SUPREME COURT OF QUEENSLAND

CITATION:	*Sullivan v Council of the City of Gold Coast* [2026] QCA 105
PARTIES:	**PATRICK SULLIVAN, MICHELLE TEYS, MICHAEL DAVIDSON & TRACEY DAVIDSON** (applicants) **v** **COUNCIL OF THE CITY OF GOLD COAST** (first respondent) **BELLA FELICITA NO 2 PTY LTD** ACN 655 775 367 (second respondent)
FILE NO/S:	Appeal No 5788 of 2025 P & E Appeal No 571 of 2025
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2025] QPEC 20 (Everson DCJ)
DELIVERED ON:	9 June 2026
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2026
JUDGES:	Mullins P, Doyle JA, Kelly J
ORDERS:	**1. Leave to appeal is granted limited to grounds 1, 2, 3 and 8 of the draft Notice of Appeal.** **2. The appeal is dismissed.** **3. The applicants are to pay the respondents' costs of the application for leave and of the appeal.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – DUTY TO GIVE REASONS FOR DECISION – where the first respondent approved a development application for a development permit and material change of use of the subject site for use as a seven storey residential apartment building – where the second respondent applied to amend the approval to, among other things, increase the building height to accommodate nine storeys and the number of units as well as replace the basement car parking with ground level parking – where the applicants appealed the approval to the Planning and Environment Court – where the primary judge approved the development

application subject to agreed conditions including an increased setback – where the applicants apply to this Court for leave to appeal on the bases that the primary judge failed to give adequate reasons for finding, in accordance with the applicable planning scheme, that the proposed development reinforced the local identity and sense of place of the local area, achieved an excellent standard of appearance of built form, and achieved a well managed interface by reference to the reasonable amenity expectations – where the applicants contend that the primary judge gave insufficient reasons for concluding, notwithstanding any noncompliance, that the approval was warranted – whether leave to appeal should be granted – whether there has been an error of law by reason of inadequacy of reasons

Planning and Environment Court Act 2016 (Qld), s 47, s 63
Planning Act 2016 (Qld), s 60

Abeleda v Brisbane City Council (2020) 6 QR 441; [2020] QCA 257, cited
Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430; (1997) 25 MVR 373, cited
Beckett v Tax Practitioners Board [2023] FCAFC 100, applied
Chief Commissioner of Police v Crupi (2024) 98 ALJR 1131; [2024] HCA 34, cited
DL v The Queen (2018) 266 CLR 1; [2018] HCA 26, applied
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66, applied
Expectation Pty Ltd v PRD Realty Pty Ltd (2004) 140 FCR 17; [2004] FCAFC 189, considered
G v O (2018) 53 WAR 393; [2018] WASCA 211, cited
Jurd v The King [2024] VSCA 224, applied
Najdovski v Crnojlovic (2008) 72 NSWLR 728; [2008] NSWCA 175, cited
Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury (2014) 242 IR 318; [2014] NSWCA 112, applied
Trinity Park Investments Pty Ltd v Fabcot Pty Ltd; Dexus Funds Management Limited v Fabcot Pty Ltd [2021] QCA 276, applied
Wainohu v New South Wales (2011) 243 CLR 181; [2011] HCA 24, applied

COUNSEL: C J Jennings KC, with D C Whitehouse, for the applicants
D P O'Brien KC, with J J Ware, for the first respondent
M J Batty KC, with N A Batty, for the second respondent

SOLICITORS: TurksLegal for the applicants
HopgoodGanim Lawyers for the first respondent
MacDonnells Law for the second respondent

[1] **MULLINS P:** I agree with Doyle JA.

[2] **DOYLE JA:** This is an application for leave to appeal a decision of the Planning and Environment Court of Queensland approving, subject to conditions, an application made affecting 133 Golden Four Drive, Bilinga (the subject site). Leave is required pursuant to s 63 of the *Planning and Environment Court Act 2016*. If leave is granted, any appeal is limited to error or mistake in law or jurisdictional error: s 63 of the *Planning and Environment Court Act 2016*.

[3] For the reasons given below, in my view, leave to appeal should be granted but the appeal dismissed.

Background

[4] In December 2022, the first respondent (the Council) approved a development application for a development permit and for a material change of use of the subject site for its use as a seven storey residential apartment building containing a total of 11 units.

[5] On 14 June 2024, the second respondent (Bella Felicita) made an application to amend that approval in a number of respects but particularly:

(a) to increase the height of the building from 23 metres, with seven storeys, to 32.58 metres, with a total of nine storeys;

(b) to increase the number of units to 13; and

(c) to remove a basement car parking level and replace it with ground level parking, facilitated by car stacking lifts at various locations around the site, altering (to reduce) some setbacks and other changes.

[6] That application was impact assessable and produced submissions opposing it, including from the present applicants.

[7] The applicants are all owners or occupiers of a development described as 'Nusa' which is located at 135 Golden Four Drive, Bilinga. It is immediately to the north of the subject site.

[8] The applicants were concerned with a number of matters including:

(a) the increase in height and bulk of the proposed development;

(b) the lack of appropriate setbacks from the boundary and in particular from the common boundary with Nusa;

(c) the consequent effect on their privacy; and

(d) the absence of sufficient landscaping.

[9] The subject site is within the local authority area of the Council and its development the subject of the Gold Coast City Plan (the Planning Scheme). It is within the medium density residential zone and the medium density residential zone code (the code) applies.

