
20171018 Item 15.2.3 LATE Report Appeals: 4940 of 2015, 2 of 2016 & 44 of 2016 - 128-144 Boundary Road, Thornlands – Delivery of Judgment of the Planning and Environment Court

Objective Reference: A2628362
Reports and Attachments (Archives)

Attachments:

1. [4940 of 2015](#)
2. [2 of 2016](#)
3. [44 of 2016](#)
4. [Judgement 4940 of 2015, 2 of 2016, 44 of 2016](#)
5. [MCU013296 Decision Notice](#)
6. [MCU013296 Approved Plans](#)

Authorising Officer: Louise Rusan
General Manager Community and Customer Services

Responsible Officer: David Jeanes
Group Manager City Planning and Assessment

Report Author: Ellen Dwyer
Acting Senior Appeals Planner

PURPOSE

This matter is referred to the General Meeting of Council seeking formal direction on whether Council wishes to file an appeal against a Judgment of the Court.

BACKGROUND

Original Application

Council received an application seeking a Preliminary Approval (under s242 of the *Sustainable Planning Act 2009*) for a Material Change of Use for a Mixed Use Development and a Development Permit for Reconfiguring a Lot (1 into 2 Lots) on land at 128-144 Boundary Road, Thornlands.

The application was assessed against the relevant provisions of the Redlands Planning Scheme and the proposed development was considered to conflict with some elements of the Planning Scheme. The key issue identified in the assessment was:

- Out of centre commercial development.

Given the significance of this issue, Council's planning and assessment team engaged independent town planning and economic need experts to advise on the assessment of the application.

The application demonstrated sufficient planning grounds to justify the conflict and it was subsequently given approval by Council, subject to conditions, on 10 November 2015.

Appeal

Appeal Numbers:

4950 of 2015
2 of 2016
44 of 2016

Parties:

Lipoma Pty Ltd	Appellant
	4950 of 2015
Lanrex Pty Ltd	Appellant
	2 of 2016
Victoria Point Lakeside Pty Ltd	Appellant
	44 of 2016
Redland City Council	Respondent
Nerinda Pty Ltd	Co-Respondent

The appellants (submitters) filed appeals in respect of Council's approval (various dates, Attachments 1 - 3). The appellants identified the issues in their various notices of appeal. The matters which were in dispute in the appeal are summarised as follows:

- The nature and extent of the conflict with the Redlands Planning Scheme (RPS) including:
 - The development is inconsistent with the Network of Centres described in the Planning Scheme's Strategic Framework.
 - The development is inconsistent within the Kinross Road Structure Plan land designations, and the Structure Plan dictates a centrally located mixed use Neighbourhood Centre in an entirely different location to that proposed by the Co-respondent.
 - The development proposal includes additional vehicle access points to Panorama Drive and Boundary Road which are inconsistent with the Kinross Road Structure Plan.
- The nature and extent of the conflict with the Draft City Plan.
- The nature and extent of the conflict with the South East Queensland Regional Plan 2009-2031 (SEQRP).
- Whether there are sufficient grounds to justify the approval despite the conflicts having regard to:
 - The need for the development;
 - Commercial, traffic and amenity impacts of the development;

- Whether the RPS has been overtaken by events.
- The proposed development substantially exceeds the proposed Neighbourhood Centre and proposes a commercial precinct of District Centre size.

Judgment

On 8 September 2017 the Judgment for appeal 4940 of 2015, 2 of 16 and 44 of 2016 was delivered by Judge DC Morzone QC (Attachment 4). The appeal was allowed and the development application was refused. The Judge concluded that the proposed development significantly conflicts with the RPS. While the Judge found that there were strong arguments (in particular, need) for the development, he found that they were not sufficient to overcome the conflict. The Judge also noted that similar zoning patterns, centre hierarchy and centre zoning have been proposed in the Draft City Plan.

Site Description and Past Use

The subject site has been used for agricultural purposes by the current owners for some decades. A shop, colloquially described as the 'Round Shop', operated on the site previously as a general store and produce depot, and included the sale of fuel. The shop was later removed when road works were undertaken. There is an existing 2013 approval over the site for a 1000m² mixed use development (shop, service station, refreshment establishment, commercial office and health care centre), located on the corner closest the Panorama/Boundary Road intersection (refer MCU012565). The applicant included an economic assessment demonstrating need for the development. The application was lodged under the RPS version 3.1 when this part of the land was zoned Local Centre.

ISSUES

The application and subsequent appeal have revealed a gap in Redland's centre hierarchy in this catchment area, which is a point agreed by Council's and the co-respondent's experts in the appeal, and accepted by the Judge. The refusal of the development application leaves two options to address this issue.

- (1) Council can choose to join the co-respondents in appealing the Judgment of the court. In doing this Council will need to consider the grounds available to appeal and the potential costs implications of doing so; or
- (2) Council can complete a review of Redland's centres strategy and, ultimately, amend the planning scheme to incorporate a new centre zoning.

If Council was to appeal the Judgment, the matters of appeal may only be made on errors of law.

Grounds of Appeal

The potential grounds of appeal are:

- A failure to give adequate reasons. Within the Judgment (Attachment 4), the grounds of the case extend for many pages, and then, without real explanation, finds at [186] that such grounds are insufficient;
- Inconsistencies within the judgment itself. For instance, at paragraph [48(2)], the judge finds, as a ground for serious conflict with the scheme, the fact that

the development would impact upon the City's planned centre-driven economic and employment opportunities at Cleveland and Victoria point, and then later at [152] clearly finds that the proposed development "will not detrimentally impact other existing and planned centres".

- Too much weight was placed upon any impact of the development on the planned Kinross Road Local Centre, when the evidence before the Court, including the submitter-appellant's economic need expert (see [71]), was that this local centre was poorly located being at the end of a no-through-road to fulfil its proper function.
- A failure to properly assess the 'nature and extent' of the conflict. In assessing conflict, the Judge limited his assessment to the site zoning, and did not consider in real detail the impact upon other centres and uses in determining the level of conflict with the scheme.
- Most fundamentally, an incorrect application of the Weightman test, which requires a balancing of scheme conflict with need for the development. In this context, the Judge accepted, throughout the judgment, that there was a real need for this type of development (see, e.g., [137]-[138], [149]-[150], [168] and [180]-[186]). Indeed, at [186], the Judge said that the development "would fill an obvious gap in the Redland City's existing and planned hierarchy and network of centres. However, the Judge failed to correctly balance these real needs as against the conflict.

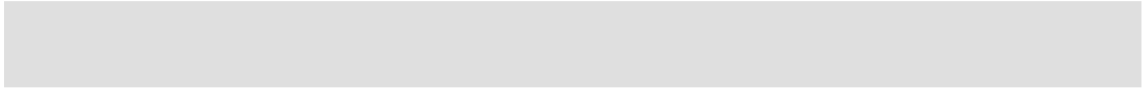
Considerations

In weighing up the two options to either (1) appeal the Judgment or (2) review the centres strategy and make a future major amendment to the planning scheme, the following matters were considered:

- There is an identified gap in the centres network in this location.
- It is considered that Council must do something to address this need for a centre, which has an impact on existing and future residents within this catchment.
- An appeal will be a more timely approach to address this need. A review of the centres strategy, followed by the drafting and processing of a major amendment to the planning scheme will take a significant amount of time to complete.

- [REDACTED]

- [REDACTED]



STRATEGIC IMPLICATIONS

Legislative Requirements

If Council chooses to file an appeal against the Judgment, it must be filed with the Court by 24 October 2017.

Risk Management

The financial risk is discussed under the Financial heading below.

Financial

If Council opts to appeal the Judgment it will incur legal expenses in the form of a junior barrister and a Q.C. [REDACTED]

[REDACTED] There is also the potential of the Court awarding costs against Council if it lost the appeal.

People

Nil

Environmental

Nil

Social

Nil

Alignment with Council's Policy and Plans

The merits of the development have already been considered by Council in deciding the application.

CONSULTATION

City Planning Assessment consulted with the General Counsel Group, as well as seeking advice from Counsel.

OPTIONS

Option 1

That Council resolves to:

1. Instruct Council's solicitors to file an appeal in the Court of Appeal, provided an appeal has been first lodged by the co-respondent; and
2. Maintain this report as confidential until the appeal has been finalised.

Option 2

That Council resolves to not appeal the Judgment and agrees to commence a review of the Redland's centres strategy.

Option 3

That Council resolves to not appeal the Judgment.

OFFICER'S RECOMMENDATION

That Council resolves to:

- 1. Instruct Council's solicitors to file an appeal in the Court of Appeal, provided an appeal has been first lodged by the co-respondent; and**
- 2. Maintain this report as confidential until the appeal is finalised.**

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Lipoma Pty Ltd & Ors v Redland City Council & Nerinda Pty Ltd* [2017] QPEC

PARTIES: **LIPOMA PTY LTD ACN 002 203 581**
(Appellant)

and

LANREX PTY LTD ACN 010 740 191
(Appellant No. 2 of 2016)

and

**VICTORIA POINT LAKESIDE PTY LTD
ACN 106 781 757**
(Appellant No. 44 of 2016)

and

REDLAND CITY COUNCIL
(Respondent)

and

NERINDA PTY LTD ACN 001 325 720
(Co-Respondent)

FILE NO/S: 4940 of 2015, 2 of 2016 and 44 of 2016

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING
COURT: Brisbane

DELIVERED ON: 6 September 2017

DELIVERED AT: Cairns

HEARING DATE: 27, 29 & 30 September 2016 & 7 October 2016

JUDGE: Morzone QC DCJ

ORDER: **1. Appeal allowed.**
2. The development application is refused.
3. I will hear the parties as to any consequential orders.

CATCHWORDS: PLANNING AND ENVIRONMENT – Appeal against approval of major commercial development including a “*full-line*” supermarket; specialty shops, including retail warehouse (discount chemist); family tavern; medical centre; service station; and parking – retail/commercial component of the appeal - 5.4 km of the major centre – Partly in the Medium Density Residential Zone, Urban Residential Zone, Open Space Zone and the Community Purposes Zone - Designated as partly Medium Density Residential Housing, partly Urban Residential Housing and partly Greenspace Network.

OUT OF CENTRE DEVELOPMENT – Conflict with the scheme – at serious end of spectrum - provision of the necessities of life (food and groceries) - whether unacceptable adverse impacts on the centre network and centres hierarchy.

FOUNDATIONS – whether the proposal will meet an existing community, economic and planning need - whether the scheme provisions “overtaken by events” - whether sufficient grounds to approve the application despite the conflicts.

Legislation

Acts Interpretation Act 1954, s 14A.

Redlands Planning Scheme 2006.

Sustainable Planning Act 2009 (Qld), ss 242, 314, 316, 324, 326, 329, 462, 493, 495.

Cases

Abacus Funds Management v. Sunshine Coast Regional Council [2012] QPELR 669.

Aldi Stores (A Limited Partnership) v Grounds Redland City Council [2009] QPELR 602.

All-A-Wah Carapark v Noosa Shire Council [1989] QPLR 155.

Australian Capital Holdings Pty Ltd v Mackay City Council [2008] QCA 157.

Bird v Logan City Council [2012] QPELR 502.

Bunnings Building Supplies Pty Ltd v. Redland Shire Council and Ors [2000] QPELR 193.

Cut Price Stores Retailers v. Caboolture Shire Council [1984] QPLR 126.

Degee v Brisbane City Council [1998] QPELR 287.

Elan Capital Corporation Pty Ltd v Brisbane City Council [1990] QPLR 209.

Elfband Pty Ltd and Vanhoff Pty Ltd v Maaroochy Shire Council [1995] QPLR 290.

Fabcot Pty Ltd v Cairns Regional Council [2013] QPEC 38

Fitzgibbons Hotel Pty Ltd v Logan City Council [1997] QPELR 208.

Friend v Brisbane City Council [2014] QPELR 24.

Garyf Pty Ltd v Maroochy Shire Council [2009] QPELR 435.
Grosser v Gold Coast City Council [2001] 117 LGERA 153.
Handley v Brisbane City Council [2005] QPELR 80.
Harbug Investments Pty Ltd v Brisbane City Council [2000] QPELR 313.
Holts Hill Quarries Pty Ltd v Gold Coast City Council [2001] 1 QdR 372.
Hotel Pty Ltd v Logan City Council [1997] QPLER 208.
Hydrox Nominees Pty Ltd v Sunshine Coast Regional Council [2014] QPEC 18.
Intrafield Pty Ltd v. Redland Shire Council [2001] 116 LGERA 350.
JPF Australia Pty Ltd v Livingstone Shire Council [2006] QPELR 359.
Kangaroo Points Residents Association Inc v Brisbane City Council [2015] QPELR 230.
Leda Holdings Pty Ltd v Caboolture Shire Council [2006] QCA 271.
Lewiac Pty Ltd and ING Real Estate, Joondalup BV v Gold Coast City Council [2003] QPELR 385.
Lewiac Pty Ltd v Gold Coast City Council [1996] 2 Qd R 266.
Lockyer Valley Regional Council v Westlink Pty Ltd [2013] 2 Qd R 302.
Luke v Maroochy Shire Council [2003] QPELR 447.
Mackay Shopping Centre Pty Ltd v Mackay Regional Council [2013] QPELR 661.
Metroplex Management Pty Ltd v Brisbane City Council [2010] QCA 333.
Nordale Management Pty Ltd v Maroochy Shire Council [1995] QPLR 368.
Overton v. Redcliffe City Council [2000] QPELR 250.
Parmac Investments v. Brisbane City Council [2008] QPELR 480.
Provincial Securities Pty Ltd v Brisbane City Council [2001] QPELR 143.
R v Brisbane City Council ex parte Read [1986] 2 Qd R 22.
Roosterland Pty Ltd & its agents v. Brisbane City Council [1986] QPLR 515.
Scurr v Brisbane City Council (1973) 133 CLR 242.
Sellars Holdings Pty Ltd v Pine River Shire Council [1988] QPELR 12.
SEQ Properties Pty Ltd v Maroochy Shire Council [1999] QPELR 36.
Seven-Eleven Stores Pty Ltd v Pine Rivers Shire Council [2006] QPELR 85.
Skateway Pty Ltd v. Brisbane City Council [1980] QPLR 245.
Stappen Pty Ltd v. Brisbane City Council [2005] QPELR 466.
Viridian Noosa Pty Ltd (Receivers and Managers Appointed) v Sunshine Coast Regional Council [2013] QPEC 54.
Weightman v Gold Coast City Council [2003] Qd R 441.

Westfield Management Limited v. Pine Rivers Shire Council [2004] QPELR 337.
Wheldon & Armview Pty Ltd v Logan City Council [2015] QPELR 640
Wilispap Pty Ltd v. Mulgrave Shire Council [1992] QPLR 51.
Woolworths Ltd v Maryborough City Council (No. 2) (2006) 1 Qd R 273.
Yu Feng Pty Ltd v Maroochy Shire Council [2000] 1 Qd R 306.
Zappala Family Co v Brisbane City Council [2014] 201 LGERA 82.
ZW Pty Ltd v Peter R Hughes & Partners Pty Ltd (1992) 1 Qd R 352.

COUNSEL: C Hughes QC and N Kefford for the Appellant
 KW Wylie for the Respondent
 D R Gore QC and J G Lyons for the Co-Respondent

SOLICITORS: McCullough Robertson solicitors for the Appellant
 Redland City Council for the Respondent
 Anderson Lawyers for the Co-Respondent

- [1] The co-respondent developer seeks to uphold the respondent Council’s decision to approve an application for a development permit to reconfigure a lot (1 into 2), and a preliminary approval for material change of use for a mixed use development, including a shopping centre on the corner of Panorama Drive and Boundary Road in Thornlands.
- [2] The appellants, who submitted against the application, own and operate three nearby shopping centres, which provide retail, commercial and entertainment facilities in a *major centre* within the hierarchy of centres located about 3.8km from the land.
- [3] The Council defends its decision.

Proposed development

- [4] The development application was made under the *Sustainable Planning Act 2009 (Qld)* (“SPA”) in August 2014 when the *Redlands Planning Scheme 2006* (“2006 scheme”) was in force. The draft Redlands City Plan 2015 (‘*draft scheme*’) was publicly exhibited by the time the Council approved the application on 18 November 2015.¹
- [5] The development application seeks:
1. a development permit to reconfigure a lot (1 lot into 2 lot subdivision); and

¹ Exhibit 2, vol 3, p. 1.0915.

2. a preliminary approval pursuant to s 242 of SPA for a mixed use development that incorporates both residential and centre uses as well as a large green space precinct.
- [6] The focus of the appeal was on the retail/commercial component of the appeal, as encapsulated by the expert town planners who agreed:²

“The application involves a number of elements, being the proposed retail/commercial centre, the residential component and the reconfiguration component. We agree that there is no issue with the residential component, and we agree that the reconfiguration component is an ordinary consequence of the Preliminary Approval, such that if the appeals were upheld, the reconfiguration component falls away. In essence, it is the retail/commercial component of the application that is of concern in these appeals.”

- [7] The “retail/commercial” component is intended to comprise:³
- (a) a 4,100m² “full-line” supermarket (proposed as 3,840m² in an agreement to lease with Coles⁴);
 - (b) 1,600m² of specialty shops, including a 500m² retail warehouse (discount chemist);
 - (c) a 850m² family tavern;⁵
 - (d) a 225m² medical centre;
 - (e) a 100m² service station; and
 - (f) parking for 374 vehicles.
- [8] The proposed Paradise Gardens Plan of Development shows the various precincts of the proposed development and its layout (subject of evolving commercial negotiations with Coles).⁶ The components of the proposed precincts are:⁷

Proposed zone/precincts	Approximate area (ha)	Percentage of site area	Proposed components
Neighbourhood Centre	2.4	38	Supermarket and specialty shops comprising 5,700m ² retail and associated uses totalling 1,175m ² (tavern, service station and medical

² Exhibit 7 town planning JER p. 14, para 24.

³ Exhibit 6 need JER p. 3, para 3, updated by agreement to lease per Exhibit 8 Statement of Zeller p. 2, para 8.

⁴ Exhibit 8.

⁵ T3-13/30-35.

⁶ Exhibit 7 town planning JER pp. 10 and 11, Figures 2-3 and 2-4. Exhibit 8 appendix AZ-1.

⁷ Exhibit 7 town planning JER p. 9, Table 2.3.

			centre). Total floor space of 6,875m ² .
Medium Density Residential Housing – 3b Boundary Road and Panorama Drive	1.4	23	A mixture of 35 (approx.) two-storey, attached and semi-detached terraces, townhouses and duplexes on small lots.
Urban Residential Housing – 4b Panorama Drive	0.2	3	Larger lots along the northeast boundary.
Greenspace – 7e Eastern Wetlands Corridor	1.4	22	Rehabilitated watercourse, detention basin, retained vegetation, market garden, outdoor cafe, “common”, northern boundary buffer. The irrigation dam would be drained
Access Road	0.85	14	Collector Road. To be a public road.
TOTAL	6.25	100	

- [9] In effect the proposed centre development will require code assessable development applications to the council, and may be refused or approved subject to conditions necessary to mitigate any potential impacts. Of particular relevance in this case are:
- (a) a “*hotel*” use is code assessable if in the Neighbourhood Centre precinct and 850m² or less (otherwise it is impact assessable);⁸
 - (b) a “*shop*” is in certain circumstances self-assessable, code assessable (if less than 5,700m² and in the Neighbourhood Centre precinct) and otherwise impact assessable;⁹ and
 - (c) a “*service station*” is code assessable in the Neighbourhood Centre precinct (otherwise impact assessable).¹⁰
- [10] The applicant seeks to vary the 2006 scheme by altering the levels of assessment for development within the various precincts, and specifying the assessment criteria for such development.¹¹

Land

⁸ Exhibit 2, vol 3, p. 1.0937.

