetland in circumstances where the flow of groundwater will be interrupted by the lake. It will also purportedly provide a freshwater curtain to protect the central wetland from groundwater salinity emanating from the adjacent constructed lake.

- [42] This purported theoretical engineering solution, which is intended to save the central wetland from destruction, relies on the groundwater model developed by Dr Merrick.<sup>76</sup> Curiously however, the model only focuses upon a 10-year period from 2006 to 2015 in terms of rainfall statistics.<sup>77</sup> Increases in rainfall of 10 percent on the historical values are then factored in to account for climate change. No allowance is made for climate change leading to drier than average periods as well as wetter than average periods.<sup>78</sup> Dr Merrick however candidly conceded that if there are two dry years in a row “the curtain would be pulled down in those dry times.”<sup>79</sup> While he boldly stated that “even a couple of dry years will not allow the saltwater from the lake to progress very far”,<sup>80</sup> he ultimately conceded in cross-examination from Ms McCarthy, one of the co-respondents, that he had not modelled the salinity effects of two or three dry years in a row.<sup>81</sup> Thereafter, Dr Merrick purported to justify his modelling based on the 10 year period referred to above as it was “the most normal, that is, percentile 50, in 120 years of [records]”.<sup>82</sup>
- [43] Given the uncertainties in terms of weather events currently being experienced as a consequence of climate change, the utilisation of the most normal period of the past 120 years of data is a questionable benchmark. Furthermore, in circumstances where only increases in rainfall, but not periods of drought have been taken into account, I am not persuaded that the model is sufficiently rigorous or accurate to provide a sound basis for a hypothetical engineering solution to both recharge the central wetland with freshwater, and protect it from the deadly intrusion of groundwater salinity.
- [44] There is, furthermore, a lack of anything resembling a design demonstrating with any precision where the bioretention basins and infiltration basins proposed by Dr

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<sup>76</sup> Exhibit 007.035.

<sup>77</sup> Ibid, p 10, Table 1.

<sup>78</sup> Ibid, p 11.

<sup>79</sup> T8-30, ll 20-30.

<sup>80</sup> Ibid, ll 30-35.

<sup>81</sup> T8-42, ll 19-21.

<sup>82</sup> T8-43, ll 1-3.

Johnson are to be located. This assumes considerable significance as they are all indicatively shown as being within the edge of the central wetland or the Maroochy River Conservation Park and the proposed development footprint. As already discussed, this area is intended to be a buffer to these ecologically important areas identified in the planning scheme. The locations broadly intended for this infrastructure include where the buffer will be at its narrowest.

[45] The appellant submits that it has demonstrated that such a system to protect the central wetland “is capable of being designed”.<sup>83</sup> It is submitted that the question of whether this complies with the planning scheme can be deferred for consideration in a subsequent development application for operational works.<sup>84</sup> It is further submitted that the threshold for demonstrating that the theoretical concept appropriately complies with the planning scheme in the context of this appeal requires the appellant to show that the theoretical concept is not a futility,<sup>85</sup> and therefore it is sufficient for only the elements of the design to be identified at this stage.<sup>86</sup> I reject these submissions. Although the appellant is relevantly only seeking a preliminary approval at this point, such an approval will result in the approval of the Twin Waters West Plan of Development,<sup>87</sup> which sets the footprint for the proposed development, including the location of the constructed saltwater lake, the various zones for development and the buffers which are proposed pursuant to the open space plan.<sup>88</sup> I find the purported theoretical engineering solution most unconvincing.

[46] The Plan of Development creates the threat to the central wetland. As noted above, the effective buffering of it and the other environmentally significant areas on and adjoining the site are important considerations and called up by assessment benchmarks which are consistently expressed at numerous levels of the planning scheme. The protection of the central wetland is something which is very much in issue in the appeal, and it is not appropriate to grant a preliminary approval for a development footprint in circumstances where I find that the appellant has not

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<sup>83</sup> T11-53, ll 1-5.