[10] The subject site is in an area covered by a building height overlay map and subject to a building height limit of 23 metres. However, for urban neighbourhoods (in

which the subject site is located) specific outcome 3.3.2.1 of the Strategic Framework of the Planning Scheme provides, inter alia:

> "(8) The Building height overlay map shows the building height pattern and desired future appearance for local areas within urban neighbourhoods. This map also shows areas where building heights change abruptly to achieve a deliberate and distinct contrast in built form within and between low, medium or high-rise areas.
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> (9) Increases in building height up to a maximum of 50% above the Building height overlay map may occur in limited circumstances in urban neighbourhoods where all the following outcomes are satisfied:
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> (a) the development is not located within The Spit Master Plan height sensitive area, as identified on the Building height overlay map;
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> (b) a reinforced local identity and sense of place;
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> (c) a well managed interface with, relationship to and impact on nearby development, including the reasonable amenity expectations of nearby residents;
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> (d) a varied, ordered and interesting local skyline;
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> (e) an excellent standard of appearance of the built form and street edge;
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> (f) housing choice and affordability;
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> (g) protection for important elements of local character or scenic amenity, including views from popular public outlooks to the city's significant natural features;
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> (h) deliberate and distinct built form contrast in locations where building heights change abruptly on the Building height overlay map; and
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> (i) the safe, secure and efficient functioning of the Gold Coast Airport or other aeronautical facilities.
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> …
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> (10) Increases in building height, beyond 50% above the Building height overlay map, are not anticipated in urban neighbourhoods."

[11] The applicants appealed the Council's approval of the application to the Planning and Environment Court. In that court the parties agreed a list of issues for the court to decide and to which it will be necessary to return.[1] For present purposes they include reference to the relaxation of the height overlay limit of 23 metres and in turn whether the proposed development met or satisfied certain of the criteria set out in specific outcome 3.3.2.1(9).

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1 Exhibit 1A.

[12] In the course of the trial, and in response to the primary judge's expressed concerns, Bella Felicita stated that it would accede to a condition requiring an increased setback to a distance of 1.5 metres from the boundaries, as well as providing opaque glass at level one of the building, adjacent to Nusa, to reduce any impact upon the privacy of the occupants of Nusa.

[13] Ultimately the Planning and Environment Court approved the development application subject to those various agreed conditions.

Grounds of Appeal

[14] The Amended Notice of Appeal identifies five grounds of what are said to be errors or mistakes of law or jurisdiction. They are:

> "1. The primary judge erred at law in failing to provide adequate reasons for a finding that the proposed development complied with Specific outcome 3.3.2.1(9)(b) of the applicable planning scheme (**Reinforced local identity and sense of place**), being only two sentences in paragraph [23] of the judgment which had no evidentiary basis and did not address material questions of fact put in dispute by the appellants, including:
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> (a) that there were no buildings of a high rise height nearby;
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> (b) that buildings of a high rise building height in the locality were all but one, located on larger allotments;
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> (c) that the photomontages at pages 45 and 49 of Exhibit 8 showed the proposed building would be considerably more imposing and dominant and not compatible with existing built form which included the new development of 'Nusa' in which the Appellants live;
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> (d) that the dark treatment at the upper levels of the building drew attention to, rather than mitigated the appearance of the upper levels; and
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> (e) the contents of the uncontested lay evidence and submissions regarding the local identity and sense of place.
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> 2. The primary judge erred at law in failing to provide sufficient reasons as to compliance with Specific outcome 3.3.2.1(9)(c) of the applicable planning scheme (**Well managed interface**) in circumstances where there were no plans showing what the proposed development would look like following the imposition of a condition requiring the built form to be set back 1.5 metres from the rear boundary.
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> 3. The primary judge erred at law in failing to provide adequate reasons as to compliance with Specific outcome 3.3.2.1(9)(e) of the applicable planning scheme (**Excellent standard of appearance**) which was wholly dealt with at paragraph [24]

of the judgment and did not address material questions of fact put in dispute by the appellants, including:

(a) that the car parking changes at ground level resulted in an active car deck with built to boundary walls and substantial increase in hardstand at ground level;

(b) the bulky and visually dominant form and height of the proposed building contributed to the building not providing an excellent standard of appearance.

4. The primary judge erred at law in failing to determine what the reasonable amenity expectations of nearby residents were, which was necessary to determine whether there was compliance with Specific outcome 3.3.2.1(9)(c) in circumstances where there was uncontested lay witness evidence from nearby residents.

…

8. The primary judge erred at law in failing to provide sufficient reasons for his findings at paragraph [27] of the judgment that there were relevant matters which, notwithstanding any non-compliance, warranted approval in that the primary judge did not:

(a) reveal whether or how the necessary balancing exercise between non-compliance with the Strategic framework and other relevant matters informed that decision;

(b) refer to the evidence supporting those findings and provide any analysis between that evidence and the evidence against those findings."

[15] Grounds 1, 2, 3 and 8 contend that the primary judge erred in not providing adequate or sufficient reasons for various findings. Grounds 1, 2, 3 and 4 each relate to the findings that the development satisfied or met the requirements of certain subparagraphs of specific outcome 3.3.2.1(9). Ground 4 is a particular aspect of an asserted failure which overlaps with the subject matter of ground 2.

Application for Leave

[16] An appeal, on the grounds of error or mistake in law or jurisdictional error, only lies with leave of this Court. While various decisions have identified matters which can bear on the exercise of the discretion, ultimately leave can be given if good reason is shown.[2] The asserted errors pointed to in the Amended Notice of Appeal principally concern the failure of the court below to provide adequate reasons. If made out that would be an error of law. The application for leave was heard together with the appeal itself. The issues raised are sufficiently arguable and also of general application beyond merely this case. In my view leave should be granted (though as is apparent below I would not include leave to agitate ground 4).[3]

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2 See *Trinity Park Investments Pty Ltd v Fabcot Pty Ltd; Dexus Funds Management Limited v Fabcot Pty Ltd* [2021] QCA 276 at [80].