⁹ Exhibit 2, vol 3, pp. 1.0941-1.0942.

¹⁰ Exhibit 2, vol 3, p. 1.0941.

¹¹ Exhibit 2, vol 3, pp. 1.0931 and 1.0945: preliminary approval p. 4 s.5.15.5 and p. 18, s.5.15.6.

- [11] The land subject of the proposal has an area of 6.254 hectares. It is located at 128-144 Boundary Road, Thornlands, on the north-western corner of Panorama Drive and Boundary Road, and is described as Lot 3 on SP 117065.¹²
- [12] The land is situated at the junction of two major roads, namely Boundary Road (a four lane divided State controlled road) and Panorama Drive (with two to four lanes). These roads are facilitate bus routes 270, 273, 274, 276, 279, 280, 281 and N250, and bus stops outside the land.
- [13] The land is currently used for a market garden.¹³ Nostalgically, the proposal includes a market garden and café in acknowledgment of the history of the land.¹⁴
- [14] The surrounding land uses comprise:¹⁵
- (a) To the north - Established low density residential development with blocks vary from 1800m² to 4,000m² accessed by Milner Place.
 - (b) To the east - Panorama Drive and low density residential subdivisions in the Park Residential Zone and Low Density Residential Zone.
 - (c) To the south - Boundary Road, larger rural residential blocks zoned Rural and Sheldon College. Designated as an Integrated Employment Area under the *2006 scheme* and as a Future Urban Growth Investigation Area under the *draft scheme*. It is also within the Rural Landscape and Regional Production Area under the *South East Queensland Regional Plan 2009-2031*.¹⁶
 - (d) To the west - Land zoned for urban development under the Kinross Road Structure Plan. Current flower production occurs in greenhouses immediately to the west. Opportunity for future westerly connection with the development of sites adjoining the Nerinda site.
- [15] The land is about 3.8 km west of the Victoria Point Major Centre, which includes:¹⁷

Centre Name	Estimated lettable area (m ²)	Major tenants	Total Shops (No.)	Vacancies as at May 2016		
				Shops (No.)	Area (m ²)	Vacancy rate (%)
Victoria Point Shopping Centre	26,936	Kmart, Coles, Woolworths	110	10	1,042	3.9

¹² Exhibit 1- aerial photography at pages 1 – 3, and Exhibit 7 Joint Town Planning Report, p 7, Figure 2.

¹³ Exhibit 7 Joint Town Planning Report, p 8.

¹⁴ Exhibit 10; T3-13/1-25; Nostalgia based on personal reasons or circumstances are not relevant grounds: SPA, s.326(1) & definition of “Grounds” in Schedule 3.

¹⁵ Exhibit 7 Joint Town Planning Report, p. 7.

¹⁶ Exhibit 13 Town Planning Report of Mr Schomburgk, p 5 [21].

¹⁷ Exhibit 6 need JER p. 36, Table 5.

Towncentre Victoria Point	26,080	Bunnings, Woolworths	36	2	534	2.0
Victoria Point Lakeside	25,000	Cineplex Cinemas, Aldi, Lincraft	85	12	1,312	6.6

- [16] The land is 5.4 km south of the Cleveland Town Centre; and, more broadly, 25km east of the Brisbane central business district.

Planning Treatment

- [17] The 2006 scheme was in force at the date the development application was made to the Council. Under the provisions of the scheme, the land is:

- (a) Partly in the Medium Density Residential Zone – Sub Area MDR5; partly in the Urban Residential Zone – Sub Area UR1; and partly in the Open Space Zone and the Community Purposes Zone – Sub Area CP7 (road);¹⁸ and
- (b) Designated under the Kinross Road Structure Plan as partly Medium Density Residential Housing, partly Urban Residential Housing and partly Greenspace Network.¹⁹

- [18] Part of the land, at the corner of Panorama Drive and Boundary Road, has the benefit of a development approval (subject to conditions) dated 3 April 2013 for a commercial centre of 1,000 m² gross floor area.²⁰

- [19] The draft scheme was publicly exhibited between 20 September 2015 and November 2015,²¹ being a year after the Council issued the acknowledgement notice for the development application on 29 September 2014. The Council approved the proposed development on 18 November 2015.²² The draft scheme has not yet commenced and the likely commencement date is unknown. The draft scheme effectively replicates the current zoning pattern of the Kinross Road area with the land zoned a mixture of medium density residential, low-medium density residential, and open space.²³

- [20] It seems to me that the draft scheme ought be afforded due weight.

Legal framework

- [21] The appeals were commenced pursuant to s 462 of SPA.

¹⁸ Exhibit 7 Joint Town Planning Report, p 7; Exhibit 2, vol 1, p. 1.0128: Report submitted to the Council p. 104.

¹⁹ Exhibit 7 Joint Town Planning Report, p 4 [4]; Exhibit 2, vol 1, p. 1.0047: Report submitted to the Council p. 23.

²⁰ Exhibit 7 Joint Town Planning Report, p 4 [5]; Exhibit 2 Appeal Book, Vol 3 Tab 33 – Approval.

²¹ Exhibit 7 town planning JER p. 45, para 127.

²² Exhibit 2, vol 3, p. 1.0915.

²³ Exhibit 7 Joint Town Planning Report, p. 47, para 136.

- [22] The appeals are by way of a hearing anew.²⁴ The court must assess the development permit component of the application in accordance with ss 314 of *SPA* and decide the application in accordance with ss 324 and 326 of *SPA*. For the preliminary approval component under s 242, the assessment must be in accordance with ss 314 and 316 of *SPA*, and the decision must accord with ss. 323, 327 and 329 of *SPA*
- [23] Pursuant to s 495(2)(a) of *SPA* the appeal must be decided based on the laws and policies in force on the date the application was made in August 2014, although weight may be given any new laws and policies that the court considers appropriate.²⁵ The *2006 scheme* was in force when the application was made and is applicable to the assessment. The *draft scheme* was publicly notified before the appellant's development application was approved.
- [24] Pursuant to s 314(3)(b) of *SPA*, the court must also assess the development application having regard to development approvals for the land,²⁶ here being the current development permit for a shopping centre with a GFA of over 1,000m².²⁷ The land has, since the commencement of the *2006 scheme* on 30 March 2006,²⁸ been identified for centre uses either by way of zoning or development approvals except for 14 months.²⁹
- [25] Pursuant to ss 326 and 329 of *SPA* the decision must not conflict with the planning scheme unless there are "*sufficient grounds*" to justify that decision despite the conflict. The word "*Grounds*" is defined in Schedule 3 of *SPA* in respect of s. 326(1) as:
- “1. *Grounds means matters of public interest.*
 2. *Grounds does not include the personal circumstances of an applicant, owner or interested party.*”
- [26] In *Weightman v Gold Coast City Council*,³⁰ in considering a similar requirement to s 326 of *SPA* in the repealed *Local Government (Planning and Environment) Act 1990*, Atkinson J observed:

“In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s. 4.4(5A)(b) of the P&E Act, the decision maker should:

1. examine the nature and extent of the conflict;
2. determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds;
3. determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict.”

²⁴ *SPA* ss 462 & 495.

²⁵ *SPA* s 495(2)(a).

²⁶ *Abacus Funds Management v. Sunshine Coast Regional Council* [2012] QPELR 669, 676 [20].

²⁷ Exhibit 7 Joint Town Planning Report, p. 13, paras 20-21.

²⁸ Exhibit 4C.

²⁹ T4-56/45, T4-57/25-30 and Exhibit 29.

³⁰ *Weightman v Gold Coast City Council* [2003] Qd R 441, [36].

[27] The co-respondent bears the onus of establishing that the appeal should be dismissed.³¹

Appeal Issues

[28] The appellants have identified the issues in their various notices of appeal, including issues of: general amenity, acoustic and lighting;³² landscaping treatment;³³ ecology including koala issues;³⁴ traffic³⁵ including traffic safety;³⁶ town planning;³⁷ and need.³⁸

[29] The issues about landscaping and acoustic treatment along Boundary Road and Panorama Drive frontages, amenity, impact on local koala populations, and traffic, are no longer pressing many of these issues as grounds warranting refusal. The appellants properly acknowledge that these issues are not enough to warrant refusal.³⁹

[30] No issue is taken with the proposed residential component and reconfiguration of a lot, but the retail/commercial component is disputed, with particular focus on the proposed full-line supermarket based centre with associated retail and tavern uses.⁴⁰

[31] The disputed issues can be synthesised as follows:

- (a) The nature and extent of the conflict with the *2006 Scheme* including:
 - (i) Desired Environmental Outcomes;
 - (ii) The Strategic Framework;
 - (iii) The Kinross Road Structure Plan;
 - (iv) The zones including Neighbourhood Centre Zone, Medium Density Zone, Open Space Zone, Urban Residential Zone and the Community Purposes Zone.
- (b) The nature and extent of the conflict with the *draft scheme*;
- (c) The nature and extent of the conflict with the South East Queensland Regional Plan 2009-2031 (“SEQRP”);
- (d) Whether there are sufficient grounds to justify the approval despite the conflicts having regard to:
 - (i) The need for the development;
 - (ii) Commercial, traffic and amenity impacts of the development;

³¹ SPA, s 493(1)

³² Exhibit 3: p. 4, paras 4(p)-(q); p. 15, para 8(f) (Lakeside) and pp. 40-41, paras 1-3.

³³ Exhibit 3: p. 15, para 8(f).

³⁴ Exhibit 3: p. 24, para 2(h)(ii).

³⁵ Exhibit 3: p. 3, paras 4(n)-(o); p. 9, para 16; pp. 14-15, para 8(e).

³⁶ Exhibit 3: p. 3, para 4(m); pp. 14-15, para 8(f).

³⁷ Exhibit 3: pp. 2-4, paras 4(a)-(d),(f)-(h),(j),(r)-(t); pp. 7-8, para 13; p. 14, paras 8(a)-(d).

³⁸ Exhibit 3: p. 3, paras 4(k)-(l); Lanrex notice of appeal paras 14-15; p. 15, paras 8(g)-(h).

³⁹ Exhibit 3, p.47.

⁴⁰ Exhibit 7 Joint Town Planning Report, p. 14, para 24.

(iii) Whether the 2006 scheme has been overtaken by events.

- [32] The broad planning issues are whether the proposed centre is too big and in the wrong place, having regard to the network and hierarchy of centres, and whether there are sound planning reasons to depart from the planned network of centres in the 2006 scheme.⁴¹

Nature and extent of conflict with the planning scheme

- [33] It is necessary to identify any conflict between an approval and with the *planning scheme*, and if so, consider the nature and extent of the conflict taking a sensible approach and regarding the scheme as a whole.
- [34] Any conflict must be “*plainly identified*”.⁴² The term “*conflict*” was considered by the Court of Appeal in *Woolworths Ltd v Maryborough CC (No. 2)*,⁴³ where Fryberg J said:

“‘*Conflict*’ in this context means to be at variance or disagree with. It describes a quality of a relationship between the subject (the decision) and a part of the predicate (the scheme). Unlike ‘*compromise*’ in para. (a), it implies no particular impact by a subject upon an object. A determination that there has been a breach of the requirement that ‘the assessment manager’s decision must not ... conflict with the planning scheme’ requires the identification of the decision, the identification of some part or parts of the scheme with which the decision might be said to conflict and a decision whether the former conflicts with the latter. Only if such a determination has been made is it necessary to consider whether there are sufficient planning grounds to justify the decision.”

- [35] In *Lockyer Valley Regional Council v Westlink Pty Ltd*,⁴⁴ the Court of Appeal discussed and affirmed the *Weightman* test. Later, in *Kangaroo Point Residents Association Inc v Brisbane City Council*,⁴⁵ the Court held at [69]-[70]:

“A useful starting point for such interpretation is to consider the approach of de Jersey CJ, with whom Muir JA and Douglas J agreed, in *Stockland Development Pty Ltd v Townsville City Council & Ors*. There, after noting that the first instance approach to the application of the scheme to the developer’s proposal involved ‘a correct interpretation of the language of the scheme’ and ‘a factual conclusion as to the absence of conflict,’ de Jersey CJ stated that it was a mistake to think that the construction of town planning schemes can or should be attended by the precision and certainty which should characterise the construction of contracts and statutes, because good town planning, basic principles aside, depends on a large element of fluidity and flexibility: at 324 [25]-[26].

But that approach does not mean that the same general principles which apply to statutory construction do not apply to the construction of planning documents. This was the concern of the Court of Appeal in *Zappala Family Co Pty Ltd v*

⁴¹ Exhibit 13 p. 2, para 9; see also Exhibit 7 town planning JER p. 65, para 204

⁴² *Fitzgibbon Hotel Pty Ltd v Logan City Council* [1997] QPLER 208, [212].

⁴³ *Woolworths Ltd v Maryborough City Council (No. 2)* (2006) 1 QdR 273, [23].

⁴⁴ *Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 QdR 302, 322-323; *Hydrox Nominees Pty Ltd v Sunshine Coast Regional Council* [2014] QPEC 18, [14].

⁴⁵ *Kangaroo Point Residents Association Inc v Brisbane City Council* [2014] QPEC 64.

Brisbane City Council & Ors. There, Morrison JA, with the concurrence of McMurdo P and Douglas J, authoritatively stated that the correct approach to statutory interpretation must begin and end with the text itself, while at the same time bearing in mind that the modern approach to statutory interpretation insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, using ‘context’ in its widest sense: at 95 [55] (with citations omitted). Where the flexibility and fluidity must then occur, consistently with Morrison JA’s analysis, is by appreciating that such documents need to be read in a way which is practical, to be read as a whole, and to be read as intending to achieve balance between outcomes: at 95 [56]. In this understanding of such need, Morrison JA expressly adopted statements by Chesterman JA in *AAD Design Pty Ltd v Brisbane City Council*, to the effect that: planning schemes, and the definitions found in them, often lack clarity, contain ambiguities, and sometimes appear contradictory; and attempts to make sense of them gives rise, on occasions, to ‘expressions of judicial exasperation:’ at 96 [57]”.

[36] In considering the principles relevant to the construction of planning schemes, the matters enunciated by Britton SC DCJ in *Westfield Management Ltd v Pine Rivers Shire Council* [2009] QPELR 337 remain apposite:

- (a) They should be construed broadly rather than pedantically or narrowly and with a sensible, practical approach;⁴⁶
- (b) They should be construed as a whole;⁴⁷
- (c) They should be construed in a way which best achieves their apparent purpose and objects;⁴⁸
- (d) In the light of the proscription against prohibiting development;⁴⁹
- (e) Statements of Intents or Aims or Objectives are intended to provide guidance for the task of balancing the relevant facts, circumstances and competing interests in order to decide whether a particular use should be rejected as inappropriate;⁵⁰
- (f) A Strategic Plan sets out broad desired objectives and not every objective needs to be met before a proposal can be approved;⁵¹
- (g) A Strategic Plan should be read broadly and not pedantically;⁵²

⁴⁶ *ZW Pty Ltd v Peter R Hughes & Partners Pty Ltd* (1992) 1 Qd R 352, 360; *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306, 340, 342, 345; *Harbug Investments Pty Ltd v Brisbane City Council* [2000] QPELR 313, 318.

⁴⁷ *Luke v Maroochy Shire Council* [2003] QPELR 447.

⁴⁸ *Luke v Maroochy Shire Council* [2003] QPELR 447; *Nordale Management Pty Ltd v Maroochy Shire Council* [1995] QPLR 368, 370; *Acts Interpretation Act 1954*, s 14A.

⁴⁹ IPA, s 6.1.2(3).

⁵⁰ *Degee v Brisbane City Council* [1998] QPELR 287.

⁵¹ *Lewiac Pty Ltd v Gold Coast City Council* [1996] 2 Qd R 266, 272 ; (1994) 83 LGERA 224, 230; [1994] QPLR 318, 322.

⁵² *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306.

- (h) Although planning documents have the force of law they are not drawn with the precision of an Act of Parliament;
- (i) A conflict alone may not have the effect of ruling out a particular proposal.⁵³

2006 Scheme

- [37] The 2006 scheme took effect from 20 March 2006. Section 3.1.1 provides, rather unusually, that the “effective life” of the scheme is a “*period of 8 years from the date of commencement*”.⁵⁴ That is, March 2014, but of course it remains in force until repealed when a new scheme is in force.
- [38] The 2006 scheme is divided into 12 parts. Of particular relevance are the higher order provisions in Part 3, including the Desired Environmental Outcomes and Strategic Framework, and also Part 4 containing the zones.

Desired Environmental Outcomes

- [39] DEO no. 6 which relates to economic development and relevantly provides:⁵⁵
 - “(1) *Redland Shire has a diverse, dynamic and sustainable economy with increasing levels of employment opportunity through -*
 - (a) *a network of multi-purpose centres where -*
 - (i) *development occurs in accordance with Redland Shire’s Centre network, where,*
 - a. *Capalaba and Cleveland are recognised as Principal Activity Centres under the South East Queensland Regional Plan, and together with Victoria Point are located within the Major Centre zone to accommodate the key concentrations of higher order retail, commercial, residential, administrative, community and entertainment uses and employment mix;*
 - b. *Birkdale and Alexandra Hills are district centres;*
 - c. *Wellington Point, Redland Bay, Mount Cotton Village, Dunwich and Colburn Avenue, Victoria Point are neighbourhood centres.*
 - ...
 - (iii) ***the City centres are geographically defined by the extent of the Centre zones in the case of District, Neighbourhood and Local Centres and Diagram 12 Capalaba Principal Activity Centre, Diagram 13 Cleveland Principal Activity Centre and Diagram 14 Victoria Point Major Centre.***

⁵³ *Fitzgibbons Hotel Pty Ltd v Logan City Council* [1997] QPELR 208, 212.

⁵⁴ Exhibit 4, vol 1, p. 26: 2006 planning scheme s.3.1.1(3).

⁵⁵ Exhibit 4, vol 1, p. 30: 2006 planning scheme part 3, division 1, p. 5 (with my bolding)

- (iv) ***the primacy of the City’s centres network shall be protected by discouraging out of centre development outside of the centre areas identified in (i) above. ...***

[40] A “Centre” is defined to mean “*the City Centres geographically defined by the extent of the Centre Zones in the case of District, Neighbourhood, Local, Point Lookout and SMBI Centres and Diagram 12 Capalaba Principal Activity Centre. Diagram 12 Cleveland Principal Activity Centre and Diagram, 14 Victoria Point Major Centre as depicted in Part 3: Division 2 Strategic Framework of the Redlands Planning Scheme.*”⁵⁶

[41] In DEO 6 the “Redland City’s Centre network” prescribes for differing levels of centres, including Major, District, Neighbourhood and Local centres. Here, the co-respondent characterises the proposed centre as a “*Neighbourhood Centre*” with a total floor space of 6,875m², comprising a full-line supermarket and specialty shops comprising 5,700m² retail and associated uses totalling 1,175m² (tavern, service station and medical centre).