<sup>84</sup> Ibid, ll 8-11.

<sup>85</sup> T11-65, ll 14-17.

<sup>86</sup> T11-75, ll 24-32.

<sup>87</sup> Exhibit 007.001.

<sup>88</sup> Ibid, p 26.

discharged the onus of demonstrating compliance with the relevant assessment benchmarks of the planning scheme in this regard.<sup>89</sup>

[47] The failure of the appellant to discharge the onus of demonstrating that the areas of high ecological significance on the site, including the central wetland, will be protected and enhanced is such that the appeal should be dismissed on this basis alone.

[48] Finally, I need to consider whether the proposed constructed pipe outlet to the Maroochy River will cause unacceptable impacts on a particular threatened species, the water mouse. I am satisfied that a detailed investigation of water mouse habitat in the vicinity of the site,<sup>90</sup> and the limited interference with its habitat which will be occasioned by the construction and presence of the pipe outlet, are such that there will not be unacceptable impacts upon this species.

### **Water quality**

[49] This issue is expressed in the following terms:

“Whether the proposed extension of the existing Twin Waters waterway system will cause unacceptable on-site and off-site water quality impacts (in particular impacts on the downstream receiving environment including existing tidal wetlands and the Maroochy River) because of design, water depth and on-going maintenance”.<sup>91</sup>

[50] Originally it was intended that the constructed freshwater lake would become a council asset at the conclusion of its on-maintenance period after approximately 13 years.<sup>92</sup> Maintenance of the lake is now proposed to be funded through a sinking fund in circumstances where it will remain in private ownership. There was considerable evidence given at the hearing of the appeal concerning the adequacy of the amounts proposed to be set aside to ensure the ongoing maintenance of the lake. I am satisfied that these are matters for conditions and not matters which justify refusal of the proposed development.

[51] I accept evidence before me that other similarly designed saline lake systems have been handed over to the respondent in the past.<sup>93</sup> I note the agreement of the

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<sup>89</sup> For an example of such a circumstance see *Barro Group Pty Ltd v Sunshine Coast Regional Council* [2022] QPELR 235 at 249.

<sup>90</sup> Exhibit 004.024, p 143.

<sup>91</sup> Exhibit 008.015, p 2, para 3.

<sup>92</sup> T6-7, ll 4-16.

<sup>93</sup> Exhibit 004.030, p 22, para 58.

ecologists that there will be no unacceptable impacts to the Maroochy River and associated tidal wetlands from the quality of water discharged from the proposed lake.<sup>94</sup> I also accept the evidence of Mr Walker, an engineer who gave evidence on behalf of the appellant, that the design of the proposed lake involving an intake pump and a remote sensing system will ensure appropriate water quality outcomes.<sup>95</sup> In summary, on the evidence before me, the only water quality impacts which justify refusal of the proposed development are those on the central wetland discussed above.

### **Flood emergency management**

- [52] This issue relates to whether the proposed Flood Emergency Management Plan adequately mitigates risks to the safety of people from flooding. As a starting point, it is important to acknowledge that pursuant to the strategic framework there are a number of strategic outcomes in s 3.10.1 of the planning scheme which seek to avoid the risks posed by flooding.<sup>96</sup> However, the site is zoned future urban and therefore designated pursuant to the planning scheme for residential development. It is uncontentious that the proposed development adequately meets the design requirement that is set out in PO3 of the Flood hazard overlay code because the risk of damage to property on the site is avoided or minimised as far as practicable. This is because it has been designed up to and including the defined flood event. Safety of people is subject to a higher standard, however. PO4 which immediately follows states:

“Development does not compromise the safety of people resulting from the residual flood or storm tide inundation risk associated with events including the *DFE* or *DSTE*, up to and including the *probable maximum flood (PMF)* or *probable maximum storm tide (PMST)*.”<sup>97</sup>

- [53] It is the PMF which is relevant to the consideration of this issue. I accept the evidence of Dr Johnson that the PMF statistically occurs every 1,000,000 to 10,000,000 years.<sup>98</sup> It is truly a biblical flood event. The appellant proposes a combination of an early warning system to enable people to leave the site before the surrounding road network is cut, combined with the opportunity to shelter on-site in circumstances

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<sup>94</sup> Exhibit 004.024, p 52, para 4.1.