3 I will for convenience continue in these reasons to refer to the moving party as the applicants.

Content of the Obligation to Give Reasons Generally

[17] It is uncontroversial that:

(a) The primary judge was obliged to provide reasons for his decision; and

(b) A failure to meet the minimum standard of the contents of those reasons will be an error of law and so may be made the subject of appeal to this court (once leave is given).[4]

[18] The central issue of relevance in this case is just what is that minimum requirement. The benchmark for adequacy of reasons is that they "identify the principles of law applied by the judge and the main factual findings on which the judge relied."[5]

[19] In *DL v The Queen* (2018) 266 CLR 1 per Kiefel CJ, Keane and Edelman JJ (Bell and Nettle JJ dissenting) summarised the obligation as follows (citations omitted):

> "[32] The content and detail of reasons 'will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision'. In the absence of an express statutory provision, 'a judge returning a verdict following a trial without a jury is obliged to give reasons sufficient to identify the principles of law applied by the judge and the main factual findings on which the judge relied'. One reason for this obligation is the need for adequate reasons in order for an appellate court to discharge its statutory duty on an appeal from the decision and, correspondingly, for the parties to understand the basis for the decision for purposes including the exercise of any rights to appeal.
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> "[33] … Not every failure to resolve a dispute will render reasons for decision inadequate to justify a verdict. At one extreme, reasons for decision will not be inadequate merely because they fail to address an irrelevant dispute or one which is peripheral to the real issues. Nor will they be inadequate merely because they fail to undertake 'a minute explanation of every step in the reasoning process that leads to the judge's conclusion'. At the other extreme, reasons will often be inadequate if the trial judge fails to explain his or her conclusion on a significant factual or evidential dispute that is a necessary step to the final conclusion. In between these extremes, the adequacy of reasons will depend upon an assessment of the issues in the case, including the extent to which they were relied upon by counsel, their bearing upon the elements of the offence, and their significance to the course of the trial. In particular:
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> > 'Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties, to

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4 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443; *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [57].

5 *DL v The Queen* (2018) 266 CLR 1 at [32] citing *Douglass v The Queen* (2012) 86 ALJR 1086 at [8]. See also *Chief Commissioner of Police v Crupi* (2024) 98 ALJR 1131 at [19].

> formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at, to apply the law found to the facts found, and to explain how the verdict followed.'"

[20] An aspect of the requirement to provide adequate reasons is to ensure an unsuccessful litigant understands the result to facilitate any appeal right, among other things.[6] In other words, "the reasons must be sufficient to give effect to that right."[7]

[21] This Court in *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [58] described the requirement in this way:

> "The rationale for the requirement that courts give reasons for their decisions provides some guidance as to the extent of the reasons required. The requirement has been explained, variously, as necessary: to avoid leaving the losing party with 'a justifiable sense of grievance' through not knowing or understanding why that party lost; to facilitate or not frustrate a right of appeal; as an attribute or incident of the judicial process; to afford natural justice or procedural fairness; to provide 'the foundation for the acceptability of the decision by the parties and the public' and to further 'judicial accountability'."

[22] The content and depth of reasoning "will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision."[8]

[23] In this respect the present case has a number of relevant features:

(a) The primary judge is placed in the position of the assessment manager who is to decide de novo whether the application for approval ought to be granted. The nature of the assessment process often is one which involves a mix of policy and evaluative judgments on imprecisely expressed criteria.

(b) The primary facts were not substantially in issue. The configuration of the proposed development is clear from the various plans provided. The proposed height, setback, footprint, effect on sightlines, and shadowing were identified. The nature of the development in its immediate and more remote vicinity is also clear from photos and from the montage to which I refer below.

(c) To a real extent the issues in this case involved a comparison between the outcomes: development in accordance with the existing approval; and that the subject of the 2024 application for the amended approval. The existing approval already allowed for a high-rise (as distinct from low-rise) seven storey 11 unit development of a certain bulk, with impacts on amenity for

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6 *DL v The Queen* (2018) 266 CLR 1 at [32].
7 *G v O* (2018) 53 WAR 393 at [65].
8 *Wainohu v New South Wales* (2011) 243 CLR 181 at [56].

the neighbours. That development could be included in the assessment of what the character of the locality was, the reasonable expectation of residents and other issues. The evaluative process was one that involved a comparison between the two in a number of respects.

(d) The various planning instruments were also identified. The issues for the primary judge relevantly did not raise any issue of construction of them save perhaps as to the scope of the area to be the focus of assessment when considering some of the specific outcome criteria.

(e) What remained was largely an evaluative task of assessing the significance of the nature of the impact of the proposed development in its local environment.

(f) The particular issues to be addressed by the primary judge in that regard involved criteria expressed in imprecise terms: whether the development contributed to a "well-managed interface" with nearby development; and whether the development reinforced "local identity and sense of place."

(g) The evidence tendered by each party addressing those criteria comprised a mix of objective and substantially uncontroversial material (maps, drawings, calculated sight lines and the like) and opinion value judgments.

[24] Accordingly, the nature of the jurisdiction being exercised and the matters in issue in this Planning and Environment Court judgment can be differentiated from many judgments in courts exercising different jurisdictions, and indeed from some other matters in the Planning and Environment Court.