[42] In s 4.15.7(2) of the *Overall Outcomes for Neighbourhood Centre Zone Code*, the characteristics of the *Neighbourhood Centre* includes:

- (a) Centre uses to service residential and tourist catchments up to 5000 people in sub-area NC1 and 10,000 people for other areas in the zone;
- (b) Meet community needs to serve neighbourhood catchments;
- (c) Limited size and scale of retailing activities, proportionate to catchment zone;
- (d) Includes mini supermarket, speciality stores, refreshment establishments, limited commercial activities and limited community services.

[43] By comparison, a District Centre (which sits between a Neighbourhood Centre and a Major Centre servicing catchments greater 50,000 people), according to s 4.4.7(2) *Overall Outcomes for Distirct Centre Zone Code*, has characteristics to provide for a range of uses that (among other things):

- (a) Meet demonstrated community needs to serve a district sized catchment;
- (b) Includes supermarket, specialty stores, commercial activities and community services.

[44] More like a District Centre, the proposal seeks to develop the largest Coles full-line supermarket, and the second largest full-line supermarket, in the Redland City local government area. It will be smaller than the Woolworths at Capalaba Central,⁵⁷ which is part of a Principal Regional Activity Centre under the *South East Queensland Regional Plan 2009-2031* and is designated as a Major Centre in the 2006 scheme.

⁵⁶ Exhibit 4, vol 1, p. 30: 2006 planning scheme part 3, division 1, p. 6.

⁵⁷ T2-2/L44-47 (McCracken).

- [45] The term “*Out of centre development*” is defined in the 2006 scheme as ‘A location that is clearly separate from a centre’, with the notation that ‘land is zoned with the word “centre” in the title is a centre for the purposes of the planning scheme.’⁵⁸ The subject land is not included within any geographically defined centre zones and can only be characterised as out of centre development.
- [46] The appellant argues that the proposed development conflicts with DEO 6, because the proposed development does not protect the City’s centres network in the manner required in that it involves out of centre development; and retail development of a size and function not supported in the locality.
- [47] Whilst, the co-respondent accepts that the proposed development would represent out of centre development, it argues that the proposed development does not affect the “*primacy*” of the centres network, as the centres referred to in the DEO will retain their role and function as higher order centres, regardless of whether the Court grants the approval the subject of this appeal. Further, it points to the term - “*discouraging*”, (in relation to out of centre development in DEO 6 (iv)) as not the strongest possible language, the stated 8 year “*effective life*” of the scheme, council’s earlier approvals of out of centre development, and approvals of large centres for existing centres.
- [48] Even so, it seems to me that the conflict with the 2006 scheme is plain and significant since the proposed centre is not contemplated by the scheme in its location, scale or function, and is ‘out of centre development’. In my view, the proposed development would:
1. Result in an additional centre inconsistent with the 2006 scheme’s planned centre network;⁵⁹ and
 2. Impact upon the City’s planned centre-driven economic and employment opportunities at Cleveland and Victoria Point.⁶⁰

Strategic Framework

- [49] The appellants also assert conflict with provisions of the strategic framework, particularly, ss. 3.2.3 and 3.2.4(5), and diagrams 2 & 3.⁶¹
- [50] Section 3.2.3 of the Strategic Framework, which relevantly states (using the appellant’s bolding):

“3.2.3 Strategies for the City

(1) Urban Settlement Pattern and Population Growth -

- (k) The development of centres is in accordance with a functional network, with the major centres at Capalaba, Cleveland and Victoria Point. These areas will accommodate the primary concentrations of higher order commercial, retail, administrative, community and entertainment facilities. Both**

⁵⁸ Exhibit 4, vol 1, p. 285 - 2006 planning scheme, part 9, division 2, p. 16 - “*Out of centre development*”.

⁵⁹ Lanrex Grounds [13(a)]; Victoria Point Grounds [8(a)]; and Lipoma Particulars [2(a)].

⁶⁰ Victoria Point Grounds [8(g)].

⁶¹ Exhibit 3: p. 8, para 13(b); Exhibit 3: pp. 21-23, paras 1(b) & (c) and 2(b) & (c); and Exhibit 3: p. 14, para 8(a).

Capalaba and Cleveland are recognised in the Regional Plan as Principal Activity Centres which service catchments of sub regional significance and accommodate key concentrations of employment.

...

(3) *Centres -*

(a) ***The Redlands Planning Scheme encourages the development of centres in accordance with a functional network, with individual centres of varying level differentiated from one another on the basis of a centres matrix that distinguishes centre role and function, scale and use composition. The geographical extent of each of the larger centres is defined by Diagram 12 Capalaba Principal Activity Centre, Diagram 13 Cleveland Principal Activity Centre and Diagram 14 Victoria Point Major Centre. The extent of other smaller centres is determined solely by the extent of the relevant centre zoning(s) in that area.***

...

(h) ***District centres at Birkdale, Alexandra Hills and Redland Bay provide for the commercial and retail needs of surrounding district catchment population of approximately 15,000 persons. The extent of these District Centres are geographically defined on the zoning maps by the District Centre zone.***

(i) ***Neighbourhood centres are located at Wellington Point, Redland Bay, Mount Cotton Village, Dunwich and Colburn Avenue – Victoria Point. These centres are intended to fulfil a traditional village centre role. They provide for neighbourhood commercial and retail needs of a catchment population generally up to 7,500 persons, except Mount Cotton Village and Colburn Avenue – Victoria Point where the catchment size is reduced to reflect location circumstances. Retail and commercial activity within these centres is to encompass mini-markets, specialty shops, and limited commercial premises. Full-line supermarkets are inconsistent with the intended role and function of these centres and accordingly are not considered appropriate. The extent of Neighbourhood Centres are geographically defined on the zoning maps by the Neighbourhood Centre zone.***

(j) ***All remaining centres in the City are local centres. Local centres are encouraged to develop in locations zoned for such purposes.***

- (k) *The Redlands Planning Scheme actively protects the primacy of the City’s centres by discouraging out of centre development – that is, development outside of the geographical extents of the larger centres as shown in Diagrams 12-14 and the extent of the centre zonings in other centres – and ensuring no existing centre expands to the next level in the centre’s matrix by virtue of size or function.”*

[51] Section 3.2.4(5)(b), with respect to the Kinross Road Structure Plan Area⁶² provides as follows (using the appellant’s bolding):

“3.2.4 Local Level Strategies applying to certain parts of the City

(5) *Kinross Road Structure Plan Area*

(b) *Overall development intent and vision statement*

- (i) ***Vision for the Kinross Road Structure Plan Area – “The Kinross Road Structure Plan Area is a sustainable, integrated and well planned urban community accommodating a range of dwelling types, integrated movement and public open space networks and a range of local community, commercial and retail facilities. The Kinross Road Structure Plan Area has a distinct sense of place and community built upon a strong respect for the natural environment including Hilliards Creek, flood affected areas, bushland habitats and fauna movement corridors.***

*The integration and land uses and transport infrastructure ensures the community enjoys a range of travel choices including pedestrian and cycle networks, public transport and private vehicles. **Internal linkages ensure good access to the Mixed Use Local Centre Precinct, Community Facilities Precinct and Greenspace Precinct. External linkages ensure strong connectivity to higher order retail, employment and community facilities at Cleveland, Capalaba and Victoria Point.***

...

*Urban areas within the Kinross Road Structure Plan Area are attractive and functional neighbourhoods with convenient walkable access to public transport. **The Mixed Used Local Centre Precinct, in combination with the Community Facilities Precinct and local recreation park creates a community hub and focal point for the urban community.***

Urban form in the Kinross Road Structure Plan Area is typified by a range of residential densities and building

⁶² Exhibit 4 Planning Scheme Extracts, Vol 1 p 54 (emphasis added).

heights, with the greatest densities located in proximity to the Mixed Use Local Centre Precinct. A diversity of dwelling types provides housing choice and improved affordability within a unique urban form that enjoys the amenity and values of the surrounding environment.

....

(e) *Land Use Precincts Strategy – Mixed Use Local Centre Precinct (Precinct 1)*

(i) *The Mixed Use Local Centre Precinct will provide convenience shopping catering for the local resident's day to day convenience needs, commercial employment opportunities and residential accommodation in a vibrant central hub of community activity.*

(ii) *Outcomes for the Mixed Use Local Centre Precinct include:*

a. *providing limited retail and commercial services to meet the convenience needs of surrounding residents;*

b. *providing for small scale commercial offices or service industry activities that encourage and support local employment opportunities while respecting and protecting the amenity of adjoining housing precincts;*

c. *exhibiting the basic characteristics of a transit orientated community by integrating land uses and public transport infrastructure;*

d. *providing, in association with the adjoining Community Facilities Precinct, local recreation park, pedestrian and cycle network and bus stop, a focal point for the urban community;*

e. *providing opportunity for medium density housing above the ground story;*

f. *ensuring the built form incorporates:*

- *sustainable sub-tropical building design in a mid-rise form; and*

- *active street frontages on the ground level.*

g. *ensuring site planning and building design addresses the Greenspace Precinct and*

facilitates connections to the adjoining local recreation park;

- h. demonstrating principles of Water Sensitive Urban Design;*
- i. managing urban stormwater and wastewater quality and flows to protect receiving water quality and improve waterway stability through construction and operational phases to meet the design objective.*

....

(g) Sub-Precinct 3a Medium Density Residential Housing – Kinross Road:

- *is designed to maximise views and outlook across the adjoining Greenspace Precinct;*
- *supports an increased density of dwelling units in proximity to the Mixed Use Local Centre and Community Facilities precinct;*
- *incorporates pedestrian and cycle pathways which provide convenient linkages to the Mixed Use Local Centre Precinct, Community Facilities Precinct, Greenspace Precinct and bus stops; and*
- *supports development in a mid-rise (3 storeys) built form.*

(h) Sub-Precinct 3b Medium Density Residential Housing – Boundary Road and Panorama Drive:

- *provides low-rise medium density residential development in close proximity to line haul bus services along Boundary Road and Panorama Drive;*
- *provides physical breaks in the built form to facilitate convenient pedestrian access to the public transport services along Boundary Road and Panorama Drive;*
- *incorporates acoustic treatments and building setbacks which mitigate noise impacts from Boundary Road and Panorama Drive;*
- *ensures consistent acoustic treatments incorporate high quality landscaping design and façade treatments that are visually attractive to address acoustic requirements and provide a transition to the rural land to the south of Boundary Road included in the Regional Landscape and Rural Production Area of the SEQRP 2009-2031; and*

- *limits development to a low-rise (1-2 storeys) built form*”

[52] The proposed development is inconsistent with the 2006 scheme’s Strategic Framework as identified by the appellant, in that:

1. The development would result in an additional centre inconsistent with the Scheme’s planned centre network;⁶³
2. The development would potentially jeopardise the ability of higher order centres to function at the level intended by the centres hierarchy;⁶⁴
3. The development is inconsistent with the intention for the land to be utilised for medium density residential housing (sub-precinct 3b), urban residential housing (sub-precinct 4b) and green space network (sub-precinct 7(e));⁶⁵ and
4. The development would jeopardise the ability for the planned local centre in the Kinross Road Structure Plan area to properly function.⁶⁶

[53] However, I accept the co-respondent’s argument that the 2006 scheme expressly and effectively excludes these Strategic Framework provisions from the assessment of the proposed development. Section 3.2.1(2) of the 2006 scheme provides:⁶⁷

“The Strategic Framework does not have a role in the development assessment under the Redlands Planning Scheme.”

[54] In *Viridian Noosa Pty Ltd (Receivers and Managers Appointed) v Sunshine Coast Regional Council*,⁶⁸ Robin QC DCJ considered a similar provision in circumstances where a council alleged conflict with the Strategic Framework. His Honour said at [20]:

“The Council relies on 1.7.8 Visitor Facilities in the strategic framework which introduces the planning scheme. It provides that ‘(a) Noosa Heads and Noosaville will remain the principal focus of visitor accommodation with some sites protected for the exclusive use of visitor accommodation.’ Telling against that provision constituting a relevant basis for a finding of conflict is 1.3.2: ‘This division does not have a role in development assessment under the planning scheme.’ Conflict is something to be established with reasonable clarity, and in the circumstances I do not consider that it exists with either of the provisions set out above, although the Council sought to rely on it in that regard...”

[55] I agree. Since the Court in a merits appeal “*stands in the shoes*” of the local government as the assessment manager,⁶⁹ I conclude that the appellants’ reliance upon conflict with

⁶³ Lanrex Grounds [13(b)(i)-(ii)]; Lipoma Grounds [2(b)(i)-(ii)].

⁶⁴ Lipoma Grounds [(2)(b)(iv)].

⁶⁵ Lanrex Grounds [13(b)(iii)-(iv)]; Lipoma Grounds [2(b)(iii)].

⁶⁶ Lipoma Grounds [2(c)].

⁶⁷ Exhibit 4, vol 1, p. 32: 2006 planning scheme part 3, division 2, p. 1.

⁶⁸ *Viridian Noosa Pty Ltd (Receivers and Managers Appointed) v Sunshine Coast Regional Council* [2013] QPEC 54.

⁶⁹ *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QCA 333, [59]-[60]; see also *Wheldon & Armview Pty Ltd v Logan City Council* [2015] QPELR 640, [40]-[44].

the Strategic Framework provisions is rendered impotent by s 3.2.1(2) of the 2006 scheme. I do rely upon any conflict in this regard.

The zones

[56] The appellants also contend conflict with the zone provisions as follows:

- (a) overall outcomes for the Community Purposes Zone, particularly ss 4.2.7(2)(a)(i)g. and 4.2.7(2)(a)(ii), and Specific Outcomes S1.1 and S1.2 for the Community Purposes Zone; and
- (b) overall outcomes for the Medium Density Residential Zone, particularly ss 4.14.7(2)(a)(i)i. and j., and overall outcomes for the Kinross Road Structure Plan Area Overlay, particularly ss 5.15.8(2)(b)(i)k.

[57] The Overall Outcomes for Medium Density Residential Zone Code, include (using the appellant's bolding):

- (i) Section 4.14.7(2)(a)(i) i and j:⁷⁰

“Provide for a range of residential uses that -

...

- i. in sub area MRD5 – provide for permanent residential uses including multiple dwellings, tourist accommodation and aged and special needs housing with no direct vehicular access from Boundary Road.*
- j. in sub area MDR5 – non residential uses are highly restricted to protect the higher order function of Boundary Road as a primary road link between the City’s southern districts and Brisbane.”*

- (ii) Section 4.14.7(2)(a)(ii):⁷¹

“Provide for a range of non-residential uses that -

- a. fulfill a local community need and provide opportunities for social interaction and activity;*
- b. are highly accessible to the residents served;*
- c. do not compromise the role and function of centres;*
- d. are not large land consumers that by their scale and nature will diminish the quantity of land within this zone;*
- e. are located on the major road network rather than local residential streets;*

⁷⁰ Exhibit 4 Planning Scheme Extracts, Vol 1 p 93 (my bolding).

⁷¹ Exhibit 4 Planning Scheme Extracts, Vol 1 pp 93 – 94 (my bolding).

f. do not result in commercial ribbon development; ...”

[58] The Overall Outcomes for the Major Centre Zone Code, includes s 4.12.7(3)(a)(v) (again using the appellants’ bolding):⁷²

“Sub-areas MC9, MC10, MC11 and MC12 comprise the Victoria Point Major Centre which provides for a range of uses that –

...

- b. serves a catchment of less than 50 000 people;*
- c. include one (1) discount department store, supermarkets, specialty stores and commercial activities;*
- ...*
- f. provide entertainment facilities such as cinemas, nightclubs, restaurants and other like activities;*
- g. incorporates a public transport interchange;*
- h. has high accessibility by private transport with driving time of less than 15 minutes to the majority of its catchment and provides higher order services to the Southern Moreton Bay Islands; ...”*

[59] The Overall Outcomes for the District Centre Zone Code, relevantly states in s 4.4.7(2)(a)(i) (with the appellants’ bolding):⁷³

Provides for a range of uses that –

- a. enhance and protect the primacy, vitality and vibrancy of the City’s network of centres;
- b. meet demonstrated community needs to serve a district sized catchment;
- c. **includes supermarkets**, specialty stores, commercial activities and community services;
- d. provides employment opportunities;
- e. provides focus for community interaction and activity;
- f. are located near schools, parkland and community facilities to form part of a district community node and support the function of retail and commercial activities to be located in the district centre zone;

⁷² Exhibit 4B Planning Scheme Extracts, pp 6 - 7.

⁷³ Exhibit 4B Planning Scheme Extracts, p 1 (emphasis added).

- g. are conveniently accessible to the district catchment area they serve by private vehicle, public transport and pedestrian and cycle routes;
- h. in sub-area DC1 – are predominantly for residential and tourism accommodation uses where part of a mixed use development;
- i. in sub-area DC2 – provide opportunity for the redevelopment or expansion of existing hotel.

[60] The Overall Outcomes for the Neighbourhood Centre Zone Code, includes in s 4.15.7(2)(a)(ii) (with the appellants' bolding):⁷⁴

Provides for a range of centre uses that –

- a. **enhance and protect the primacy, vitality and vibrancy of the City's network of centres;**
- b. fulfil a traditional village centre role;
- c. meet community needs to serve neighbourhood catchments;
- d. limit the size and scale of retailing activities, proportionate to catchment size;
- e. **includes mini-supermarket**, specialty stores, refreshment establishments, limited commercial activities and limited community services;
- f. provide for employment opportunities;
- g. are conveniently accessible by private vehicle, public transport and pedestrian and cycle routes to the neighbourhood they serve;
- h. in sub-area NC1 – provide local convenience shopping for the day to day needs of the local catchment.

(c) the Overall Outcomes for the Local Centre Zone Code, includes s 4.10.7(2)(a)(i) (with the appellants' bolding):⁷⁵

Provides for a range of centre uses that –

- a. enhance and protect the primacy, vitality and vibrancy of the City's network of centres;
- b. serve a local catchment;
- c. **provide local convenience shopping for day to day needs;**

⁷⁴ Exhibit 4B Planning Scheme Extracts, p 9 (emphasis added).

⁷⁵ Exhibit 4B Planning Scheme Extracts, p 3 (emphasis added).

- d. provide for local employment opportunities;
- e. provide a focus for local community interaction and activity;
- f. are located near schools, parkland and community facilities to form part of a local community node;
- g. are conveniently accessible to the catchment area they serve by private vehicles, public transport and pedestrian cycle routes.

[61] As discussed above, the proposed development is more accurately characterised functioning more like a District Centre, or at least, a larger centre than a Neighbourhood Centre (so called by the co-respondent).

[62] It seems to me that the proposed development conflicts with the zone provisions as contended by the appellants. It involves uses that are inconsistent with the zone and use of the planned road. The proposed road connection in an alternative location will also affect the adjacent land because it does not align with the land that is zoned road on the land to the immediate west. Further, the proposed development involves direct vehicular access from Boundary Road.