<sup>95</sup> Exhibit 005.021, p 5, para 29.

<sup>96</sup> Exhibit 003.001, p 93.

<sup>97</sup> Ibid, p 226.

<sup>98</sup> T6-99, ll 30-40.



where the community centre and certain other areas will remain above the level of the PMF. The proposed development is designed such that people can progressively walk to higher ground and as Mr Collins, the engineer who gave evidence on behalf of the respondent concedes, no one is going to drown even in a PMF scenario.<sup>99</sup> He concedes an appropriate emergency response can be the subject of conditions.<sup>100</sup> In the circumstances this is not ground for refusal.

### **Residential character**

[54] This issue is identified in the following terms:

“Whether the proposed residential development (both the residential subdivision and the two medium density residential sites) is unacceptable on the land because it does not reflect, and is not consistent with, sympathetic to, or in keeping with, the scale, intensity and configuration of the established and prevailing low-density residential character of the adjoining Twin Waters residential community”.<sup>101</sup>

[55] Specifically, this issue arises as a consequence of assessment benchmarks set out in the Maroochy North Shore local plan code. Firstly, in s 7.2.18.3 overall outcome (2)(p) states:

“Development in the Emerging community zone (Twin Waters West) is integrated with the existing Twin Waters residential community and provides for the establishment of residential land uses that are sympathetic to, and in keeping with, the prevailing low density residential character of the area. Development incorporates large areas of public open space and focuses on connection to water as a key design and character element for the emerging residential community.”<sup>102</sup>

[56] Thereafter, in Table 7.2.18.4.1 the following performance outcomes and acceptable outcomes are most relevant:

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<sup>99</sup> T7-67, ll 30-35.

<sup>100</sup> T7-68, ll 5-15.

<sup>101</sup> Exhibit 008.015, p 1, para 2.

<sup>102</sup> Ibid, p 189.

“PO22	Development in the Emerging community zone provides for residential uses at a scale and intensity, and in a configuration that is consistent with and sympathetic to the established low density residential character of the adjoining Twin Waters residential community.	AO22	<p><i>In partial fulfilment of Performance Outcome PO22: -</i></p> <p>Development provides for: -</p> <p>(a) low density residential uses within the development to achieve: -</p> <p>(i) a minimum lot size of 500m<sup>2</sup>; and</p> <p>(ii) an average lot size of at least 700m<sup>2</sup>; and</p> <p>(b) limited Multi-unit residential uses which are focussed in discreet nodes with convenient access to public transport and active transport routes.</p>
PO23	<p>Development in the Emerging community zone maintains or improves the amenity of neighbouring premises having regard to: -</p> <p>...</p> <p>(c) building character and appearance; and</p> <p>(d) building massing and scale as seen from neighbouring premises.</p>	AO23	<p><i>In partial fulfilment of Performance Outcome PO23: -</i></p> <p>Development for Multi-Unit residential uses does not adjoin or overlook a residence in the existing Twin Waters residential community.”<sup>103</sup></p>

[57] In the Twin Waters West Plan of Development, the appellant seeks to vary building heights, dwelling design provisions and permitted residential densities.<sup>104</sup> First, an increase in height in the Medium density residential zone and Community facilities

<sup>103</sup> Ibid, p 195.