[25] Where the decision involves an evaluative judgment, "the reasons must reveal the process of evaluation that has been undertaken and the reasoning involved in arriving at the relevant conclusions."[9] But given such decisions often involve weighing a range of factors which may "pull in different directions", courts should exercise caution in determining the reasons are inadequate.[10] Moreover it cannot be ignored that an evaluative process does not necessarily admit of detailed analytical exposition.

[26] I agree with the statement of Basten JA (Ward JA and Bergin CJ in Eq agreeing) in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] NSWCA 112, where his Honour said at [46]:[11]

> "Generally, the concept of 'reasons' requires an explanation connecting any findings of fact with the ultimate decision. Where the legal test to be applied involves an evaluative judgment, it may well not be practicable to provide a detailed articulation as to how specified (and conflicting) factors have been weighed in the balance; the scope of the obligation must recognise that constraint. (A different question arises if mandatory considerations have not been identified.)"

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9 *David Jurd v The King* [2024] VSCA 224 at [56] applying *Chief Commissioner of Police v Crupi* (2024) 98 ALJR 1131 at [19]-[23].

10 *Beckett v Tax Practitioners Board* [2023] FCAFC 100 at [38].

11 See also *Najdovski v Crnojlovic* (2008) 72 NSWLR 728 at [22].

[27] It is to be observed that the trial was conducted over four days with the primary judge's reasons delivered the following day. The applicants refer to this in their outline of argument but made clear in argument that this was not a criticism. It has been said that the promptness of, or delay in, the delivery of reasons can bear upon the determination of the content of the minimum required by those reasons: see *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 at [72] where it was said:

> "In cases not affected by delay, an appellate court is entitled to assume that the mere failure to refer to evidence does not mean that it has been overlooked or that other forms of error have occurred. However, where there is significant delay, no favourable assumptions can be made. In such circumstances, it is up to the trial judge to put beyond question any suggestion that he or she has lost an understanding of the issues. Where there is significant delay, it is incumbent upon a trial judge to inform the parties of the reasons why the evidence of a particular witness has been rejected. It is necessary for the trial judge to say why he or she prefers the evidence of one witness over the evidence of other witnesses…"

[28] However, I would not read this passage as suggesting that in a case of a very promptly delivered judgment the reasons do not have to meet the minimum requirement or can be excused from so doing by making favourable assumptions as to what those reasons must have been. The reasons given must still be adequate.

Ground 1 – Reinforce Local Identity and Sense of Place

[29] One of the outcomes which was in issue was satisfaction of specific outcome 3.3.2.1(9)(b). The precise meaning of the specific outcome is not directly relevant to this appeal. Suffice for present purposes to note that it seems to be common ground that the proposed development (with its increased height) must satisfy the criteria in the sense of enhancing or at least being consistent with and thereby reinforcing, the local identity and sense of place.

[30] A factual matter which attracted attention below was the identification of the geographical extent of an area which the primary judge called the local area. On appeal it was acknowledged by senior counsel for the applicants that the purpose of doing so was to inform the assessment then to be made of the satisfaction or otherwise of specific outcome 3.3.2.1(9) to the extent it called up some geographical connection. Specific outcome 3.3.2.1(9)(b) clearly did so.

The Local Area

[31] Town planning, architectural and visual amenity experts for both sides of the dispute provided written reports and were cross examined. In doing so they were of course addressing, relevant to the present issue, the local identity and the sense of place. The amended reply outline of the applicants sets out the evidence given by each of these experts on this issue. In summary that evidence shows:

(a) Bilinga is on the ocean south of Tugun and north of Kirra;

(b) Within Bilinga there is a relatively narrow strip of land between Pacific Parade and the Gold Coast Highway which is designated medium density residential zone;

(c) Development in that strip generally faces or seeks views of the ocean;

(d) Different parts of that area have different building height overlay map limits;

(e) The area within that narrow strip that has a height limit of 23 metres runs from Mills Street in the north to Musgrave Street in the south;

(f) Even within that section, development can be said to be in transition. There is a range of buildings above six storeys and up to 11 storeys which have been built or which have been approved for development (some approvals being under appeal, others not);

(g) The incidence of those buildings varies across the section between Mills Street and Musgrave Street with more of those buildings in the southern half of that section than in the north;

(h) In the particular block in which the subject site is located (between Cahill and Graham Streets) there is only one other such building. In the block next to the north, there are none and only one further to the north closer to Mills Street;

(i) Accordingly, the built (or approved) form could be described as varied with particular areas having a low-rise built form even if the location as a whole can be said to be in transition toward more buildings of height, scale and bulk.

[32] The experts for the applicants, while recognising the spread of the higher rise built form across the Bilinga area between Mills and Musgrave Streets, sought to focus on the existence at present of more isolated low-rise areas. It was then said the proposed development could not be said to reinforce the local identity and sense of *that*, more limited, place.[12] The features which the experts pointed to as rendering the proposed development not such as to reinforce that local identity or sense of place were: its height (proposed nine storeys); the 'choc top' or dominant upper levels which it was said were out of character and drew attention to its height; inadequate setbacks and excessive site coverage.

[33] On the issue whether specific outcome 3.3.2.1(9)(b) was satisfied the primary judge concluded at R [23]:

> "… The proposed development is a good example of a beachside high-rise multiple dwelling in an area where this development is contemplated by the planning scheme. It occurs where other similar development is occurring nearby…"

[34] The applicants submit that the primary judge's reasons in relation to the satisfaction of subparagraph 3.3.2.1(9)(b) were limited to those two sentences in R [23].