[63] In any event, the Kinross Road Structure Plan overlay code provides that it prevails over any other provisions within the *2006 scheme* to the extent of any inconsistency.⁷⁶ As to the zoning of the road shown in the Kinross Road Structure Plan, it is true that a reconfiguration will cause a change of the level of assessment under the *2006 scheme*,⁷⁷ however, this is dissipated by the *draft scheme* which does not identify or zone roads differently to the rest of the parcel.⁷⁸ Further, the road network for the Kinross Road Area is shown more indicatively.⁷⁹

Kinross Road Structure Plan

[64] The land is within the Kinross Road Structure Plan Area. The provisions of the structure plan overlay code prevail over any other provisions within the *2006 scheme* to the extent of any inconsistency.⁸⁰

[65] The structure plan area comprises 7 precincts: mixed used local centre precinct (precinct 1); community facilities precinct (precinct 2); medium density residential housing precinct (precinct 3); urban residential housing precinct (precinct 4); low density residential housing precinct (precinct 5); bushland living precinct (precinct 6); and green space precinct (precinct 7).⁸¹ There are also sub-precincts within some precincts.

[66] The Kinross Road Structure Plan Area is subject to the Kinross Road Structure Plan overlay code. Map 1 of that overlay code shows the precincts and sub-precincts.⁸² It

⁷⁶ Exhibit 4, vol 1, p. 192: 2006 planning scheme part 5, division 15, p. 1, s.5.15.2(4).

⁷⁷ T4-67/25-34.

⁷⁸ Exhibit 4, vol 2, p. 480.

⁷⁹ Exhibit 4, vol 2, pp. 398-399.

⁸⁰ Exhibit 4, vol 1, p. 192: 2006 planning scheme part 5, division 15, p. 1, s.5.15.2(4).

⁸¹ Exhibit 4, vol 1, pp. 212-217: 2006 planning scheme part 5, division 15, pp. 21-26, s.5.15.8(2).

⁸² Exhibit 1 p. 16; Exhibit 4, vol 1, p. 211: 2006 planning scheme part 5, division 15, p. 57.

contains overall outcomes which are the purpose of the code,⁸³ and specific outcomes that contribute to achieving the overall outcomes.⁸⁴ Development that is consistent with the specific outcomes will comply with the Kinross Road Structure Plan overlay code.⁸⁵

[67] Section 5.15.8(2)(a)(ii) of the Kinross Road Structure Plan Overlay, relevantly provides:⁸⁶

“Uses and other development reinforce the specific development intent for each Land Use Precinct, depicted on Map 1 – Kinross Road Structure Plan Area – Land Use Precincts, as follows –

*a. **Mixed Use Local Centre Precinct – (Precinct 1)***

- ***provides limited retail and commercial services to meet the convenience needs of surrounding residents;***
- *provides for small scale commercial offices or service industry activities that encourage and support local employment opportunities while respecting and protecting the amenity of adjoining Housing Precincts;*
- *exhibits the basic characteristics of a transit orientated development by integrating land uses and public transport infrastructure;*
- *provides, in association with the adjoining Community Facilities Precinct, local recreation park, pedestrian and cycle network and bus stop, a focal point for the surrounding housing precincts;*
- ***provides opportunity for medium density housing above ground level;***

*c. **Medium Density Residential Housing Precinct – (Precinct 3)***

- *provides a range of housing types including apartment buildings, multiple dwellings, town houses, terraces, and aged care and special needs housing to meet the community’s diverse housing needs;*
- *takes advantage of the views and amenity offered by the Greenspace Precinct ensuring development addresses and provides passive surveillance of public open spaces;*
- ***provides a higher density of dwelling units in proximity to the Mixed Use Local Centre Precinct and Community Facilities Precinct;***

⁸³ Exhibit 4, vol 1, p. 211: 2006 planning scheme part 5, division 15, p. 20, s.5.15.7(8).

⁸⁴ Exhibit 4, vol 1, p. 211: 2006 planning scheme part 5, division 15, p. 20, s.5.15.7(3).

⁸⁵ Exhibit 4, vol 1, p. 211: 2006 planning scheme part 5, division 15, p. 20, s.5.15.7(4).

⁸⁶ Exhibit 4 – 2006 Scheme extracts, Tab 7 pp 212 – 213 (bolding added).

- *incorporates pedestrian and cycle pathways which provide convenient linkages to the Mixed Use Local Centre Precinct, Greenspace Precinct and bus stops;*
- ***Sub-Precinct 3a Medium Density Residential Housing – Kinross Road***
 - › *ensures building design maximises views and outlook across the adjoining Greenspace Precinct;*
 - › ***provides for a higher density of dwelling units in proximity to the Mixed Use Local Centre and Community Facilities Precinct;***
 - › *incorporates pedestrian and cycle pathways which provide convenient linkages to the Mixed Use Local Centre Precinct, Community Facilities Precinct, Greenspace Precinct and bus stops;*
 - › *supports a mid-rise built form;*
- ***Sub-Precinct 3b Medium Density Residential Housing – Boundary Road and Panorama Drive***
 - › ***provides for low-rise medium density residential development in close proximity to line haul bus services along the public transport corridors on Boundary Road and Panorama Drive;***
 - › ***provides physical breaks in the built form to facilitate convenient pedestrian access to the public transport services along Boundary Road and Panorama Drive; ...”***

[68] The appellants point to these provisions to demonstrate conflict with the overall outcomes for the Kinross Road Structure Plan Area Overlay, particularly ss 5.15.8(2)(a)(ii) a. and c. The appellants contrast, accurately in my view, the structure plan with the proposal. It seems to me that the proposal’s retail and commercial services exceed the convenience needs of surrounding residents; it will restrict the medium density residential housing planned near the intersection of Boundary Road and Panorama Drive in the south-east corner of the land; and the impact on the function and viability of the planned local centre.

[69] The co-respondent accepts that the proposed development conflicts with the provisions of the Sstructure Pplan, in that it will use the land for centre uses instead of its designated use for housing uses; other land is designated in the structure plan to be used for centre uses; and it also provides a centre that is a larger in scale than that anticipated within the structure plan area.

[70] The local centre contemplated under the structure plan was the subject of evidence, which the co-respondent relies upon to highlight some issues with the centre.⁸⁷

[71] The co-respondent emphasised Mr McCracken's testimony about the evolvement of the plan as follows:⁸⁸

“And so you're saying that the centre's hierarchy is wrong. That is that the council got it wrong – weren't prepared to see this hierarchy?---Well, my involvement in the Kinross Road structure plan in 2006 – a centre was envisaged there but so were access from Kinross Road through to Panorama Drive at Goddard Road and another crossroad, which I think is still shown in the cadastral maps, but they're not to be built is my understanding. Which would've opened that area up so that people to the – I mean even the people who live in Kinross Road structure plan now on the Panorama Drive cannot access that centre without having to – well, they can't drive to it.

Mr McCracken, can you go to page 16 of exhibit 1? Am I correct in saying that that shows a future road network that will be built as and when the urban areas, particularly those precincts 4A are built throughout the Kinross structure plan area?---Yes.

Am I correct in saying that if once that road system is in place and once that area is developed the mixed-use local centre shown in blue in the centre will be indeed conveniently centrally located to all of that population in where they live?---If the road through our site is – the subject site is built they would be able to – my point is, that when these centres were being talked about this Kinross Road area had – it wasn't a cul-de-sac. It had access through to – I think it was through Goddard Road and one other road which I'll see a name for. So I don't know what happened after our input as part of the Parsons Brinckerhoff team that did the structure plan, but something went awry. It seems they've lost – left a big local centre in there but with no way of accessing, even the part of the structure plan area that exists.”

[72] It is also relevant that the Council has previously approved a centre on the subject land, which would have impacted the local centre. Further, at the time that Mr Fiteni entered into a call option to purchase 53-65 Kinross Road (which is now the subject of a centre designation), that parcel was not the subject of a centre designation and instead the subject land had the benefit of a centre designation⁸⁹.

[73] Mr Ovenden, who was the planner called by the Council, accepted that it hasn't got the planning “quite right”.⁹⁰ Mr Norling emphasised that the designated centre was poorly located in respect of servicing the needs of the community.⁹¹ Indeed, Mr Zeller on behalf of Coles has explained that the designated location for retail is not a location of interest for Coles.⁹² In contrast, Mr Schomburgk posited that the structure plan

⁸⁷ T2-13/40-T2-14/5, T2-36/25-40; Exhibit 6 pp. 76-77, paras 197-198; T2-79/5-20; Exhibit 6 p. 77, para 199; T3-94/40-T3-95/5; Exhibit 7 pp. 40-41, paras 110-113; T4-22/20-25, T4-23/20-45; Exhibit 7 pp.39-40, paras 106-107.

⁸⁸ T2-14/15-40 (bolding to emphasise).

⁸⁹ T3-69/10-40; T3-70/1-5.

⁹⁰ T1-17/20-45; Exhibit 11: Individual Report of Mr Ovenden, p. 3, para 3.4.

⁹¹ Exhibit 6 need JER p. 77, para 199.

⁹² Exhibit 8 p. 4, para 17; see also T3-6/30-35 and T3-11/10-25.

provided for a local centre for residents to undertake a ‘top-up shop’ or for ‘day to day needs’, and they would undertake ‘chore’ shopping at the major centres at Cleveland to the north and Victoria point to the south.⁹³

[74] The appellants have seized upon the provision in the structure plan overlay code that anticipates a centre with only “*limited retail and commercial services to meet the convenience needs of the surrounding residents*”.⁹⁴

[75] A similar provision was considered in *Aldi Stores (A Limited Partnership) v Redland City Council*,⁹⁵ where Wilson SC DCJ said:

“[39] It is accepted by both parties that although ALDI stores have a limited range of products, they sell a much larger range of goods than anticipated to meet a local community need. Council also argues that, due to the location of the proposed ALDI store vis a vis the existing Shopping Centre, as well as the positioning of its entry and exit points, social interaction or activity would not be promoted.

[40] The fact that paragraph (c) of Specific Outcome S1.3(1) (‘providing only for the identified convenience needs of the local community’) is not able to be met by this proposal has been properly conceded by Mr Schomburgk, ALDI’s town planning expert. This concession is necessarily qualified by the observation that the Court has been commonly confronted with this type of problem, and accepted that the provision of services to a community wider than the local community is not necessarily a disqualifying factor.”

[76] For the latter proposition, His Honour cited, amongst other cases, *Seven-Eleven Stores Pty Ltd v Pine Rivers Shire Council*,⁹⁶ wherein Rackemann DCJ emphasised that provisions within planning schemes which seek to limit retail uses to the needs of the local community “*should be construed and applied in a practical rather than pedantic way*”. That approach to the construction of planning schemes has more recently been endorsed by the Court of Appeal in *Zappala Family Co v Brisbane City Council*.⁹⁷ But in doing so, the court ought not usurp the role of the local authority.⁹⁸

[77] Ascertaining the seriousness or nature of the conflict involves discerning from the verbiage of the *2006 scheme*, the degree of importance it attaches to compliance with particular principles, requirements or Codes and, then, analysis of the particular proposal within that regime.⁹⁹

⁹³ T4-55/42 – T4-56/4; see also Mr McCracken at T2-13/23 – 30.

⁹⁴ Exhibit 4, vol 1, p. 212: 2006 planning scheme part 5, division 15, p. 21, s.5.15.8(2)(a)(ii)a (precinct intent for the mixed use local centre precinct).

⁹⁵ *Aldi Stores (A Limited Partnership) v grounds Redland City Council* [2009] QPELR 602.

⁹⁶ *Seven-Eleven Stores Pty Ltd v Pine Rivers Shire Council* [2006] QPELR 85, [10].

⁹⁷ *Zappala Family Co v Brisbane City Council* [2014] 201 LGERA 82, [56].

⁹⁸ *Elan Capital Corporation Pty Ltd v Brisbane City Council* [1990] QPLR 209, 211. Affirmed by the Court of Appeal in *Holts Hill Quarries Pty Ltd v Gold Coast City Council* [2001] 1 QdR 372, Grosser v Gold Coast City Council [2001] 117 LGRA 153, [6] & [38], *Leda Holdings Pty Ltd v Caboolture Shire Council* [2006] QCA 271, [23], *Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157, [55].

⁹⁹ *Stappen Pty Ltd v Brisbane City Council* [2005] QPELR 466, 473 [31] per Wilson DCJ

- [78] It seems to me that the *2006 scheme* provides for a detailed, prescriptive and purposeful planning strategy and centres hierarchy. It plans for, and identifies the location and trade area for existing or planned major centres, district centres, neighbourhood centres, and smaller local centres, and each is galvanised by zoning. The *2006 scheme* establishes a hierarchy of centres, and expressly discourages out-of-centre development unless specifically intended in a zone or precinct. The *2006 scheme* facilitates local centre shopping, and access to a range of full-line supermarkets in designated major centres within a five to six minute drive both to the north and the south.
- [79] For the reasons set out above, I prefer the appellant’s arguments. The proposal plainly and seriously conflicts with the *2006 scheme* as a consequence of the size and location of the retail components of the proposed development; non-compliance with the prescribed and mapped centres hierarchy, and the land use intents contained within the Scheme’s Kinross Road Structure Plan Area Overlay Code Overall Outcomes, and the inclusion of inconsistent uses in all of the prevailing zones, namely, the Medium Density Residential, Low Density Residential, Open Space and the Community Purpose Zones.
- [80] Despite the idealistic suitability of the proposed development on this land, it seems to me that the proposal conflicts with the Kinross Road Code, in that the development compromises Overall Outcome 5.15.8(2)(a)(ii), and the Structure Plan, in that:
1. The development is inconsistent with that proposed for the land use precincts that apply to the site;¹⁰⁰
 2. The only precinct type that deals with provision of retail and commercial services, being precinct 1 (noting that this does not apply to the land), envisages delivery of “*limited retail and commercial services to meet the convenience needs of surrounding residents*” from a centralised location within the structure plan area, whereas the proposed development will provide broader services to a larger catchment, and in a location different to that proposed in the structure plan;¹⁰¹ and
 3. The proposed development would impact the ability for the planned local centre with adjoining community facilities in the Kinross Road Structure Plan area to properly function.¹⁰²

Draft Scheme

- [81] The *draft scheme* is also relied upon by one appellant.¹⁰³ The *draft scheme* was subject of public notification between September and November 2015, but is yet to commence. The zoning maps for the *draft scheme* effectively replicate the current zoning pattern of the Kinross Road area with the subject land zoned a mixture of:¹⁰⁴
- (a) medium density residential;

¹⁰⁰ Lanrex grounds 13(d)(iii)-(iv) and 13(e); Victoria Point grounds 8(b); Lipoma grounds 2(h)(iv)]; and Order of Rackemann DCJ dated 22 July 2016.

¹⁰¹ Lanrex grounds 13(d)(i)-(ii); Victoria Point grounds 8(b)-(d).

¹⁰² Lipoma grounds 2(h)(i) and (iii) grounds.

¹⁰³ Exhibit 3: p. 3, para 4(f).

¹⁰⁴ Exhibit 7 town planning JER p. 47, para 136.

- (b) low-medium density residential; and
- (c) open space.

- [82] The *draft scheme* effectively replicates the current zoning pattern, and attracts the same issues as the *2006 scheme* discussed above. The only material difference is that “Neighbourhood Centres” will be called “Local Centre” to conform with Queensland Planning Provisions centre zone designations.
- [83] It seems to me that the *draft scheme*’s maintenance of full-line supermarkets in the centres hierarchy and centre zoning, after a whole scheme review, dilutes Council’s arguments and expert opinion of a planning deficiency to meet population growth in the Kinross Road Structure Plan area, and the broader Thornlands area.¹⁰⁵ Whilst there is significant force in this argument and opinion, it is a matter for the Council to address perceived deficiencies in its scheme.
- [84] At this point, the argument is not supported by the expression of intent in the *draft scheme*.

Nature and extent of the conflict with the South East Queensland Regional Plan

- [85] One appellant relies on the State perspective through the *South East Queensland Regional Plan 2009-2031* (“SEQRP”) as strengthening the importance of the centres hierarchy and planned network of centres in the *2006 scheme*, in particular, at page 31:¹⁰⁶
1. The SEQRP refers to the Kinross Road local development area to provide a residential community in combination with additional employment opportunities, together with local retail and commercial functions and community services;
 2. It notes the low self-containment levels of employment in Redland City and indicates that employment growth is to be focused within the planned network of multi-purpose activity centres;
 3. It records that Victoria Point is a major regional activity centre and notes that there are lower-order centres across Redland City that otherwise accommodate the remaining centre-based employment growth; and
 4. It notes that timely provision of transport infrastructure, including quality public transport infrastructure is essential to support Redland City’s expected population and employment growth and that plans to support such growth include ‘*bus priority measures between Cleveland and Capalaba principal regional activity centres and Victoria Point*’.
- [86] The SEQRP is in the nature of a higher order strategic planning document expressed in broad terms and ought be considered with that in mind.¹⁰⁷ Mr Ovenden opined that the development is consistent with desired regional outcomes 3 and 8 of the SEQRP.¹⁰⁸

¹⁰⁵ Exhibit 7 town planning JER p. 48, paras 143-144; Council’s Submission para 6(6), 75, 76.

¹⁰⁶ Exhibit 25.

¹⁰⁷ Cf. *Harburg Investments Pty Ltd v Brisbane City Council* [2000] QPELR 313, 318.

¹⁰⁸ Exhibit 7 town planning JER p. 64, para 202(e); see also Exhibit 25 p. 55 (Desired Regional Outcome 3) and p. 90 (Desired Regional Outcome 8).

On the contrary, Mr Schomburgk opined that the SEQRP was not supportive of out of centre development.¹⁰⁹ It is also apparent that the SEQRP deals mainly with higher order centres, save that it includes the district centre of Victoria Point.

- [87] It seems to me that the nature and extent of the conflicts identified by the appellant, add little, if anything, to the issues raised about the *2006 Scheme* (and *draft scheme*). Even so, conflict with the SEQRP does not mandate refusal in the absence of sufficient grounds.¹¹⁰

Sufficient Grounds

- [88] Against this analysis, it must be considered whether there are sufficient grounds to approve despite the conflicts and departure from the *2006 scheme* (and the *draft scheme*). Relevant grounds are matters of public interest, and do not include the personal circumstances of a party.¹¹¹

- [89] In light of the nature and extent of the identified conflicts with the respective schemes, I think the co-respondent needs strong grounds to overcome the identified conflicts.

- [90] The co-respondent relies upon the following:¹¹²

“1. There is need for the proposed neighbourhood centre development on the site, because

- (a) the provision of additional neighbourhood level retail facilities in the Thornlands area is needed to service existing and future populations;*
- (b) the proposed development will provide the growing trade area population with retail facilities that are not conveniently available within a reasonable proximity of the site;*
- (c) the proposed development will provide a more geographically balanced distribution of retail and community services in the local government area;*
- (d) there has been significant growth in dwellings and population in the southern Thornlands area, and the growth is predicted to continue in the future in such areas as Kinross Road and Woodlands Drive;*
- (e) the proposed development will be convenient to the large volumes of vehicular traffic travelling east along Boundary Road;*
- (f) the proposed development will be convenient to a major industry and healthcare employment precinct to its north;*
- (g) the proposed development will involve a vibrant and accessible centre, which will provide a commercial and community focal point for the Kinross Road growth area;*

¹⁰⁹ Exhibit 7 town planning JER p. 49, para 147; Exhibit 13: Individual Report of Mr Schomburgk p. 7, paras 39-40.