<sup>104</sup> Exhibit 007.001, p 10.

zone is sought to be made to 12 metres.<sup>105</sup> Thereafter, front, rear and side setbacks are sought to be reduced. The effect of these variations were summarised by the planner who gave evidence on behalf of the appellant, Mr Reynolds, as being the reduction of front setbacks for garages from six metres to 4.5 metres, the introduction of a new requirement for rear setbacks to be at least 1.5 metres at ground level and two metres at first storey level, the reduction of the side setback for the corner lots to two metres at ground level along the secondary frontage, and the change to the acceptable outcome of 4.5 metres for the ground storey and six metres for the first storey.<sup>106</sup>

[58] The variations contemplate greater code assessable development densities in the intended Low density residential zone and in the proposed Medium density residential zone than what the planning scheme contemplates. In respect of the former zone, AO22(a) is sought to be varied to provide for a minimum lot size of 400m<sup>2</sup>, to limit the proportion of lots less than 500m<sup>2</sup> to 12 percent of the total number of low density residential lots, with a maximum density of 12 lots per hectare delivered across the entire site.<sup>107</sup> In respect of the Medium density residential zone, AO22(b) is sought to be varied by permitting the medium density precincts to be developed at a maximum cumulative density of 40 dwellings per hectare.<sup>108</sup> A maximum yield for the MD1 zone is nominated at 111 dwellings and a maximum yield for the MD2 zone is nominated at 69 dwellings.<sup>109</sup> However, thereafter provision is made for dwelling yield to be transferred between the precincts providing the cumulative number of dwelling units does not exceed 180 dwelling units.<sup>110</sup> Furthermore, the maximum number of dwelling units within a precinct is not to exceed 50 dwelling units per hectare and the cumulative yield across both zones is not to exceed 40 dwelling units per hectare.<sup>111</sup>

[59] The appellant sought to rely upon the evidence of Dr McGowan, a visual amenity expert, who relied upon various photomontages to contend that any changes set out above will not be readily perceptible. Dr McGowan asserted that this was a

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<sup>105</sup> Ibid, p 17, para 6.1.

<sup>106</sup> Exhibit 004.027, p 13, para 36.

<sup>107</sup> Exhibit 007.001, p 18.

<sup>108</sup> Ibid, p 18.

<sup>109</sup> Ibid, p 19.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid, pp 18-19, para 8.1 and 8.2..

consequence of the overall feel of the development and the landscaping which is contemplated.<sup>112</sup> Under cross-examination, Dr McGowan conceded that a range of parameters of development are controlled by the assessment benchmarks sought to be varied: height, setbacks and building form, with all of these benchmarks affecting character.<sup>113</sup> Dr McGowan also conceded that the multiple dwelling areas in the proposed development are larger and accommodate a greater number of units.<sup>114</sup>

[60] Mr Reynolds also adopted a similar approach, going to great lengths to seek to demonstrate that character “is not a quantitative concept, but rather qualitative and conceptual”.<sup>115</sup> Significantly, Mr Reynolds conceded that there was no public benefit to the variations sought, rather it was “just about the developer getting a better yield from the site”.<sup>116</sup>

[61] Mr Adamson, the town planner who gave evidence on behalf of the respondent, conceded during cross-examination that his primary concern was not the proposed minimum lot size of 400m<sup>2</sup>, but the absence of an average lot size.<sup>117</sup> He also conceded that in Twin Waters East there is an average density of 11 dwellings per hectare whereas what is proposed by the appellant is 10.4 dwellings per hectare.<sup>118</sup> This may be so, however the metrics discussed below make it clear that what is proposed is very different from the more consistent spread of low density residential lots within Twin Waters East.<sup>119</sup> While there may be qualitative considerations that significantly influence the perception of residential density, quantitative measures of the type found in the planning scheme remain important, particularly the requirement for an average lot size. The appellant does not offer up any specific covenants to achieve qualitative outcomes in any event. There is also an opportunity to obtain greater density and height in both of the proposed Medium density residential zones compared to that which prevails in Twin Waters East.