[35] It is further submitted that the only additional relevant reference is to a footnote which it is said takes the matter no further. It is submitted that the primary judge's reasons, therefore, do not:

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12 The expert evidence on this point led by the applicants is summarised in the applicant's reply outline being: at [5(a)] the town planner Mr Adamson; at [5(b)] Mr Middleton the architect; and at [5(c)] the visual amenity expert.

(a) Deal with the contentions advanced by the applicants concerning:

(i) the height, bulk and scale of the building being at variance with its contextual setting; and

(ii) the part of the local area in which the site is located having less variation in the building height and building heights being predominantly low.

(b) Explain why the views of the applicants' experts were not adopted.

[36] The applicants, however, approach too narrowly the identification of where the primary judge dealt with this topic in his reasons. The applicants' experts identified the proposed development as out of keeping with the identity of the particular lower-rise developed areas at Bilinga while recognising that more broadly the location was transitioning towards greater height and scale of development. The primary judge's consideration of that topic needs to be considered in addition to his conclusions in R [23]. The primary judge principally dealt with his identification of the local area in R [3]-[4] which state (citations omitted):

> "[3] The site is located on the western side of Golden Four Drive, within a narrow linear band of residential development, on the southern Gold Coast. To the east is Pacific Parade which runs parallel to the edge of the beach. To the west is Golden Four Drive which runs parallel to the Gold Coast Highway. These roads are joined by a series of short streets resulting in a finger of land two lots wide. Understandably, the focus of the urban development is the nearby beach. Pursuant to the Gold Coast City Plan 2016 ('the planning scheme'), the site is within the Urban area on Strategic framework map 1 and in the Consolidation area on Strategic framework map 9. The site is within the Medium density residential zone. Pursuant to the Building height overlay map, it is part of an area subject to a building height of 23 metres which extends from Mills Street to the south to Musgrave Street in the north. All of the relevant experts who gave evidence at the hearing of the appeal identified this as the appropriate local area for the context of assessing the proposed development, with the exception of Mr Middleton and Mr Butcher, the architect and the visual amenity expert who gave evidence on behalf of the appellants. In circumstances where the area is well defined by the beach on one side and the highway on the other, topography is uniform and the planning controls identical, the local area identified above appears appropriate for this purpose.
>
> [4] The more restricted local areas identified by Mr Middleton and Mr Butcher, which they contend are appropriate, given the relative absence of high-rise buildings to date, fail to acknowledge that the character of the local area calls for consideration both the planned and existing local identity. I will therefore base my assessment on the local area

> described above ('the local area') which contains numerous existing and approved buildings above 6-storeys scattered within it, including buildings with partial built-to-boundary built form. It is uncontentious that the local area is an area in transition with smaller residential buildings increasingly being replaced with larger residential multiple dwellings."

[37] In identifying what was the "appropriate local area for the context of assessing the proposed development" the primary judge had regard to the circumstance: that part of the medium density residential zone with the building height overlay map restricting height to 23 metres extended between Mills and Musgrave Streets; and scattered across that whole area there were numerous existing and approved buildings above six storeys, including buildings with partial built to boundary built form.

[38] In R [23] the primary judge makes reference to "other similar development… occurring nearby" and footnotes Exhibit 11, Figure 1. It is this footnote that the applicants submit takes the matter no further. But that figure contains a montage of the existing and approved buildings above six storeys within the area between Mills and Musgrave Streets and bounded by Pacific Parade and the Gold Coast Highway. They are designated by colours indicating if the building has been built or just approved and if approved whether subject to appeal. In addition, each is accompanied by a small photograph indicating its scale and style of the building. The only buildings so represented on this figure are those over six storeys. I would read his Honour's reference at R [23] to other similar developments occurring nearby to be a reference to all of them as being such that the proposed development can be said to reinforce the local identity and sense of place.

[39] The applicants urge that the reasons are inadequate in that they do not identify the reasons for the views of the experts they called nor explain why as to each expert those views were rejected. In fact his Honour did so. As recorded in R [3] the primary judge said that the relevant experts identified the local area his Honour adopted as the context for assessing the proposed development. On one view Mr Adamson both agreed and disagreed with the local area the primary judge adopted. But not only does that not make the primary judge's summary incorrect, the reasons given by Mr Adamson for his possible disagreement are no different from those advanced by Mr Middleton and Mr Butcher. The views of these experts, who took different views, are then identified and dealt with in R [4].

[40] In terms of the test discussed above, in my view the primary judge has: summarised the crucial arguments of the parties; formulated the issues for decision; explained how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at; and then applied that to determine whether this first specific outcome was one that had been satisfied. It could have been approached by dealing more explicitly with each different expert individually but doing so would not necessarily enhance the reasons which in fact dealt with the substance of each issue and expert view raised.

[41] In my view the reasons provided are sufficient (indeed I would not describe them as merely the bare minimum) and accordingly this ground of appeal is not made out.

Ground 3 - Excellent Standard of Appearance of the Built Form

[42] The applicants contend that the primary judge's reasons for being satisfied as to this outcome appear only in R [24] and that they are inadequate reasons as they do not deal with the contentions made by the applicants as to the implications of certain features of the built form, identified in ground 3 which is set out above. In submissions the features are further identified as:

(a) the substantial increase in hardstand, reduced setbacks and inadequate landscaping at the ground level and level one of the building;

(b) the black box (or 'choc top') exacerbating and not mitigating the impact of the additional height; and

(c) the north and south elevations presenting in a flat dominant form: Applicants' Submissions at [20].