¹¹⁰ *Bird v Logan City Council* [2012] QPELR 502, [44]-[45].

¹¹¹ SPA, Schedule 3; s. 326(1)

¹¹² Exhibit 3: pp. 31-35.

- (h) *the proposed development will provide choice and variety with the introduction of a full-line supermarket based centre, and will provide most trade area residents with access to a greater range and variety of convenient shopping options, and promote competition in a price and service;*
 - (i) *the proposed development will provide a significant community benefit by providing healthcare services in a convenient location.*
2. *There is need for the proposed residential development on the site, because:*
- (a) *there has been significant growth in population in the southern Thornlands area, and the growth is predicted to continue in the future;*
 - (b) *the proposed development is a logical extension of;*
 - (i) *existing residential development on the northern boundary;*
 - (ii) *future residential development to the west;*
 - (c) *the site has been recognised by the respondent as being suitable for residential development;*
 - (d) *the proposed development will add to the provision of choice in relation to available housing stock and will provide the community with residential development that is proximate to and within walking distance of shopping, health and community services.*
3. *The proposed development will contribute to and promote transport network efficiency, because*
- (a) *it is at the intersection of two main roads (Boundary Road and Panorama Drive) which provide convenient and safe vehicular access to the site;*
 - (b) *it will facilitate vehicular and pedestrian movements between Boundary Road and Panorama Drive by the inclusion of a link road;*
 - (c) *it is centrally located to serve trade area residents, and will reduce vehicular trips, travel times and distances presently experienced in accessing retail centres more removed from the trade area of the proposal;*
 - (d) *it will provide an east-to west road link through the site that will ultimately connect Panorama Drive to Kinross Road, as contemplated by the Kinross Road Structure Plan (including the signalisation of the intersection of that east-west link with Panorama Drive);*
 - (e) *it is proximate to an existing and future local population and so will encourage pedestrian and cycle trips.*
4. *The proposed development will result in yet further community benefits, because:*

- (a) *it will provide a hub for social and community interaction in a family friendly environment (with the proposed tavern also providing a family friendly leisure/entertainment venue);*
 - (b) *it will enhance the potential for convenient, multi-purpose trips to a single location;*
 - (c) *it will provide facilities that are complementary to the future land uses envisaged for the Kinross Road Structure Plan area;*
 - (d) *it will contribute to the amenity of a growing residential area (including by the provision of a central community and recreational area along the waterway in the north western part of the site);*
 - (e) *it will establish a neighbourhood centre that is likely to stimulate residential development in the Kinross Road Structure Plan area and to assist in achieving the residential outcomes envisaged for the area;*
 - (f) *it will result in the rehabilitation of the dam in the north-western part of the site, the improvement and rehabilitation of onsite vegetation, and the provision of central community parkland;*
 - (g) *it will result in the provision of a useable open space area in close proximity to the residential and neighbourhood centre uses (it being likely that the open space area would be used for walking, recreation, a market garden and other community uses);*
 - (h) *it will promote interaction between the open space, residential and retail uses by the particular layout proposed;*
 - (i) *it will require over 200 part-time and full-time employment positions.*
5. *The proposed development is in the public interest, because:*
- (a) *it represents an efficient and appropriate use of the site to satisfy the need for retail facilities to serve a growing population;*
 - (b) *it will complement Redland City's existing and planned hierarchy of network of centres;*
 - (c) *it can achieve the outcomes referred to in subparagraph 5(a) and (b) without threatening the viability of any existing supermarket or retail centre;*
 - (d) *it remedies a deficiency in the centres hierarchy in the planning scheme (as it was not suitably updated to account for the Kinross Road Structure Plan Area being incorporated into the planning scheme);*
 - (e) *it will satisfy a need in circumstances where there is no unacceptable impact on amenity, traffic movements or competing retail outlets;*
 - (f) *of the matters referred to in paragraphs 1 to 4 (above)”*

[91] These grounds can be synthesised as follows:¹¹³

1. The site is an excellent site, from all relevant perspectives, for the development of a full-line supermarket based centre of the size and the type proposed;
2. There is a strong community and economic need for the proposal, having regard to the location of the site with respect to its trade area, and significant growth in population that has occurred, and is likely to occur, in that trade area;
3. Part of the subject land has been earmarked for retail development since the commencement of the *2006 scheme* (save for a period of c.14 months);
4. The development of the proposal will not give rise to any adverse impacts, with respect to either amenity or centres hierarchy issues.

[92] The Council supports approval of the development, notwithstanding conflict with the *2006 scheme* (and the *draft scheme*) because:

1. There is community, economic and planning need for the development the subject of the appeal;
2. The *2006 scheme* fails to adequately promote development necessary to enable Desirable Environmental Outcome No. 3(1)(f), in particular, provision of development of the type proposed to service the Scheme's Kinross Road Structure Plan Area, as well as the broader southern Thornlands Area; and
3. The development would not result in negative impacts or detrimental effects, including such impacts or effects on the existing and planned hierarchy of multi-purpose retail district and neighbourhood centres.¹¹⁴

[93] I first turn to consider the weight that ought be afforded Council's previous departures from the planning scheme and it's approval here.

Weight of Council's previous departures

[94] The co-respondent also relies upon the Council's own departure from the Centres hierarchy, and the decision to approve the application.

[95] In *Grosser v Gold Coast City Council*,¹¹⁵ White J (with whom the others agreed) said:

“44 It is well recognised that a town planning appeal court may depart from the planning intent of the local government if the local government has itself departed from that intent or the subject land has been given a designation that was and remained invalid, *Beck v Atherton Shire Council* [1991] QPLR 56 at 59, quoted with approval by Newton DCJ in *Pacific Exchange Corporation Pty Ltd v Gold Coast City Council* [1998] QPELR 335 at 339 and following. ...”

¹¹³ Co-respondent's Outline of Argument, para 145.

¹¹⁴ Exhibit 3, p.36.

¹¹⁵ *Grosser v Gold Coast City Council* [2001] 117 LGERA 153

[96] It seems that the Council has in appropriate cases departed from the planning intent in the 2006 scheme by:

- (a) previously approving centre uses on the subject land, contrary to the structure plan designations and zoning designations that apply to the subject land;¹¹⁶
- (b) approving a full-line supermarket at the Neighbourhood Centre in Mt Cotton,¹¹⁷ in circumstances where the strategic framework does not encourage full-line supermarkets within a Neighbourhood Centre,¹¹⁸ and
- (c) approving the “Shoreline” preliminary approval which includes a district centre on land not identified in the centres hierarchy.¹¹⁹

[97] These do not provide some licence to ignore a planning scheme, but rather, each application must be considered on its merits and in the public interest. It is also not appropriate that this court conduct a meritorious review of past decisions. There is no suggestion that these previous decisions were other than appropriate based on the merits of the case and in the public interest, nor is there any suggestion of invalidity of the scheme provisions.

[98] Beyond a mere preparedness to allow applications commensurate with the times, it seems to me that Council’s previous decisions are of little assistance. This case ought be determined on its own merits and in the public interest.

Weight of the Council’s decision

[99] Here, the Council has decided to approve the proposed development, and maintain its position in this appeal, despite the conflicts with the scheme. In these circumstances it is permissible for the Court to place weight on the Council’s approval in forming its own view of whether the application ought to be approved.¹²⁰

[100] In *Kangaroo Point Residents Association Inc v Brisbane City Council*,¹²¹ Dorney QC DCJ referred to the various earlier decisions, and said:

“[100] In *Scurr v Brisbane City Council*¹²² Stephen J, with whom Barwick CJ, McTiernan, Menzies and Gibbs JJ agreed, outlined the principle that a decision on a planning issue was one to which the court ‘would no doubt ordinarily wish to pay some regard as to the expression of the views of the responsible planning authority’: at CLR 257; ALR 431.

[101] In this court in *Wingate Properties Pty Ltd v Brisbane City Council*¹²³ Brabazon QC DCJ identified the Scurr principle as permitting ‘weight’

¹¹⁶ Exhibit 7 town planning JER p. 35 para 91(f) and p. 13, Table 2.4; Cf. *Handley v Brisbane City Council* [2005] QPELR 80, [14].

¹¹⁷ Exhibit 7 town planning JER pp. 40-41, paras 102-103.

¹¹⁸ Exhibit 4, vol 1, p. 37: 2006 planning scheme part 3, division 2, p. 6.

¹¹⁹ Exhibit 6 need JER p. 25, para 70; Exhibit 7 town planning JER p. 60, para 148 and Exhibit 1A.

¹²⁰ *Mackay Shopping Centre Pty Ltd v Mackay RC* [2013] QPELR 661; *Friend v Brisbane City Council* [2014] QPELR 24; *Kangaroo Points Residents Association Inc v Brisbane City Council* [2015] QPELR 230; *Scurr v Brisbane City Council* (1973) 133 CLR 242; *R v Brisbane City Council ex parte Read* [1986] 2 QdR 22.

¹²¹ *Kangaroo Points Residents Association Inc v Brisbane City Council* [2015] QPELR 230.

¹²² [1973] 133 CLR 242.

¹²³ [2001] QPELR 272.

to be placed ‘on an approval by a local authority, as that represents an expression of the views of the response of the planning authority’: at [22]. Earlier, in *R v Brisbane City Council; Ex parte Read*,¹²⁴ in the then Full Court, McPherson J (as he then was) remarked that the principle did give rise to a consideration of the weight to be attached to the relevant council decision: at Qd R 28; LGRA 9.

[102] More recently, local first instance decisions applying the principle were made by Robin QC DCJ and Robertson DCJ in *Mackay Shopping Centres Pty Ltd v Mackay Regional Council*¹²⁵ and *Friend v Brisbane City Council*,¹²⁶ respectively.

[103] Nevertheless, as remarked by Robin QC DCJ in *Mackay Shopping Centre*, what counts, in the end, is the persuasiveness of the council’s case, from the standpoint of assisting the developer to satisfy the onus the developer bears: at [44].

[104] It should be noted that the Brisbane City Council, as the ‘responsible planning authority’, has made submissions which are distinctly harmonious with those made by Metro. That regard is recognised.”

[101] In *Mackay Shopping Centre Pty Ltd v Mackay Regional Council*,¹²⁷ Robin QC DCJ said (excluding references):

“[44] Although this appeal is a rehearing, in which the co-respondent must establish before the court a case for approval of its proposal (that is that the appeal should be dismissed), uninfluenced by the council’s favourable determination, the council is the planning authority, and its persistence in advocating strongly for the proposal in the appeal is a factor the court is entitled to take some notice of in line with certain judicial utterances ... as might have been strong council opposition. A developer with council support would usually be in a better situation. Of course, what counts in the end is the persuasiveness of the council’s case, from the standpoint of assisting the developer to satisfy the onus the developer bears.”

[102] In this case, the Council has conducted a positive case, called evidence from independent experts, made submissions in support of the proposed development, conceded the *2006 scheme* “is inadequate”, and acknowledged the “deficiency” of the centres hierarchy.¹²⁸ I will deal with that now.

Zoning has been “overtaken by events” or scheme inadequacy

[103] The co-respondent argues that the *2006 scheme* has been overtaken by events and is no longer in step with the needs of the community. These are relied upon to contextualise the nature and extent of the conflict with the *2006 scheme*, such that the extent of the conflict should only be regarded as minor to moderate.

¹²⁴ [1986] 2 Qd R 22.

¹²⁵ [2013] QPELR 661, 689 [44].

¹²⁶ [2014] QPELR 24, 50 [103].

¹²⁷ *Mackay Shopping Centre Pty Ltd v Mackay Regional Council* [2013] QPELR 661.

¹²⁸ T1-17/20-45.

[104] The co-respondent argues that this appeal is within a very rare category of cases where a respondent council accepts that its centres hierarchy is not “*soundly based or logically conceived*”, that being a reason which the Courts have accepted for not according weight to a relevant aspect of a planning scheme.¹²⁹ It is submitted this is demonstrated through:

- (d) the departures from the Council’s planning intent by granting the development approvals referred to above;
- (e) the Council’s notified grounds for approval;¹³⁰
- (f) the evidence of Mr Ovenden;¹³¹
- (g) the evidence of Mr Norling;¹³²
- (h) the submissions made on behalf of the Council.¹³³

[105] Support for the argument is also found in the 2006 *scheme* itself where it expressly provides that it has an “*effective life*” of 8 years.¹³⁴ It is also argued that the 2006 *scheme* contains some errors or inconsistencies which further highlight the shortcomings of the document. For example the planning experts noticed that the DEOs classify Redland Bay as a Neighbourhood Centre whereas it is zoned a district centre.¹³⁵ Another error was identified in s 5.15.2(8) of the Kinross Road Structure Plan overlay, which purports to prohibit development applications for preliminary approvals varying the effect of the 2006 *scheme*.

[106] The appellant also points to the population and centre equation to highlight that the centres hierarchy is not soundly based. For example, the 2006 *scheme* effects an intention of the appellants’ centres to serve a catchment of less than 50,000 people,¹³⁶ whereas at 2016 they are serving catchment of 60,651 people.¹³⁷ Mr Schomburgk acknowledged so much during his cross examination.¹³⁸

[107] Other problems with the centres hierarchy are highlighted in the need experts’ joint report about the reports prepared by SGS and Urbis dealing with the retail needs of the local government area. For example, when considering the SGS report the economists agreed that (with the co-respondent’s bolding):¹³⁹

“Despite identifying a need for nearly 286,000m² of additional in-centre retail and commercial floorspace by 2031, SGS made no recommendations for additional neighbourhood or local centres, other than to note that Council would need to plan and designate land for local centres within

¹²⁹ *Sellars Holdings Pty Ltd v Pine River Shire Council* [1988] QPELR 12,17; *SEQ Properties Pty Ltd v Maroochy Shire Council* [1999] QPELR 36, 50 line a.

¹³⁰ Exhibit 3: p. 36, para 2.

¹³¹ For example Exhibit 11: Individual Report of Mr Ovenden, pp. 3-4, paras 3.4 and 3.9; Exhibit 7 town planning JER p. 18, para 38; T3-100/25, T3-101/5, T3-101/20-25.

¹³² Exhibit 6 need JER p. 71, para 189.

¹³³ Eg T1-17/20-45.

¹³⁴ Exhibit 4, vol 1, p. 26: 2006 planning scheme s.3.1.1(3).

¹³⁵ Exhibit 6 need JER pp. 10-11, paras 23-24.

¹³⁶ Exhibit 4, vol 1, p. 36: 2006 planning scheme part 3, division 2, p. 5, s.3.2.3(3)(g)(i).

¹³⁷ T4-62/10-T4-63/30.

¹³⁸ T4-62/10-T4-63/30.

¹³⁹ Exhibit 6 need JER p. 20, para 54.

areas not served by neighbourhood or other higher order centres. The only substantial changes to the centre hierarchy recommended by SGS was that the Redland Bay Neighbourhood Centre be re-designated as a District Centre on the basis that its future population should reach 15,000 by 2026 and 16,000 by 2031, and that the Victoria Point Major Activity status should be recognised as such in the SEQ Regional Plan (page vi)."

[108] Similar Urbis reports also identified population increases but made no specific recommendations for new centres to serve the identified future growth.¹⁴⁰

[109] The need JER records that both Mr McCracken and Mr Norling:¹⁴¹

"... consider it extraordinary that, despite identifying significant increases in Redland City's population (42,000 to 50,000 additional people), neither the two Urbis reports nor the SGS report identified or recommended the potential need for additional shopping centres capable of incorporating full-line supermarkets to service this growth. Under past and current Planning Scheme Centre Hierarchies for Redland City, the introduction of additional full-line supermarkets to serve Redland City's current and future populations (to 2031) can only be accommodated within existing Major Centres (Cleveland, Capalaba and Victoria Point) and in designated District Centres (Alexandra Hills, Birkdale and Redland Bay)."

[110] This is consistent with the evidence of the Council's planning expert, Mr Ovenden who stated:¹⁴²

"It is important not to read the planning scheme too rigidly, particularly in circumstances where the planning authority has not got the planning quite right. In this particular instance, I am of the opinion the departure from the very prescriptive retail hierarchy in the scheme is in the interest of the community and will not undermine the integrity of the planning scheme. More specifically, it will assist in achieving Desired Environmental Outcomes of the Planning Scheme, it will not undermine the roles and function of other existing and planned centres in the City, nor will it compromise the delivery of the Kinross Road Structure Plan. Therefore, I believe sufficient grounds can be advanced to justify a decision to approve this proposal, despite the conflict."

[111] Mr Ovenden also opined that the current centres hierarchy fails to satisfy DEO 3 of the 2006 scheme,¹⁴³ and he testified that there was a gap in the hierarchy, and remained of this view when being cross-examined.¹⁴⁴ Mr Norling, also called by the Council, was of a similar view. He said:¹⁴⁵

"The development of supermarkets in Redland City has not kept pace with this population growth, nor has the centre hierarchy been amended to cater to the needs of the emerging Thornlands population."

¹⁴⁰ Exhibit 6 need JER p. 22, para 61.

¹⁴¹ Exhibit 6 need JER p. 23, para 64.

¹⁴² Exhibit 11: Individual Report of Mr Ovenden, p. 3, para 3.4.

¹⁴³ Exhibit 7 town planning JER p. 18, para 38; Exhibit 11: Individual Report of Mr Ovenden p. 4, para 3.9; T3-100/25 and T3-101/5

¹⁴⁴ T3-101/20-25 and T3-102/25-30.

¹⁴⁵ Exhibit 6 need JER p. 71, para 189.

- [112] There is significant force in this body of expert opinion discrediting the contemporary planning for the area.
- [113] Indeed, the Council also acknowledges that the *2006 scheme* and *draft scheme* fail to adequately promote development of the type proposed to serve the Kinross Road Structure Plan Area, as well as the broader southern Thornlands area having regard to DEO 3(1)(f).¹⁴⁶ During the opening of the case Mr Wylie for the Council submitted:¹⁴⁷

“With respect to the grounds that council says would support this development, notwithstanding the conflict with the scheme, the relevant grounds are the fact that this scheme is inadequate in that it fails to provide convenient and proximate full-line supermarket services of the type proposed by the subject development to the residents of the Kinross Road Structure Plan Area and the broader Thornlands area. And that’s the area identified in the trade areas by the need experts. In particular, what is relevant is that the development that is proposed would fall within the category of the district centre. The main difference between a district centre and a neighbourhood centre in this context is that the scheme says that neighbourhood centres should not have full-line service – sorry, full-line supermarkets whereas a district centre should. And so it’s council’s position that this is a district centre and that a – and that the normal course should be that when one is not immediately proximate to a major centre, one should have access to a – one should have relevantly convenient access to a district centre, which is what this proposal provides.