[62] Overall, I accept the evidence of Mr Adamson as to the impacts on residential density of the proposed variations in the Twin Waters West Plan of Development so far as

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<sup>112</sup> Exhibit 005.016.  
<sup>113</sup> T3-41, ll 15-16.  
<sup>114</sup> T3-43, ll 40-43.  
<sup>115</sup> Exhibit 004.027, p 8, para 17.  
<sup>116</sup> T4-10, ll 30-33.  
<sup>117</sup> T4-52, ll 35-42.  
<sup>118</sup> T4-53, ll 15-30.  
<sup>119</sup> Exhibit 007.051.

they impact upon low density residential character, compared to that present in the adjoining Twin Waters residential community. He relevantly summarised his position, which took into account the metrics of the reconfiguration of a lot application for stages 1 and 2, in the following terms:

“71. In summary, primarily it is the difference in the scale and intensity of the development caused by a smaller average allotment size, that will have the greatest impact upon the character and amenity of TWW, which will not be sympathetic to, and consistent with the established low density residential character of TWE. This results in the majority of the allotments having a frontage width of less than 20m, which is evident on the proposal plans provided for Stages 1 & 2 (Stage 1 – 85% & Stage 2 – 74%). In comparison, a relatively large proportion of the allotments within TWE (about 71%...) have an area of 600m<sup>2</sup> or more and generally have a width of 20m or more... This combined with many of the allotments indicated on the building envelope plans...that can be built to the boundary and have a reduced setback to the alternative boundary in accordance with the Allotment Setbacks Table, will result in a more intensive residential form.

...

74. With respect to the proposed multi-unit nodes (MD1 and MD2), as discussed and referred to in JER1, in my opinion, these are not discrete nodes as intended under the local plan code (AO22(b)). In particular, MD1 will have a substantial number of units (111) and will be a relatively large scale and bulky development, with a building height transitioning from 8.5m to 12m in a prominent location. This development will be visible from the main collector road, viewed across Recreation Park 2 and will also be visible, at least in part, from the Sunshine Motorway.
75. While MD2 will also be a substantial development comprising 69 units to 12m in height, the location is not as prominent being bounded by open space area on three (3) sides, but also not considered a discrete node when considering the comparable multi-unit developments within TWE. In my opinion, the proposed multi-unit developments are not focused in discrete nodes and are also not consistent with, and sympathetic to, the established low density character of TWE.”<sup>120</sup>

[63] I therefore conclude that the variations sought above do not provide for residential uses at a scale, intensity and in a configuration that is consistent with and sympathetic to the established low density residential character of the adjoining Twin Waters residential community. This is reinforced when one has further regard to the

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<sup>120</sup> Exhibit 004.027, pp 30-31.

reconfiguration of a lot application in respect of stages 1 and 2 which comprises 169 residential lots with an average lot size of 543.15m<sup>2</sup>, whereas the average lot size in Twin Waters East is 705.9m<sup>2</sup>.<sup>121</sup> The proposed variations are not consistent with the densities contemplated for the site pursuant to the planning scheme. Accordingly, the appeal should also be dismissed on this ground.

**Settler’s Park**

[64] An issue is raised as to whether the access to the proposed development will involve unacceptable impacts for Settler’s Park as a recreation park, cultural heritage site and/or gateway entry feature and whether it acceptably provides for the protection and enhancement of it.

[65] The genesis for this issue is found at PO30 in Table 7.2.18.4.1 of the Maroochy North Shore local plan code. The relevant performance outcome and acceptable outcome are in the following terms:

<p>“PO30</p>	<p>Development in the Emerging community zone provides for the protection and enhancement of Settler’s park as a recreation park, <i>local heritage place</i> and gateway entry feature for the Pacific Paradise and Twin Waters communities.</p>	<p>AO30</p>	<p>Development ensures that any reconfiguring of boundaries of Settler’s Park required to accommodate upgrading of the David Low Way/Ocean Drive intersection, achieves the following:-</p> <ul style="list-style-type: none"> <li>(a) no net loss in the size of the park area;</li> <li>(b) no reduction in park embellishments;</li> <li>(c) improved levels of protection for all mango trees within the park with a minimum curtilage around the mango tress of 15 metres to the east and west and 10 metres to the north and south; and</li> </ul>
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<sup>121</sup> Exhibit 004.019, p 24, para 74.