[43] Again, the applicants' reply outline summarised the nature of the evidence given by the various experts said to bear upon these issues. The experts point to features of the kind listed above and express their views as to their inadequacies.

[44] The primary judge dealt with this issue in R [24] as follows:

> "The final matter for consideration is whether the proposed development achieves an excellent standard of appearance of built form. The Macquarie Concise Dictionary defines 'excellent' as 'possessing excellence or superior merit; remarkably good'. For the reasons set out in the opinion of Mr Richards above, I have no difficulty in concluding that the proposed development is of superior merit. It is definitely an improvement on the approved development in terms of its articulation, its roof treatment and by the provision of enhanced landscaping. Although aesthetic tastes may differ as to the merits of the palette chosen, particularly for the upper three levels resulting in the choc top, this is something on which minds may legitimately differ, without detracting from its architectural merit. I have no difficulty in concluding that the proposed development provides an excellent standard of appearance of built form in accordance with s 3.3.2.1(9)(e) of the planning scheme."

[45] But it is to look too narrowly to merely refer to that passage. The primary judge adopted as accurately articulating the merits of the proposed development the evidence of the architect Mr Richards. This evidence is set out in his Honour's reasons at R [16] as follows (omitting or correcting typographical errors in the report which the primary judge identified but did not correct):

> "In my view, Mr Richards accurately articulated the merits of the proposed development in the following terms:
>
> > Specifically, the primary impacts to NUSA are on the lowest [four] levels of the 2024 approval. The additional floor levels do not have a significant additional impact.
> >
> > In relation to the lower four levels, there are some additional impacts with the treatment of the ground level as car parking

> is located at this level and not in a basement. The interface to NUSA is to a driveway and the form of the parking does not have an impact on the level one. Ground level impacts are moderated by planter boxes on ... level one with setbacks enabling ground level deep planting and planters to fall over the edge within the property.
>
> The building form, bulk, scale and architectural expression is well considered and exhibits design excellence. It is inventively expressed in four elements, a base at ground level, a mid-rise element with a white frame and introduced curves, an upper level element where the floor plans change expressed as a darker form and a visually lighter roof terrace and pergola.
>
> The aggregation of these four elements breaks up the scale and provides a strong visual transition to the lower scale developments nearby.
>
> The apartment planning of the building is an improvement on the 2022 approval, with the primary outlook for living rooms on the street apartment now facing and overlooking to the street and not primarily to a side boundary."

[46] That was followed, at R [18], by the primary judge explicitly discussing the impact of utilising car lifts and of the ground level having a built form closer to the boundaries. His Honour noted that was particularly pronounced to a height of 4.3 metres and despite the more extensive landscaping he considered that was "inadequate in the circumstances." It was in that context that his Honour recorded that Bella Felicita would agree to a condition providing for a 1.5 metre setback.

[47] Continuing his Honour said:

> "[19] There will be a small build-to-boundary intrusion of a car lift into the setback to Lanai to the south for a distance of 13.5 metres in circumstances where the built form is to be landscaped extensively at the top with trailing vegetation cascading downwards. This overlooks a services area at the rear of Lanai. There is a similar degree of built form very close to the northern boundary at the rear of the Nusa building, which is less than a metre from this boundary. Further, along this boundary there is another built-to-boundary car lift which is again 4.3 metres high and approximately 13.5 metres long. It is located about halfway along from the street frontage. Between it and the street is an elevated walkway and outdoor entertainment area which is buffered by landscaping. The landscaping on top of the car lifts is much more extensive than that proposed to be located adjacent to the walkway and the outdoor entertaining area. This boundary adjoins the driveway of the Nusa development; but at its height of 4.3 metres, the top of the built form is a little higher than the balconies at level one of this neighbouring development.

> [20] I accept the evidence Brooksby that the proposed development incorporates 248m² of landscaping as compared to the approved development which only provided 131m² of landscaping. Further, at level one a total area of 109m² of landscaping is to be provided compared to 7.8m² for the approved development. I accept the evidence of Mr Brooksby that the provision of irrigation and maintenance infrastructure and the appropriate conditioning of the proposed development will ensure that the landscaping is appropriately maintained. When considering the extent of the landscaping, together with the condition offered by the co-respondent to install opaque glass adjacent to the walkway and outdoor entertainment area along the northern boundary, it is unsurprising that under cross-examination Mr Butcher conceded that he did not contend that there were problems with impacts of the proposed development along this boundary at ground level or at level one.
>
> …
>
> [22] … In my view the design elements evident in the proposed development, which see it progressively set back from the adjoining neighbours to the north and south as it increases in height, are such that when coupled with the substantial landscaping that is now provided which assists in articulating the building, that the setbacks are appropriate. The landscaping effectively mitigates impacts from the increased built form close to boundaries and the overall design approach of the proposed development is such that it is not physically overbearing to neighbouring properties. Privacy concerns are further addressed by a condition proposing opaque glass windows at upper levels."

[48] As senior counsel for the Council submitted, it is apparent that the primary judge did deal with each of the issues raised by the applicants and their experts which bore on this specific outcome.

(a) First, the "substantial increase in hardstand, reduced setbacks and inadequate landscaping at the ground level and level 1 of the building" are the subject of analysis in R [18]-[20] and R [22]; and also dealt with by the modified conditions as to setbacks to be imposed.

(b) Second, "the black box [or 'choc top'] form on top of the building exacerbating and not mitigating the impact of the additional height" is dealt with in R [16] and R [22].

(c) Third, "the north and south elevations presenting in a flat dominant form" are at least covered by the discussion in R [16], R [19]-[20], R [22] and as discussed below, R [24].