And an example of where that is provided in other areas of the scheme, if one turns to page 30 of exhibit 1, and you’ll see that there’s the major centres to the north of the Capalaba Park and the Stockland Cleveland, the two major centres. For the areas immediately proximate to those within, say, two to three kilometres, they will rely upon those for both their major centre and their district centre needs. But for outside that immediate area, the scheme has provided for the Alexandra Hills Shopping Centre, which is a district centre, which provides full on [sic] supermarkets. To the north outside the immediate proximity of the Capalaba Park and Stockland Cleveland major centres, we’ve – council’s provided the Birkdale Fair district centre. To the south – to the area to the southeast of the Victoria Point centre, the Redland Bay district centre. No similar district centre has been provided by the planning scheme in the vicinity of the Kinross Road Structure Plan and council acknowledges that is a deficiency of the current planning scheme that unfortunately has been carried over to the draft scheme.”

- [114] It is very rare that a Council is so critical and damning about its own current scheme. But this submission and the body of expert opinion must be properly considered in light of the legislative force and intent of the *2006 Scheme*, which is reinforced by the evolvment of the *draft scheme*.

¹⁴⁶ Exhibit 3 Documents identifying issues in dispute, Tab 7 [2].

¹⁴⁷ T1-17/20-45.

[115] The *2006 scheme* has not been left derelict. It has been amended over 15 times in its life.¹⁴⁸ The Major Amendment Package 01/2013 upgraded the Redland Bay Neighbourhood Centre to a District Centre. That amendment demonstrates that the Council is attentive to some changes in population that justify revision of its centres network strategy and has made such amendments to its centres network as it considers appropriate.¹⁴⁹

[116] The argument is also diluted by the maintenance of full-line supermarkets in the centres hierarchy and centre zoning in the *draft scheme*, after a whole scheme review. The *draft scheme* effectively replicates the current zoning pattern, and attracts the same issues that arise under the *2006 scheme* and have been dealt with above.

[117] Mr Ovenden on behalf of the Council is of the opinion that the *draft scheme*:¹⁵⁰

“...has perpetuated an identified gap in the retail hierarchy that has been carried through from the current planning scheme. It is appropriate that this gap in centre allocation be filled to meet a strong community need in this part of the City and in doing so satisfy the higher order strategic outcomes of the draft scheme.

The planning authority may take action to review the draft scheme following review of submissions or choose to amend the scheme to reflect the subject proposal, should the Court of a mind to approve this application.”

[118] I think this is very sound and timely advice.

[119] However, notwithstanding sound expert opinion or Council’s submitted aspiration, the court is bound to have regard to the relevant scheme and ought not usurp the role of the local authority. A summary of the relevant principles with respect to construction of planning schemes can be found in *Westfield Management Limited v. Pine Rivers Shire Council*.¹⁵¹ As Quirk DCJ said *Elan Capital Corporation Pty Ltd v Brisbane City Council*:¹⁵²

*“It should not be necessary to repeat it but this Court is not the Planning Authority for the City of Brisbane. It is not this Court's function to substitute planning strategies (which on evidence given in a particular appeal might seem more appealing) for those which a Planning Authority in a careful and proper has chosen to adopt (*Brazier v. Brisbane City Council* 26 L.G.R.A. 322 at 327).”*

[120] I would be less reticent about addressing the perceived deficiencies in the *2006 scheme* identified by the experts, co-respondent and Council, if they were remedied and reflected in the *draft scheme*. But they aren’t. The *draft scheme* effectively replicates

¹⁴⁸ Exhibit 4C.

¹⁴⁹ T3-97/42 – T3-98/2 (Ovenden); T4-53/30-44 (Schomburgk).

¹⁵⁰ Exhibit 7 town planning JER p. 48, paras 143-144

¹⁵¹ *Westfield Management Limited v. Pine Rivers Shire Council* [2004] QPELR 337, 342

¹⁵² *Elan Capital Corporation Pty Ltd v Brisbane City Council* [1990] QPLR 209, 211. Affirmed by the Court of Appeal in *Holts Hill Quarries Pty Ltd v Gold Coast City Council* [2001] 1 QdR 372, Grosser v Gold Coast City Council [2001] 117 LGRA 153, [6] & [38], *Leda Holdings Pty Ltd v Caboolture Shire Council* [2006] QCA 271, [23], *Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157, [55].

the current zoning pattern, and maintains full-line supermarkets in the centres hierarchy and centre zoning after a whole scheme review.

- [121] Whilst I accept the significant force in the co-respondent’s arguments, it is a matter for the council to address perceived deficiencies in its scheme. It is bound to properly consider the application according to law and respect the role of the local authority’s primacy as a legislature.

Community Need

- [122] The notion of need in this context is the enhancement of community wellbeing, and has been analysed by this court in the past, including:

1. “In ordinary parlance, one hears reference to phrases such as, ‘a person in need’, which conveys as a matter of objective fact the idea that that person, if not in distress, is nonetheless deprived to the extent that his wellbeing is at risk. One cannot sensibly translate that concept into the town planning context. ‘Need’ in planning terms is a relative concept ... (It) is firstly a community need, not in the sense that there is an element of urgent community necessity for a facility or for land so zoned on which the facility can be provided. Rather, it connotes the idea that the physical wellbeing of a community or some part of it can be better and more conveniently served by providing the means for ensuring that the provision of that facility, subject always to other considerations of the town planning kind, including all consideration that the wellbeing of a community also depends significantly on an acceptable residential amenity.”¹⁵³
2. “‘Need’ in cases such as this does not mean pressing need, critical need, widespread desire or anything of that nature. A thing is needed if its provision, taking all things into account, improves the physical wellbeing of the community”.¹⁵⁴
3. “‘Need’, in planning terms, is a relative concept. It does not connote pressing urgency, but rather relates to the general wellbeing of the community. A use is needed if it would, on balance, improve the services and facilities available in a locality.”¹⁵⁵
4. “To provide competition and choice where none exists can represent the filling of a need”.¹⁵⁶

- [123] No issue has been taken with any component of the proposed development other than the “*retail/commercial*” component.¹⁵⁷ The question is whether the residents can be better and more conveniently served with appropriate access to a full-line supermarket and complementary stores, and a tavern.

¹⁵³ *Skateway Pty Ltd v. Brisbane City Council* [1980] QPLR 245, 249-250.

¹⁵⁴ *Cut Price Stores Retailers v. Caboolture Shire Council* [1984] QPLR 126, 131.

¹⁵⁵ *Roosterland Pty Ltd & its agents v. Brisbane City Council* [1986] QPLR 515, 517.

¹⁵⁶ *Bunnings Building Supplies Pty Ltd v. Redland Shire Council and Ors* [2000] QPELR 193, [21].

¹⁵⁷ Exhibit 7 town planning JER p. 14, para 24.

[124] In my view, the consideration of need ought not be undertaken in a vacuum and ought always be cognisant of other town planning considerations and controls.¹⁵⁸ In *Luke v. Maroochy Shire Council* [2003] QPELR 447 at 459, Wilson SC DCJ said at [55]:

“The undeniable purpose of a town planning scheme is to regulate, within reasonable limits, consonant with the personal liberties of landowners, the provision and distribution of appropriate community facilities, both private and public, with a view to promoting the general wellbeing of the occupants of the relevant local government area.”

[125] Consideration of need is determined from the perspective of the community and not that of the developer, commercial competitors or submitters. In relation to the facilities supplying the necessities of life Wilson SC DCJ said in *Luke*, at [35]:

“...where, as here, the apparent public or community need for the proposed facility is strong and relates to a basic requirement of the resident population it is, plainly, a matter to which considerable weight must be given.”

[126] His Honour made similar remarks in *Parmac Investments v. Brisbane City Council*,¹⁵⁹ where he said, albeit in the context of the phrase ‘overwhelming community need’, at [30]:

“...and when, as here, the need to be satisfied involves the daily essentials of ordinary life, the bar should not be set too high; and when the planning scheme indicates a deliberate planning decision to provide an opportunity for convenience retail facilities to satisfy those needs, and there are no unacceptable impacts on amenity, the efforts required to demonstrate need at that level are not onerous.”

[127] Further, in *JPF Australia Pty Ltd v Livingstone Shire Council*,¹⁶⁰ Britton SC DCJ held that considerable weight should be given to the question of need where the need to be satisfied involves shopping for the essentials of life mainly food and groceries as well as associated convenience goods.

[128] In the context of a full-line supermarket, Rackemann DCJ in *Fabcot Pty Ltd v Cairns Regional Council*,¹⁶¹ said:

“When the need of the community under consideration involves the daily essentials of life such as food and groceries, questions of convenience and availability of choice to the public are significant considerations. The proposal would deliver a full-line supermarket to a growing area which needs one, can support one, but currently has none.”

[129] The 2006 scheme provides for ‘top up’ convenient shopping at a number of small centres within the primary trade area, and travel access to full-line supermarkets within District and Major Centres.¹⁶² There are no such larger centres in the identified trade area, which means that those residents must travel outside the area to shop at a full-line

¹⁵⁸ Cf. *Intrafield Pty Ltd v. Redland Shire Council* [2001] 116 LGERA 350, [5].

¹⁵⁹ *Parmac Investments v. Brisbane City Council* [2008] QPELR 480, 485.

¹⁶⁰ *JPF Australia Pty Ltd v Livingstone Shire Council* [2006] QPELR 359, [43].

¹⁶¹ *Fabcot Pty Ltd v Cairns Regional Council* [2013] QPEC 38, [108].

¹⁶² Exhibit 4B, pp.1, 5.

supermarket. The case involves consideration of the distance and reasonableness of that travel in the circumstances that a resident should travel to access a full-line supermarket.

- [130] The relative proximity of supermarket facilities in the vicinity include:
1. the full-line Coles and Woolworths supermarkets at Cleveland, to the north;
 2. a substantial IGA for the ‘*top-up shop*’ in the primary trade area;¹⁶³
 3. two full-line Woolworths and a full-line Coles, together with an ALDI at Victoria Point, to the south;¹⁶⁴
 4. the IGA at Crystal Waters for a ‘*top-up shop*’ at a small local centre, particularly for those in Messrs McCracken and Norling’s secondary east trade area;¹⁶⁵
- [131] Mr Viney in the joint traffic expert report sets out the public benefits by improving the existing situation in relation to traffic capacity and safety as well as other matters of public interest which can be delivered without any unacceptable impacts on amenity, traffic maintenance or traffic safety.¹⁶⁶
- [132] An arterial road network provides access to those supermarkets north and south of the primary trade area.¹⁶⁷ Residents in Messrs McCracken and Norling’s secondary east trade area can access a choice of full-line supermarkets at Cleveland and Victoria Point¹⁶⁸ and residents of Messrs McCracken and Norling’s secondary west trade area can access at least four full-line supermarkets at Capalaba.¹⁶⁹
- [133] Mr Brown on behalf of the appellants accepted a strong need for fuel retailing along the Boundary Road corridor on which the subject land is located,¹⁷⁰ but concluded there is “*limited*” demand for the tavern¹⁷¹ and no need for the development “*as a whole*”.¹⁷² It seems to me that Mr Brown’s approach is more stringent than the lower bar for the daily essentials of life. In contrast to the evidence of Mr Brown, both Mr Norling and Mr McCracken are of the view that there is a “*strong*” level of need for the proposed development.¹⁷³
- [134] Mr Brown opined that a five minute drive time radius,¹⁷⁴ compared to Mr McCracken’s two- kilometre radius, was reasonable to access a full line supermarket. Mr Zeller from Coles also acknowledged that the residents of the primary trade area would have reasonable access to the Coles and Woolworths at Cleveland.¹⁷⁵ Mr Norling preferred a metric shorter than a five-minute drive, but longer than a two-kilometre radius, as

¹⁶³ T2-10/34-38 (McCracken).

¹⁶⁴ T2-10/4-29 (McCracken); Exhibit 14 Report of Mr Brown, p 2 [13] – [14].

¹⁶⁵ T2-10/40-45 and T2-16/1 - 3 (McCracken).

¹⁶⁶ Exhibit 5 pp. 10-11, s.5.0.

¹⁶⁷ T2-10/31-32 (McCracken).

¹⁶⁸ T2-11/16-28 (McCracken).

¹⁶⁹ T2-11/39-44 (McCracken).

¹⁷⁰ Exhibit 6 need JER p. 40, para 139.

¹⁷¹ Exhibit 6 need JER p. 58, para 154; p. 84, para 215(j).

¹⁷² Exhibit 6 need JER p. 83, para 215(a).

¹⁷³ Exhibit 6 need JER p. 40, para 138 and p. 81, para 213.

¹⁷⁴ Exhibit 14, para [27].

¹⁷⁵ T3-8/30-33.

more likely to be a reasonable distance for people to expect to drive to for a supermarket shop.¹⁷⁶ Based on Mr Norling’s metric, and by reference to the two kilometre range circles around existing full-line supermarkets depicted on page 20 of Exhibit 1, and the “five minute drive time” ranges depicted on page 4 of Exhibit 14, it is clear that the majority of the Primary Trade Area north of Boundary Road would fall outside reasonable catchment areas, as would significant parts of the secondary trade areas.

- [135] Mr Cumming, planning expert for the co-respondent, described the subject site as falling within a “geographic hole” of centres.¹⁷⁷ He also averred to the affordability of weekly shopping at small convenience stores associated with higher prices compared to larger supermarkets,¹⁷⁸ and that centres provide a community focus and that many people, including young and elderly people as well as people with single cars need convenient access to centres.¹⁷⁹ Mr Ovenden also favoured the proposal as filling a community need.¹⁸⁰
- [136] I also bear in mind that the hierarchy of centres relative to the land has not been fully delivered. There are a number of local centres yet to be constructed, as well as an upgrade to a district centre to occur at Redland Bay.¹⁸¹ Such investment decisions will rely upon the centres hierarchy in the planning documents,¹⁸² and will be driven by the need to serve existing and future populations.
- [137] On balance, it seems to me that the proposed development would provide a focal point in the Kinross Road growth area and it would better and more conveniently serve local residents with appropriate access to a full-line supermarket and complementary stores, and a tavern. It is also likely to provide greater convenience to large volumes of traffic travelling on Boundary Road, and people in the major industry and healthcare precinct to the north. But this betterment and shopping convenience for local residents and others is marginal because they enjoy reasonable access to existing and proximate full-line supermarket retail facilities, with more ready access to ‘top up’ shopping facilities. These will provide most trade area residents with convenient access to a greater range and variety of shopping options, and promote competition in a price and service.
- [138] Finally, with respect to community need for a hotel, there are no hotels within the primary and secondary trade areas, and none within 5 kilometres of the land, whereas a per-capita analysis would indicate that the trade areas may support up to four hotels.¹⁸³ I accept that there is a greater community need for a hotel to be established.

Economic Need

- [139] In circumstances where community need may not warrant out-of-centre development, economic need ought be demonstrated.

¹⁷⁶ T2-78.

¹⁷⁷ Exhibit 7, para [156]. See also pp. 15-17, paras 30-33.

¹⁷⁸ T4-24/25.

¹⁷⁹ T4-19/5-15.

¹⁸⁰ Exhibit 7 pp. 17-18, paras 34-40; Exhibit 11 pp. 9-10, paras 3.31-3.41.

¹⁸¹ T2-32/44 – T2-32/3 (McCracken); T2-45/33 – T2-46/17 (Brown); T3-97/26-43 (Ovenden).

¹⁸² T2-33/38 (McCracken).

¹⁸³ Exhibit 6, para [142].

- [140] This involves consideration of whether there is ‘unsatisfied economic demand’ and the development is necessary to cater for that demand,¹⁸⁴ without unduly disrupting or prejudicing other current or planned centres.

Viability of the proposed development

- [141] A fundamental element of economic need is that the development, if approved, would be financially viable.¹⁸⁵
- [142] Broadly speaking, the need experts determined that in its first year of operation the centre as a whole would achieve a total turnover in the order of \$42.4 million¹⁸⁶ and \$39.86 million,¹⁸⁷ which is sufficient to ensure the development would be economically viable.¹⁸⁸
- [143] The experts agreed that a useful starting point is that a catchment containing 8,000 to 10,000 people warranted real consideration for a full-line supermarket to service that catchment.¹⁸⁹ Here, the Primary Trade Area, being the proposed development’s most likely trade area,¹⁹⁰ indicates a 2018 population of 8,020. That population base is at the low end of the range considered appropriate to support a full-line supermarket on the land and arguably insufficient in itself to justify the development.¹⁹¹ Therefore, passing trade will form a significant contributor to the developments viability. That is, further indicia that the proposed development will function more like a District Centre, rather than as a Neighbourhood Centre to service up to 10000 people.
- [144] Mr Brown estimated that passing trade will contribute 28.6 per cent of the trade, as compared to the 17.5 per cent estimated by Mr McCracken and Mr Norling.
- [145] The differences between Mr Brown, and Mr McCracken and Mr Norling result from the different methodologies used by those experts.¹⁹² In particular, Mr Brown used motor vehicle turn-in rates, which was considered by the other experts as quite unusual and unorthodox in relation to supermarkets.¹⁹³ From a commercial perspective, Mr Zeller (on behalf of Coles) testified that:¹⁹⁴

“Coles bases decisions to locate a store on any particular site on its location and accessibility to the existing planned population. In particular, Coles defines its catchments by primary and secondary locations from the site to the surrounding residential population. Coles does not use assumptions that volumes of passing traffic make a decision to shop at a centre as the basis for locating stores in similar developments to the proposed Thornlands development”.

¹⁸⁴ Cf. *Garyf Pty Ltd v Maroochy Shire Council* [2009] QPELR 435, [53].

¹⁸⁵ *All-A-Wah Carapark v Noosa Shire Council* [1989] QPLR 155, 158.

¹⁸⁶ Exhibit 6, Table 6 (McCracken and Norling).

¹⁸⁷ Exhibit 6, Table 12 (Brown).

¹⁸⁸ Exhibit 12 (Norling Individual Report), para [10].

¹⁸⁹ Exhibit 6, MM and JN at para [43]; MB XXN T3-40 ll 26-42.

¹⁹⁰ Exhibit 6, para [77].

¹⁹¹ T2-9/L30 – T2-10/L2 (McCracken); T2-43/L23-31 (Brown); Exhibit 14 Report of Mr Brown, p 2 [15] – [17]; T2-82/L1-13 (Norling).

¹⁹² Compare Exhibits 6 (JER), 9 (McCracken paras 7-10); 14 (Brown); 12 (Norling paras 11-18).

¹⁹³ See for example Exhibit 9 pp. 3-13, paras 7-35 and 40; Exhibit 12 pp. 3-4, paras 11-18; T1-34/10-20, T1-35/45, T1-38/10-20, T1-39/35-T1-40/5, T2-20/5-20, T2-26/5-20.

¹⁹⁴ Exhibit 8: Statement of Mr Zeller p. 3, para 16.

[146] Mr Norling explained:¹⁹⁵

“I have been involved in the analysis of prospective property developments for more than 30 years. I have utilised a range of methodologies in projecting future performance levels for property developments and observed a range of methodologies adopted by other consultants.

It has been my experience that the motor vehicle turn-in rate methodology has been adopted for service stations and fast food outlets, on the basis that these facilities primarily target passing motorists rather than a specific trade area. It is my view that this methodology is particularly relevant for those larger service centres that are located remote from populations and other services and hence rely upon the motoring public.