			(d) high quality streetscape and landscape treatments that enhance the setting and interpretation of the local heritage place (including the in situ mango trees) and present and attractive gateway entry feature for the Pacific Paradise and Twin Waters communities.” <sup>122</sup>
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[66] In circumstances where is uncontentious that the mango trees referred to are protected, I am satisfied despite the limited size and dimensions of the park as proposed by the appellant, it can be conditioned to comply with AO30.

### **Community expectations**

[67] This issue is whether the expectations of the community “reflected in the level and content of adverse local submissions favour refusal”<sup>123</sup> of the proposed development to the extent that they are reflective of an issue raised in the agreed list of issues.

[68] There were a total of 417 submissions received by the respondent in respect of the development application. Of the 417 submissions, 132 supported the proposed development and 285 opposed it. Most of the submitters opposing the development were opposed to the development in its entirety (approximately 177 of the submissions), while some submitters only opposed the development on one or more discrete grounds (approximately 108 of the submissions). The submissions are part of the common material and pursuant to s 31 of the PR must be taken into account when assessing the proposed development. However, as noted above, it is the planning scheme which is the reflection of the public interest in the appropriate development of the land.<sup>124</sup> I note the significant opposition to the proposed

<sup>122</sup> Exhibit 003.001, pp 196-197.

<sup>123</sup> Exhibit 008.015, p 5, para 12.

<sup>124</sup> *Wilhelm v Logan City Council & Ors* [2020] QCA 273 at [77].

development which was reflected in the submissions and which resulted in the presence of numerous unrepresented co-respondents by election in the appeal, with several participating in the hearing of it. However, nothing really turns on this as the identified provisions of the planning scheme are clear and this is where the legitimate expectations of the community are to be found.

### **Other relevant matters**

[69] The appellant raises numerous relevant matters which it submits support approval of the proposed development. These consist primarily of the extent to which it otherwise complies with the planning scheme and will provide a high-quality residential development facilitating residential choice. In the appellant's written submissions, the relevant matters are grouped into three categories. The first category pertains to the locational benefits of the proposed development. The second refers to a high degree of compliance with the planning scheme and the third category refers to the community benefits which would arise from approval of the proposed development. However, any such purported merits must be viewed having regard to the extent of the non-compliances with the planning scheme, particularly the failure to demonstrate the adequate protection and enhancement of the central wetland. As noted above, this is an area of high ecological significance. Moreover, the unacceptable impacts on residential character as a consequence of the variations sought must also be weighed. The relevant matters are simply not sufficient to overcome the non-compliances with the relevant assessment benchmarks.

### **Conclusion**

[70] Ecological sustainability is part of the purpose of the PA. Unsurprisingly this is defined as a balance that integrates, amongst other things, the protection of ecological processes.<sup>125</sup> The site is very constrained, particularly from an ecological perspective. The central wetland is of high ecological significance and unsurprisingly mapped as such pursuant to the planning scheme. In turn, the planning scheme contains a theme which requires the protection and enhancement of such areas. The appellant has not discharged the onus of demonstrating that the proposed development will protect and enhance the health of the central wetland. Indeed, on the evidence before me, there is a real prospect of detriment to or destruction of this wetland should the appeal be

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<sup>125</sup> PA, s 3(1) and (2).



allowed. Moreover, it has not been demonstrated by the appellant that the variations sought in the Twin Waters West Plan of Development will be consistent with the established low density residential character of the adjoining Twin Waters residential community. The appeal is therefore dismissed.