[49] I do not believe it is necessary to go further and in respect of each feature bearing on the issue of excellence in standard of appearance of built form, to identify the view expressed by each expert called by each party and accept or reject their opinions individually as to the contribution made by each feature – if that could

ever be done. The very nature of the topic now being considered is evaluative and generally allows for no greater level of analysis than: to identify the issue (excellent standard of appearance of built form); then identify the features said to favour or impair that standard in this proposed development; and express why those features collectively or, if possible, individually do or do not satisfy the primary judge of the outcome of the issue. A review of the reports given by the experts in this case reveal that their own 'analysis' reflects the evaluative nature of the issue being discussed.

[50] In my view these passages of the primary judge's reasons are sufficient to meet (at least) the minimum requirements for reasons for a judicial decision.

Grounds 2 and 4 – Well-Managed Interface

[51] The substance of these grounds is that in expressing the conclusion that specific outcome 3.3.2.1(9)(c) was satisfied the primary judge:

(a) Failed to address and make findings as to a core requirement of the clause in that he did not identify the "reasonable expectations of nearby residents" and in particular did not refer to the witness statements from the applicants; and

(b) In any event failed to give sufficient reasons for the conclusion reached.

[52] The first of these propositions should be rejected.

[53] The statement of issues in respect of which the case was conducted did not call for the determination of the "reasonable expectations of nearby residents."[13] The applicants did not make submissions (in opening the case[14]) which addressed that consideration.

[54] The issues which the applicants raised in the court below (as to the car stackers, lack of setbacks, greater site coverage, privacy and the overbearing structure) were agitated at the trial. How they were discussed and taken into account is apparent from the extracts of the reasons set out above. It was not urged on the primary judge that specific outcome 3.3.2.1(9)(c) required, whatever his Honour's views of the weight or significance of these factors, that the outcome could not be satisfied unless the proposed development satisfied the reasonable expectations of the actual nearby residents (which in this case would include the applicants). Such a case had it been advanced may well have caused the trial to be conducted differently including with the applicants being cross examined. As it was, none of them was cross examined on their statements.

[55] I would not grant the applicants leave to agitate as an error of law a primary judge's failure to decide something which turns on the evidence led where the case was conducted on the basis that issue did not arise. For that reason any leave granted to appeal should not extend to ground 4.

[56] In any event, the language "reasonable amenity expectations" is an objective standard. In the present case the applicants (who were in fact nearby residents) by their statement of issues identified the features which were alleged to bear upon the achievement of satisfaction of that specific outcome. The circumstance that

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13 Exhibit 1A paragraph 1(a).

14 Applicants' Part A written submissions at first instance at [15].

the primary judge did not, in considering these issues, also refer to the statements of evidence of the applicants which raise the same features does not detract from his Honour's approach so as to amount to error. His Honour's ultimate conclusions included (in terms of his assessment of the reasonable expectations of nearby residents) that:

> "[26] The planning scheme contemplates development to well over 30 metres in height in the local area and affords considerable design flexibility. This extends to built form and setbacks. Residents must therefore contemplate this scale and form of development when reflecting on the anticipated character of the local area."

[57] The second contention once again raises the issue of the adequacy of the reasons given by the primary judge.

[58] The issues which were identified in the Statement of Issues as relevant to specific outcome 3.3.2.1(9)(c) were:

(a) Setbacks not complying with the code;

(b) The proposed development presenting as physically overbearing to existing surrounding development at Nuna and Lanai because of its height, setbacks and built form; and

(c) Inadequate landscaping which fails to effectively mitigate or soften the impact of the built form.

[59] The expert evidence led on these matters is again summarised in the reply outline of the applicants. The submission states:

> "(a) in the Town Planning Joint Expert Report, for the Applicant, Mr Adamson observed that the proposed development introduced car stackers, increased site cover with substantial boundary-adjacent structures, did not provide sufficient screening, and increased overbearing and overlooking risks. For the Co-Respondent (at para 95-95, Mr Buckley said that interface and amenity expectations were acceptable having regard to shadowing, orientation, outlook, privacy, wall-treatments, vegetative screening and setbacks and it was not overbearing in a locality where multi-level buildings are anticipated. For the Respondent, Mr Ryan said that there was no substantial change to the outlook from neighbouring properties, and the interface at lower levels, to that in the Approved Development and any potential overlooking could be addressed by additional screening (at para 183-184);
>
> (b) in the Architecture Joint Report, for the Applicant (at paras 170-174), Mr Middleton observed that the changed plans altered the interface considerably through increased height, higher site cover, and a built-to-boundary wall and the removal of basement parking, which delivered poor interface conditions to adjoining properties and a downgraded functionality and interface when compared with the

> Approved Development. For the Respondent, Mr Richards said that the proposed interface and massing on lower levels is similar to the Approved Development (at para 238);
>
> (c) in the Visual Amenity and Landscaping Joint Report, for the Applicant (at paras 177-180), Mr Butcher observed that the development did not adequately consider the adjoining Nusa development, the combination of height and minimal setbacks created an unacceptable level of overbearing and the proposed planting would not soften the proposed development or mitigate the impact of its height. For the Co-Respondent (at para 108-110), Mr Curtis said that built form characteristics and setbacks protect the visual privacy and mitigate overbearing consistent with a medium density residential area and any residual privacy concerns could be addressed by translucent glazing. For the Respondent, Dr McGowan (paras 227-241, 323) said that with additional screening and an opaque balustrade treatment to part of the level 1 communal open space, the proposed development satisfied this criterion and the proposed landscaping was an improvement over the Approved Development." (footnotes omitted).