In all my years of experience, this is the first time I have seen a motor vehicle turn-in rate applied to project the turnover of a shopping centre and I can find no reference to this approach in the literature. It is therefore my opinion that Marcus Brown has adopted a novel approach to projecting turnover for the proposed shopping centre on this occasion.”

[147] During cross-examination, Mr McCracken explained that his criticism of Mr Brown’s methodology *“is the entire external trade for this centre comes from the south, from Redland Bay and Victoria Point is my understanding of Mr Brown’s methodology. That’s simply not plausible in my view.”*¹⁹⁶ Nevertheless, Mr McCracken acknowledged that the characteristics of the land relevant to the extent of passing trade, include:

- (a) the population of this part of Redland City is spread out in a linear fashion, with the spine of that population being Cleveland-Redland Bay Road;
- (b) Boundary Road is a major carrier of commuter traffic;
- (c) there are many people that commute from south of the land, from Victoria Point, Redland Bay and Mount Cotton, past the land to go to the Brisbane CBD;
- (d) until the population south of Redland Bay matures to the extent that they have their own full-line supermarket, many of the commuters from the area will likely stop at the supermarket during their long journey home;¹⁹⁷ and
- (e) in terms of homebound traffic, there is no easier access to a supermarket than the left-hand turn in that is proposed off Boundary Road onto the land.¹⁹⁸

¹⁹⁵ Exhibit 12: Individual Report of Mr Norling p. 3, paras 13-15.

¹⁹⁶ T2-20/10-20.

¹⁹⁷ T3-8/L24-28 (Zeller).

¹⁹⁸ T2-16/L40 – T2-17/L28 (McCracken); T2-47/L40 – T2-48/L45 (Brown); T4-4/L44 – T4-5/L37 (Norling).

[148] Mr Brown's analysis seems to account for these matters and refers to available empirical data.¹⁹⁹ However, in cross-examination, Mr Brown accepted that:

- (a) the 17,500 vehicles relied upon by him was drawn from two-way flow, and the more relevant figure homeward traffic;²⁰⁰
- (b) he had not previously interpreted traffic for the purposes of determining need for a shopping centre;²⁰¹
- (c) the impacts identified in Table 20 of the joint report would not realistically occur at one time;²⁰²
- (d) the trade area for the current Mt Cotton centre is well removed from that for the development, as would be the case for the proposed 3,200m² supermarket at Mt Cotton.²⁰³

[149] I prefer the evidence of Messrs McCracken and Norling and their methodology. It seems to me that there is sufficient population in the Primary Trade Area, supplemented by passing trade, to assure viability of the centre. Further, in their joint expert report, those economists have used lower growth levels for the Kinross Road Structure Plan Area, mainly because of the uncertainty with the poultry farm.²⁰⁴ The poultry farm has subsequently been advertised for sale.²⁰⁵ The sale may be a catalyst for further development within the structure plan area.²⁰⁶ The extent to which passing trade may draw from, and therefore impact other centres, including Victoria Point, Redland Bay and Mt Cotton, is relevant to my consideration of that impact below.

[150] As to the proposed tavern use, I also prefer the forecast sales proposed by Messrs McCracken and Norling,²⁰⁷ and note that their figures do not rely on any gaming machine profits (which may be installed in the future). It seems to me that the proposed tavern will be financially viable.

Impact upon other centres

[151] Viability of the proposed centre must be demonstrated without unduly compromising the economic functionality of current and planned nearby centres. In particular, the existing Victoria Point Major Centre, the Crystal Waters Local Centre, and the proposed Kinross Road Local Centre.

[152] It was agreed between the need experts that, with respect to detrimental impact, anything more than 15% impact on turnover would give rise to real concern.²⁰⁸ For the reasons which follow, I am satisfied that the proposed development will not detrimentally impact other existing and planned centres.

¹⁹⁹ T2-48/L10 – T2-52/L31 (Brown).

²⁰⁰ T2-64/5-T2-65/10.

²⁰¹ T3-37/1-5.

²⁰² T3-32/20-30.

²⁰³ T3-35/10-15.

²⁰⁴ T1-30/15-25.

²⁰⁵ T1-30/20.

²⁰⁶ T2-35/10-35.

²⁰⁷ Exhibit 6, Table 15.

²⁰⁸ Exhibit 6, paras [158], [167].

Victoria Point

- [153] The three full-line supermarkets at Victoria Point are trading at healthy and profitable levels, with the supermarket at Town Centre performing well.²⁰⁹
- [154] The need experts assessed the impact of the subject development, in the first year of operation (2018), would be in order of 5.7% (Mr Norling), 6.5% (Mr McCracken) and 7.28% (Mr Brown), being less than the benchmark 15% threshold.
- [155] However, Mr Brown also relied upon cumulative impacts on the Victoria Point Major Centre summarised in Table 20 of the need experts' joint report.²¹⁰ All economists acknowledge that it is normal to assess cumulative impact,²¹¹ in particular, the proposed full-line supermarkets for Mt Cotton and Redland Bay will, in turn, have an impact on the supermarkets at Victoria Point.²¹² Mt Cotton has an approval for a 3,200 square metre supermarket.²¹³ Mr McCracken acknowledged that the 2006 scheme was recently amended, and there would be a sufficient population to support a full-line supermarket at Redland Bay.²¹⁴ The developer is likely to develop with a major retail anchor.²¹⁵
- [156] Even so, I accept the evidence of Mr McCracken and Mr Norling to the effect that any impact ought be considered in the context of commensurate future population increases, which effectively neutralise any concern.²¹⁶ I think it unlikely that the prospective development will all become operational simultaneously or before 2018.²¹⁷ Therefore, I think that any material impact²¹⁸ upon the performance of the Victoria Point Major Centre will be relatively small.²¹⁹
- [157] Further, the Victoria Park Shopping Centre has an approval for a 9,000 square metre extension. Such expansion will likely involve a second Discount Departure Store, Mini-Major and additional specialty shops.²²⁰ I do not accept that the proposed development would by itself unduly delay expansion plans for the Victoria Point Shopping Centre.²²¹ However, it will nevertheless contribute to the delay. In my view, the economic impact of the proposed centre upon the Victoria Point Major Centre is within tolerable limits, and would lessen over time.

²⁰⁹ Norling XXN, T3-105.

²¹⁰ Exhibit 6 p.66.

²¹¹ T2-25/L23-29 and T2-26/L15-22 (McCracken); T2-54/L8-15 (Brown); T2-76/L27-30 and T3-109/L20-21 (Norling).

²¹² T2-25/L16-21 and T2-25/L37-38 and T2-26/L24-33 (McCracken); T2-54/L22-27 (Brown); T3-110/L13-28 (Norling).

²¹³ T2-25/L7-14 (McCracken).

²¹⁴ T2-24/L18-22 & /L24-37 (McCracken); T2-54/L17-20 (Brown). T2-24/L24-37 (McCracken).

²¹⁵ Exhibit 16 Statement of Mr Hargrave; Exhibit FGA Second Confidential Statement of Mr Hargrave; T4-30/L6 – T4-31/L9; T4-31/L11-37 (Hargrave).

²¹⁶ Exhibit 9 para 36 (McCracken) and T2-77/15-23 (Norling); Exhibit 6 at [176]; Brown XXN T3-56 – T3-57.

²¹⁷ Mr Brown conceded that it was 'probable' that development would not occur before 2018 - T3-56 & T3-55.

²¹⁸ Exhibit 6, Table 19 need JER, p.65.

²¹⁹ T3-51/1-15.

²²⁰ Exhibit 6, para [102]; Exhibit 17 Statement of Mr Cornish, [26] – [28]. See also Exhibit 15 Statement of Mr Lancini, [45] and Exhibit 16 Statement of Mr Hargrave, [19] - [22]; T4-37/L27 – T4-38/L34; T4-40/L11-39 (Lancini).

²²¹ Exhibit 6, para [160(d)].

- [158] With respect to the hotel or tavern, the experts were in agreement that detrimental impacts of that development on other hotels would not be significant.²²²

Crystal Waters Local Centre

- [159] Mr Brown's evidence about the impact on Crystal Waters differs to the evidence of the other need experts.²²³ Mr Brown assessed a 2018 impact of some \$2.16M (or -18.35%), whilst Mr Norling assessed the impact as \$0.8M (or -6.7%).²²⁴
- [160] Mr Brown accepted that the local centre presented well, appeared to carry a reasonable range,²²⁵ and had a trade area that lies outside the proposal's trade area.²²⁶ Additionally, Mr Norling explained the different assessments this way:²²⁷

“Again, that is a matter of professional judgment, and he's entitled to apply the factors that he thinks are appropriate. But when I applied the factors here, that is, that Crystal Waters – so the relevant factors I've applied, (1) Crystal Waters is the best performing neighbourhood centre in Thornlands at the moment; it is well located on that north-south road; it has a suite of pretty good tenants. As a negative, I took into account, it doesn't have great exposure to that road, in – in the sense that it faces to the rear, so that's – that's a negative. But I felt that once this – if this court approves, and it's developed, this supermarket-based centre is to be developed, it is my view that it would take trade more away from the supermarket-based centres, and that there was a sufficient geographical distance between the subject site and Crystal Waters such that the Crystal Waters centre would continue to act as a – in that neighbourhood role for that top-up shopping trip, and that the tenants – and the suite of tenants that were there would largely be able to continue to trade to that north-eastern quadrant of the primary trade area and the secondary trade area east. So – so I – I considered that a relatively low amount of trade would be taken from that centre, and those are the reasons that I factored into my professional judgment.”

- [161] During his cross-examination, Mr McCracken remarked about the distinctive functions, roles and markets of the respective centres, as follows:²²⁸

“How can you – well, can I suggest to you? Is it the case that Crystal Waters with its IGA will not be able to compete with a Coles full-line supermarket in terms of range of product, range of packaging products and offer in terms of range of bakery items, range of meat items, range of fish items, range of delicatessen items. It will simply not compete? No. They compete for different markets. Different – different functions.

And it won't compete in terms of price? Well, the IGA's tend to be a – a bit more expensive than the – the majors.”

²²² Exhibit 6, paras [179]-[181].

²²³ Table 19 need JER Exhibit 6 p.65; the cross examination at T3-29/11-36.

²²⁴ Exhibit 6, p.61 (Table 18).

²²⁵ T3-30 to T3-31.

²²⁶ Exhibit 6 pp.39-40.

²²⁷ T2-76.

²²⁸ T2-15/30-40.

- [162] Although, I prefer the assessment of Mr Norling and I conclude that they are overly optimistic about the likely impact on the local centre. I find that the Crystal Waters local centre will only be partially insulated by an adverse impact of the proposed development. Despite its nature as a local centre dislocation from the land, it will be eroded by the proposal's relative full-line, convenience and location.

Kinross Road Local Centre

- [163] I have already remarked about this mixed use local centre contemplated under the Kinross Road Structure Plan.
- [164] Mr Fiteni, the director of the corporate owner of the planned local centre site, testified that his investment decisions relied upon the 2006 scheme and the need for a local centre in the planned location surrounded by land zoned for medium density residential intended to be for an over-50s attached to a centre.²²⁹ Mr Fiteni considered that the planned local centre at Kinross Road would be 'very unlikely to survive',²³⁰ given the size and location of the proposed centre.²³¹ He opined that this would have warranted a reduced purchase price for the Kinross Road land.²³²
- [165] I accept Mr Norling's evidence that the proposed local centre site is dislocated and isolated, which would have impacted its development in any event.²³³ But it is favourably proximate to prospective residential development, a district park and Community Facility.²³⁴ Further, as Mr Ovenden opined, it will have more localised and convenient retail products, and a different form and function to the proposed development.²³⁵ Nevertheless, it is tolerably clear that the development will have a significant impact on the Kinross Road mixed use local centre in both nature and size of uses.²³⁶
- [166] Put in its proper context, for the planned local centre to retain its place and function as a local centre serving proximate residents, it will struggle to be relevant and provide complimentary function with the very proximate higher order role and function of the proposed centre, if developed. Therefore, I conclude that the proposed development will unduly impact on the planned local centre on Kinross Road.

Planning need

- [167] Planning need, and its relationship with economic need, was considered by McLauchlan QC DCJ in *Elfband Pty Ltd and Vanhoff Pty Ltd v Maroochy Shire Council*,²³⁷ as follows:

“Planning need is no doubt a more general issue than economic need, but it seems to be obvious in cases such as this that unless there is an economic need there will be no planning need. It is therefore essential that the evidence establish, as I consider it has, that there is an economic need for a shopping centre such as

²²⁹ T3-67/L30 – T3-68/L3 (Fiteni).

²³⁰ T3-68/L8-12 (Fiteni).

²³¹ Exhibit 18A Statement of Mr Fiteni, [17] and [18]; T3-67/L1 – T3-67/L12 (Fiteni).

²³² T3-67/L43-45 (Fiteni).

²³³ T2-79.

²³⁴ Schomburgk XXN, T4-67/1-15.

²³⁵ Exhibit 11, para [3.39].

²³⁶ T2-13/L42 – T2-14/L10 and T2-30/L24-39 (McCracken).

²³⁷ *Elfband Pty Ltd and Vanhoff Pty Ltd v Maroochy Shire Council* [1995] QPLR 290, 313.

Maroochydore Marketplace within the Sunshine Coast retail network. The issue of planning need then focuses upon the question whether the particular development proposed should be permitted, involving as it does an amendment to the planning scheme.”

- [168] There is little dispute that the land is physically ideal for the proposed development. Mr Schomburgk accepted that the land, being proximate to the main road network, was a highly strategic location for retail and commercial development.²³⁸ Indeed, he described the suitability of the subject site for the proposed development as follows:²³⁹

“If you were to accept that proposition that a district centre is warranted in this area, it’s an excellent location for a district centre, isn’t it?---I don’t disagree with you there. I mean, it’s a good location. It’s accessible, easy. It’s on the left-hand side of the homeward journey, as we heard Mr Lancini say, and as this court has heard so many times before about larger-scale centres, convenience centres. That’s the preferred sort of location. It’s a very busy road, it’s visible – all of those things. Yes.”

- [169] This is not altogether surprising since the Council has already accepted that the subject land is suitable for centre type activities with development approval and permit (which has not lapsed) for a shopping centre with a gross floor area of over 1,000m².²⁴⁰ The land has, since the commencement of the *2006 scheme* on 30 March 2006,²⁴¹ been identified for centre uses either by way of zoning or development approvals except for a period of 14 months.²⁴²
- [170] The appellants do not rely upon the availability of alternative land for the proposed ‘out of centre’ development. Although, they acknowledge that ‘out of centre’ development may be justified in appropriate circumstances, they argue that this is not such a case having regard to the hierarchy of centres established by the *2006 scheme*.
- [171] The consideration of planning need ought not be undertaken in a vacuum and ought always be cognisant of other town planning considerations and controls.²⁴³
- [172] This court has from time to time acknowledged proper planning of locating centres. So much is consistent with the approach taken by Skoien SJDC in *Provincial Securities Pty Ltd v Brisbane City Council*,²⁴⁴ when considering a more generic provision of a scheme. The approach was explained by Wilson SC DCJ (as he then was) in *Luke v Maroochy Shire Council*:²⁴⁵

“Faced with a statement of intent in the planning scheme for Brisbane requiring consideration whether a shopping proposal would ‘*mainly serve residents in the immediate locality*’, his Honour determined that this was not a critical point or an absolute requirement but, merely, a consideration to be taken into account – and referred, as authority for that conclusion, to *Prime Group Realty v. Brisbane City Council* (1995) QPLR at 173, at 176;

²³⁸ T4-59/15-35.

²³⁹ T4-65 ll 5-12.

²⁴⁰ Exhibit 7 - town planning JER p. 13, paras 20-21.

²⁴¹ Exhibit 4C.

²⁴² T4-56/45, T4-57/25-30 and ex.29.

²⁴³ Cf. *Intrafield Pty Ltd v. Redland Shire Council* [2001] 116 LGERA 350 at [5].

²⁴⁴ *Provincial Securities Pty Ltd v Brisbane City Council* [2001] QPELR 143.

²⁴⁵ *Luke v Maroochy Shire Council* [2003] QPELR 447, [48].

and *Phil Fletcher Planning and Investment Services v. Brisbane City Council* (1991) QPLR 16, at 18. The Brisbane planning scheme also contained another requirement that shopping centres should be ‘*on neighbourhood access roads*’ and, at 145, His Honour suggested that centres located in these places would very likely wither and die for lack of custom, and the requirement was:

‘...an example of the drafter’s wishful thinking and admirable as may be the wish it is unlikely to be met in today’s real world.’”

[173] The courts have afforded no or less weight to an aspect of a planning scheme if that planning is not “*soundly based or logically conceived*”.²⁴⁶ Such matters are a matter of context of the scheme, and the approach ought be tempered in these circumstances where a centres hierarchy has been deliberately planned and zoned.

[174] In *Wilispap Pty Ltd v. Mulgrave Shire Council*,²⁴⁷ Quirk DCJ emphasised the strategic planning importance of locating and ordering retail centres:

“The location and order of retailing facilities in developing areas is no doubt a very important part of strategic planning. This is a matter appreciated by (and to which careful attention has been given by) the Respondent Planning Authority for this area in its recently exhibited Development Control Plan. The Respondent's opposition to this proposal is in my opinion quite consistent with the planning strategies found in the Development Control Plan and no real basis for any serious questioning of the strategies has been shown. I fully appreciate that Draft Development Control Plan does not yet have the force of a statutory planning instrument. It does, however, constitute a recent expression of planning strategy formally made public as required by the Act. In a matter of this kind it would, in my view, be entirely inappropriate for this Court to make a decision which would run contrary to such a considered and carefully expressed planning strategy of a Local Authority.”

[175] Later, in *Overton v. Redcliffe City Council*²⁴⁸ Quirk DCJ consistently observed that:

“The provisions with which we are concerned have fundamental importance to the establishment of a suitable and ordered hierarchy of commercial development. As I have indicated to ignore these provisions could have fundamental and far reaching consequences for expectations based on the Strategic Plan as it is presently drawn.”

[176] Beyond the planning, Newton DCJ remarked about the vitality of a centres hierarchy to a functioning City in *Lewiac Pty Ltd and ING Real Estate, Joondalup BV v. Gold Coast City Council*²⁴⁹ as follows:

²⁴⁶ *Sellars Holdings Pty Ltd v Pine River Shire Council* [1998] QPELR 12, 17 and *SEQ Properties Pty Ltd v Maroochy Shire Council* [1999] QPELR 36, 50 line (a).

²⁴⁷ *Wilispap Pty Ltd v. Mulgrave Shire Council* [1992] QPLR 51, 52-53.

²⁴⁸ *Overton v. Redcliffe City Council* [2000] QPELR 250, 253.

²⁴⁹ *Lewiac Pty Ltd and ING Real Estate, Joondalup BV v. Gold Coast City Council* [2003] QPELR 385, 389.

“It does not appear to be in dispute that the achievement of a sustainable and effective centre hierarchy should be recognised as a good town planning principle for reasons of orderly development, increased accessibility and convenience, greater economic efficiency and investment opportunities. Indeed, in his written submissions Senior Counsel for the Respondent observed that it is remarkable that not one witness criticised the town planning principles requiring a hierarchy of centres and not one witness criticised the appropriateness of the specific hierarchy put in place for this region by the relevant planning documents.