[60] The primary judge commenced to discuss this topic in R [17] where his Honour stated:

> "Turning to the disputed issues themselves, the first is whether the proposed development achieves a well-managed interface with and relationship to nearby development, having regard to the reasonable amenity expectations of residents. In this regard, the appellants take issue with the setbacks provided and allege that the proposed development presents as physically overbearing to its neighbours as a consequence of the combination of its height, setbacks and architectural treatments. Further, it is alleged that inadequate landscaping is provided and that this fails to mitigate or soften the impacts of the built form."

[61] The discussion that followed included R [18]-[20] and R [22] which I have already set out. Each was considered in terms of the substance of the contentions advanced (and with comparisons to the existing approval).

(a) The size of the setbacks, their compliance with or divergence from the requirements of the planning scheme (at ground level and at higher levels) were the subject of determination at R [18] and R [22]. The primary judge concluded that what was initially proposed at ground level (to a height of 4.3 metres) was inadequate but as enlarged (by the proposed condition) would comply with the Assessable Development Benchmarks in the Planning Scheme (Performance Outcomes and Acceptable Outcomes) and the code: R [10] and R [18].

(b) The proposed development presenting as physically overbearing to existing surrounding development at Nuna and Lanai because of its height, setbacks and built form were considered in R [16]-[17], R [20] and R [24].

(c) Inadequate landscaping which fails to effectively mitigate or soften the impact of the built form were considered in R [19]-[20].

[62] Again, in terms of the test discussed above, in my view the primary judge has: summarised the crucial arguments of the parties; formulated the issues for decision; explained how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at; and then applied that to determine whether this first specific outcome was one that had been satisfied.

[63] The reasons provided are sufficient and accordingly this ground of appeal is not made out.

Ground 8 – the Residual Discretion to Approve

[64] The primary judge after considering the various specific outcomes to which I have already referred and then stated at R [27]:

> "If I am wrong in my assessment in this regard, in my view the following relevant matters nevertheless warrant approval of the proposed development:
>
> 1. It provides a significantly improved architectural design and landscaping outcome compared to the existing approval; and
>
> 2. In circumstances where the appellants had all lost any views they had across the site as a consequence of the approved development, the design changes attributable to the proposed development do not appear to have any meaningful consequence for them."

[65] It is urged that inadequate reasons were given for this conclusion. Given the views I have expressed above as to grounds 1 to 4 it is unnecessary to express any concluded view in respect of this ground of appeal. However, in the event that my view as to those other grounds does not prevail, I will proceed to consider this ground, albeit briefly.

[66] It is well established that the Planning and Environment Court has power to approve a development even if it is inconsistent with aspects of the Planning Scheme.[15] It was accordingly within the power of the Court to approve the proposed development whether or not these specific outcomes had been satisfied.

[67] There are some bases to argue that in this regard the primary judge has failed to provide adequate reasons.

[68] The primary judge commenced his consideration of this issue by expressing the condition "[i]f I am wrong in my assessment in this regard." What is unclear is what particular respect his Honour had in mind, or indeed whether he had in mind that he was wrong in every respect.

(a) For example, if the primary judge had in mind that he was wrong about the 'local area' which he determined, that would materially impact on some at least of the specific outcomes that were in issue and require a different consideration of the extent of departure from the planning scheme.

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15 *Planning Act 2016* (Qld), s 60; *Planning and Environment Court Act 2016* (Qld), s 47; *Abeleda v Brisbane City Council* (2020) 6 QR 441 at [53]-[59].

(b) Also, to be assumed wrong in describing the standard of the appearance of built form as excellent may not be significant if the alternative view was that it was close to excellent, but would be different if the alternative assumed position was of a substantially lower standard than that.

[69] The reasons might therefore be said to assume error without identifying it. The difficulty arises no doubt because of the hypothetical nature of his Honour's consideration of the exercise of this discretion. But if that is the right view of the sense of the reasons, it makes it difficult to comprehend what were the relevant factors to be weighed against those which the primary judge did identify at R [27] as favouring the approval.

[70] On the other hand, I do not read R [27] in that way. There is no basis for reading the reasons as a whole as containing a finding that the primary judge accepted or was assuming a particular error at all. Rather R [27] is to be understood, not as identifying at all that some feature of what preceded it in the reasons was indeed wrong, but rather that the primary judge was expressing the view that there was a further reason to approve the development. That reason is:

(a) because of the two features identified in R [27];

(b) taking into account the conclusions he had reached and expressed as to the relevant 'local area', the conformity of the proposal with the existing and emerging development in the locality, the built form having progressive setbacks and substantial landscaping, and so on;

(c) augmented by the conditions his Honour had proposed concerning the increase in setbacks and the use of opaque glass, and

(d) whatever asserted non-compliance with the planning scheme (and in substance it was the height) this was a development which ought to be approved.

[71] The construction of his Honour's reasons is supported by his use of the word "nevertheless" and the conditional expression "if I am wrong" in R [27].

[72] On this reading of the primary judge's reasons as a whole, I would not conclude they provide inadequate reasons for the conclusion.

Conclusion

[73] There is no reason why costs should not follow the event. Accordingly, in my view, the appropriate orders are:

1. Leave to appeal is granted limited to grounds 1, 2, 3 and 8 of the draft Notice of Appeal;

2. The appeal is dismissed;

3. The applicants are to pay the respondents' costs of the application for leave and of the appeal.

[74] **KELLY J:** I agree with the reasons for judgment of Doyle JA and with the orders proposed by his Honour.