It may be accepted then, that a centre hierarchy is vital to the functioning of a City in order to ensure the efficient, equitable and adequate provision of goods and services to all communities having regard to their needs, size and location. This evidence was given by Professor Brannock, a consultant town planner who testified on behalf of the Fourth Co-Respondent, and it accords in general with the evidence of all the town planning experts. A successful and well-implemented centre hierarchy correlates the economic and social functions of a centre with the needs and interests of its catchment.”

[177] This was reinforced by the Court of Appeal in *Australian Capital Holdings Pty Ltd v Mackay City Council*,²⁵⁰ Muir JA (with whom the others agreed) said:

“[58] The importance of the hierarchy of retail shopping centres or precincts established by planning schemes and the necessity of not acting so as to prejudice the viability of the established hierarchy has been recognised in a number of planning decisions. In *Lewiac Pty Ltd and ING Real Estate, Joondalup BV v Gold Coast City Council & Ors*,²⁵¹ Newton DCJ observed:

‘[15] It does not appear to be in dispute that the achievement of a sustainable and effective centre hierarchy should be recognised as a good town planning principle for reasons of orderly development, increased accessibility and convenience, greater economic efficiency and investment opportunities.

...

[16] It may be accepted then, that a centre hierarchy is vital to the functioning of a City in order to ensure the efficient, equitable and adequate provision of goods and services to all communities having regard to their needs, size and location.’

[59] Newton DCJ referred with approval to passages from the reasons of Quirk DCJ in *Wilispap Pty Ltd v Mulgrave Shire Council* [1992] QPLR 51 at 52-53 and in *Overton & Anor v Redcliffe City Council & Anor* [2000] QPELR 250 at 253. In *Wilispap* Quirk DCJ, referring to the potential impact of an application, after remarking that it would

²⁵⁰ *Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157 per Muir JA, with whom the others agreed at [1] and [73].

²⁵¹ *Lewiac Pty Ltd and ING Real Estate, Joondalup BV v Gold Coast City Council* [2003] QPELR 385, 389.

‘prejudice the feasibility of the hierarchy of shopping facilities proposed by the plan’ said, ‘In a matter of this kind, it would, in my view, be entirely inappropriate for this Court to make a decision which runs contrary to such a considered and carefully expressed planning strategy of a local authority.’ In Overton Quirk DCJ drew attention to the fundamental importance of such provisions to (at 253) ‘a suitable and order hierarchy of commercial development’ and commented that ‘to ignore these provisions could have fundamental and far-reaching consequences for expectations based on the Strategic Plan as it is presently drawn’.

[178] In terms of the benefit of centres hierarchies, Mr McCracken gave evidence that hierarchies:

- (a) encourage consolidation of existing centres;²⁵²
- (b) encourage investment and re-investment in the existing centres that have been located in appropriate locations to serve the public;²⁵³
- (c) discourage out of centre development in order to maintain the vitality, trading vigour and viability of existing centres;²⁵⁴ and
- (d) ensure planning for a relatively equitable distribution of facilities at different levels.²⁵⁵

[179] Centres are also focal points for investment in infrastructure and transport road systems. It is in the community’s best interest to both establish and protect focal points for retail, commerce, community infrastructure, transport and social discourse.²⁵⁶

[180] There has been significant growth in dwellings and population in the southern Thornlands area, and the growth is predicted to continue in the future in such areas as Kinross Road and Woodlands Drive. The area has been recognised by the respondent as being suitable for residential development.

[181] I am satisfied that there is a strong planning argument supporting the need for an additional neighbourhood centre level of retail facilities in the Thornlands area to service existing and future populations in the Kinross Road growth area, with more convenient and proximate retail shopping facilities. Such a centre will provide a more geographically balanced distribution of retail and community services in the local government area, despite the distribution of scheme network and centres hierarchy. An additional neighbourhood centre will add to the provision of choice in relation to available housing stock and will provide the community with residential development that is proximate to, and within walking distance of shopping, health and community services.

[182] The proposed development is of the nature of a vibrant and accessible centre, which will provide a commercial and community focal point for the Kinross Road growth

²⁵² T2-27/1-2 (McCracken).

²⁵³ T2-27/4-7 (McCracken).

²⁵⁴ T2-27/9-12 (McCracken).

²⁵⁵ T2-27/14-18 (McCracken); T4-9/5-8 (Norling).

²⁵⁶ See for example, T4-8/L24-30 (Norling).

area. The proposed development will provide a significant community benefit by providing healthcare services in a convenient location. It will provide a hub for social and community interaction in a family friendly environment (with the proposed tavern also providing a family friendly leisure/entertainment venue).

- [183] The co-respondent characterises the proposed centre as a “*Neighbourhood Centre*” with a total floor space of 6,875m², comprising a full-line supermarket and specialty shops comprising 5,700m² retail and associated uses totalling 1,175m² (tavern, service station and medical centre). In my view, the proposal will have a higher function than a Neighbourhood Centre with its full-line supermarket, size and scale of retailing activities, and reliance on passing trade extending beyond the neighbourhood catchment. It would function more like District Centre (at a lower order). It would service local residents and well as large volumes of vehicular traffic travelling east along Boundary Road. Albeit at a lower order District Centre, the full-line supermarket, specialty stores, commercial activities and community services, would service a wider district sized catchment. In that way it would enhance the potential for convenient, multi-purpose trips to a single location.
- [184] The proposed development would not impact on transport network efficiency. It would reduce local residents’ vehicular trips, travel times and distances presently experienced in accessing retail centres, and be conducive to pedestrian and cycle trips. The intersection of two main roads (Boundary Road and Panorama Drive) would provide convenient and safe vehicular access to the land. Vehicular and pedestrian movements between Boundary Road and Panorama Drive would be facilitated by a link road. An east to west road link through the site that would ultimately connect Panorama Drive to Kinross Road, as contemplated by the Kinross Road Structure Plan (including the signalisation of the intersection of that east-west link with Panorama Drive).
- [185] The proposed development would be of a higher order and provide facilities and generally complement the future land uses envisaged for the Kinross Road Structure Plan area. It may even stimulate residential development and employment in the Kinross Road Structure Plan area. But it will have a significant impact on the planned local centre on Kinross Road.
- [186] The co-respondent has shown a marginal community, economic and planning need for the development. It will be viable, without inflicting adverse impacts on the viability of the larger existing and planned supermarket or centres. I think that the development would fill an obvious gap in the Redland City’s existing and planned hierarchy and network of centres. However, it’s larger size and function (more than a Neighbourhood Centre and more like District Centre) would erode and prejudice the existing and planned smaller proximate centres, and the centres hierarchy, given it’s size, location, overlap and function.

Conclusion

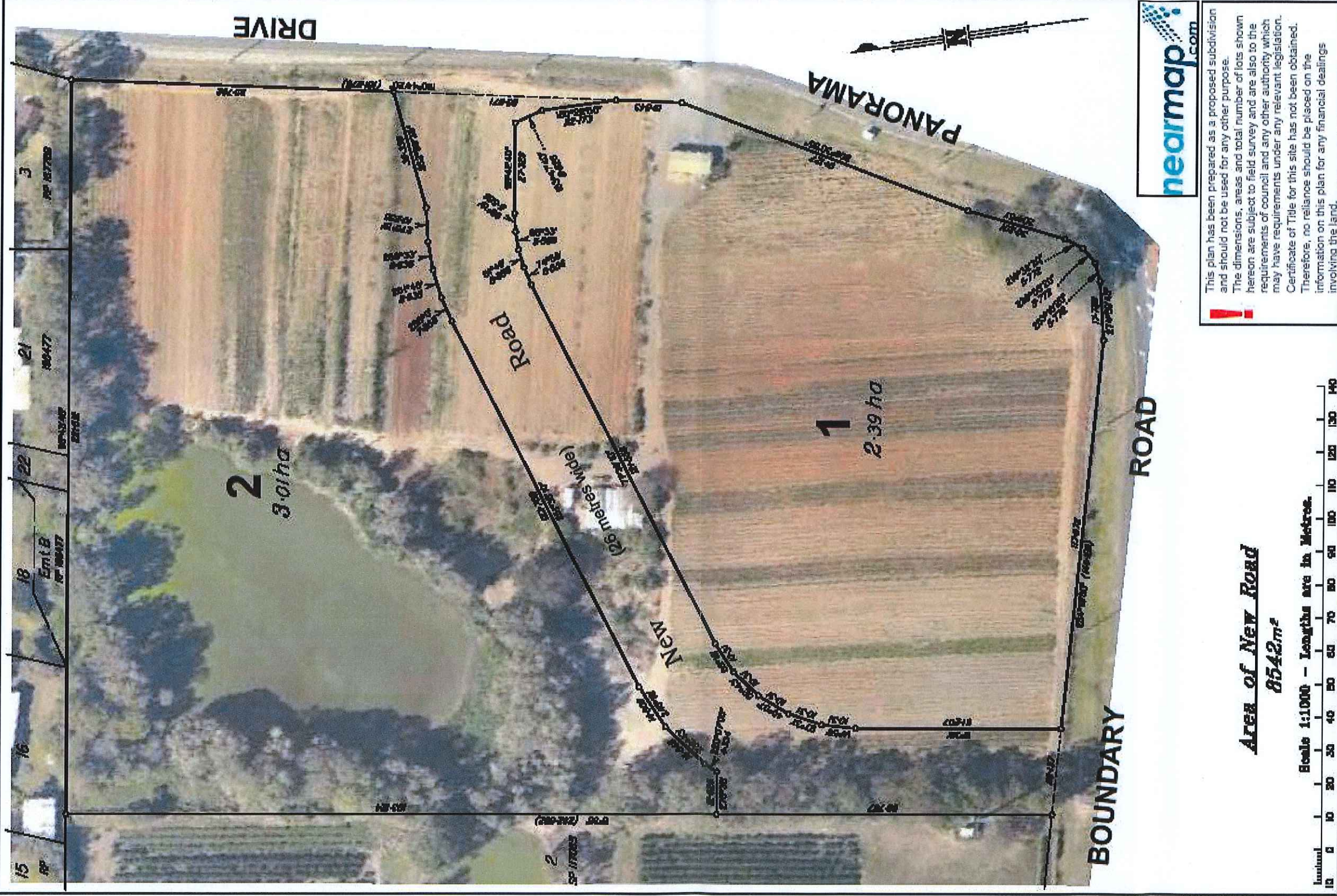
- [187] The proposed development significantly conflicts with the current planning scheme. There are strong arguments and opinion about the deficiencies in the scheme, but they are replicated in the zoning pattern, maintenance of full-line supermarkets in the centres hierarchy and centre zoning proposed in the *draft scheme* despite a whole scheme review. Having considered the grounds in favour of the application as a whole, I am not satisfied that they are, on balance, sufficient to justify approving the application despite the conflicts.

[188] I allow the appeal and refuse the development application.

[189] I will hear from the parties about any consequential orders.

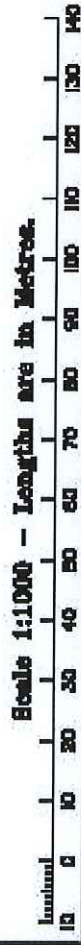
Judge DP Morzone QC

SUBDIVISION PROPOSAL PLAN



! This plan has been prepared as a proposed subdivision and should not be used for any other purpose. The dimensions, areas and total number of lots shown hereon are subject to field survey and are also to the requirements of council and any other authority which may have requirements under any relevant legislation. Certificate of Title for this site has not been obtained. Therefore, no reliance should be placed on the information on this plan for any financial dealings involving the land.

Area of New Road
 8542m²



DATE	CHECKED	AUS	LEVEL DATUM	CLIENT	SITE	SCALE
15/07/2014			N/A	Nerida Pty Ltd	Proposed Lots 1 and 2 Cancelling Lot 3 on SP 177655 128-144 Boundary Road, Thornlands	1:1000 (A3) PLAN REF: P0266-P1

RECEIVED
 28 JUL 2014
 PLANNING ASSESSMENT

REDLAND CITY COUNCIL
 Approved Plan
 18 NOV 2015
 Application Number **MCU013229b**
 See Decision Notice for conditions of approval

25 November 2015

Your Ref: N/A
Our Ref: BM:EU
File No: MCU013296
Contact: Planning Assessment

Nerinda Pty Ltd As Trustee
[Redacted Address]

Dear Sir/Madam

Decision Notice

Sustainable Planning Act 2009

APPLICATION DETAILS

Proposed Development:	Mixed Use Development - 1 into 2 Reconfiguring a Lot & Preliminary Approval (under section 242 of the <i>Sustainable Planning Act 2009</i>) for a Material Change of Use
Application Reference No:	MCU013296
Legal Description:	Lot 3 on SP117065
Site Location:	128-144 Boundary Road Thornlands QLD 4164

The development application for Reconfiguring a Lot (1 into 2 subdivision) and a Material Change of Use for a s242 Preliminary Approval at the above location has been assessed and after considering all relevant matters, a **Development Permit** and **Preliminary Approval** has been granted subject to conditions. The decision was made on 18/11/2015 by Council's delegate.

The following schedule provides all the relevant details.

APPROVAL TYPE

	Development Permit	Preliminary Approval
Building Works assessable against the Planning Scheme	<input type="checkbox"/>	<input type="checkbox"/>
Plumbing or Drainage Works	<input type="checkbox"/>	<input type="checkbox"/>
Operational Works	<input type="checkbox"/>	<input type="checkbox"/>
Reconfiguring a Lot	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Material Change of Use	<input type="checkbox"/>	<input checked="" type="checkbox"/>

REFERRAL AGENCIES

Referral Agency	Advice or Concurrence	Address
Department of State Development Infrastructure & Planning – SARA SEQ (South)	Concurrence	PO Box 3290 Australia Fair SOUTHPORT QLD 4215 ☎ 07 5583 7585 ✉ GCSARA@dship.qld.gov.au

CONDITIONS & ADVICE

CONDITIONS FOR DEVELOPMENT PERMIT (RECONFIGURING A LOT)

ASSESSMENT MANAGER CONDITIONS	TIMING								
<p>1. Comply with all conditions of this approval, at no cost to Council, at the timing periods specified in the right-hand column. Where the column indicates that the condition is an ongoing condition, that condition must be complied with for the life of the development.</p>									
Approved Plans and Documents									
<p>2. Undertake the development in accordance with the approved plans and documents referred to in Table 1, subject to the conditions of this approval and any notations by Council on the plans.</p>	Prior to Council approval of the Survey Plan.								
<table border="1"> <thead> <tr> <th>Plan/Document Title</th> <th>Reference Number</th> <th>Prepared By</th> <th>Plan/Doc. Date</th> </tr> </thead> <tbody> <tr> <td>Subdivision Proposal Plan</td> <td>P0266-P1</td> <td>AJS Surveys</td> <td>24/07/2014</td> </tr> </tbody> </table>		Plan/Document Title	Reference Number	Prepared By	Plan/Doc. Date	Subdivision Proposal Plan	P0266-P1	AJS Surveys	24/07/2014
Plan/Document Title	Reference Number	Prepared By	Plan/Doc. Date						
Subdivision Proposal Plan	P0266-P1	AJS Surveys	24/07/2014						
<p>3. Submit to Council a Survey Plan for Compliance Certificate approval, in accordance with the approved plans, following compliance with all relevant conditions and requirements of this approval.</p>	Prior to expiry of the relevant period for the approved development.								
Split Valuation									
<p>4. Pay a contribution to Council for the purposes of paying the State Government Split Valuation Fees. The current value of the contribution is \$34.10 per allotment (2015/2016 Financial Year). The amount of contribution must be paid at the rate applicable at the time of payment. A Split Valuation Fee is required for each allotment contained on the Plan(s) of Survey, including balance lots.</p>	Prior to Council approval of the Survey Plan.								
Land Dedication and Design									
<p>5. Dedicate land to the State (DNRM) with Council as trust as shown on the approved plan, for the following purposes:</p> <p>a) Road.</p>	Prior to Council approval of the Survey Plan.								

<u>Survey Control Information</u>	
<p>6. Submit Survey Plan(s) that include connections to at least two separate corners from two RCC control marks with a valid Department of Natural Resources and Mines Order or RCC Accuracy. These must be shown on the face of the Survey Plan(s) within the Reference Mark or Permanent Survey Mark tables. List the mark number and coordinate in the cover letter.</p>	As part of the request for compliance assessment of the Survey Plan.
<p>7. Survey and present all asset infrastructure in accordance with the Redlands Planning Scheme Part 11 Policy 9 – Infrastructure Works. The horizontal datum for all work must be Redland City Council Coordinates (RCC) and the vertical datum must be Australian Height Datum (AHD).</p>	As part of the request for compliance assessment of the Survey Plan.
<p>8. Supply a Permanent Survey Mark (PSM) Sketch with the Survey Plan for any new PSMs placed. Include the following on the PSM Sketch:</p> <ul style="list-style-type: none"> • the mark's AHD Reduced Level; • the datum origin mark number; and • the datum RL adopted. <p>Comply with the requirements of the <i>Survey and Mapping Infrastructure Act 2003</i>.</p>	As part of the request for compliance assessment of the Survey Plan.

CONDITIONS FOR PRELIMINARY APPROVAL (MATERIAL CHANGE OF USE)

<u>ASSESSMENT MANAGER CONDITIONS</u>	<u>TIMING</u>
<p>1. Comply with all conditions of this approval, at no cost to Council, at the timing periods specified in the right-hand column. Where the column indicates that the condition is an ongoing condition, that condition must be complied with for the life of the development.</p>	
<u>Approved Plans and Documents</u>	
<p>2. Assess all development, for the purposes of this Preliminary Approval pursuant to Section 242 of the <i>Sustainable Planning Act 2009</i>, in accordance with the approved plans and documents in Table 1.</p> <p><i>Advice: The Plan of Development includes variations to the Redlands Planning Scheme, including to the Tables of Assessment that identify levels of assessment for certain uses and development types.</i></p>	Ongoing.

Plan/Document Title	Reference Number	Prepared By	Plan/Doc. Date
Paradise Gardens Preliminary Approval Documentation and Plan of Development (subject to revisions required by other conditions of the approval)	Paradise Gardens, Thornlands – Revised POD 26/06/2015	Urban Systems	26/06/2015

Table 1: Approved Plans and Documents

3.	Comply with the executed Infrastructure Agreement over the site.	Ongoing.
4.	This preliminary approval does not vary any of the spatial mapping for the overlays identified in the Redlands Planning Scheme.	Ongoing.
5.	Provide a revised Plan of Development outlining the following changes: a) Probable Solution P1.10 (3) is to be revised to read: “(3) Buildings or structures in the Precinct do not exceed 14 metres above ground level (two storey equivalent) except for a central visual feature.”	As part of the first development application for a development permit.
<u>Access and Roadworks</u>		
9.	Design new traffic light signals as part of the proposed access arrangement at the intersection of the ‘Proposed New Road A’ as marked on a Precinct Plan 13065.01/F and Panorama Drive.	As part any future development application.
10.	Design a 2.5m wide shared use footpath works along the entire Boundary and Panorama Road frontage of the development in accordance with the requirements of the Redlands Planning Scheme – Infrastructure Works Code.	As part any future development application.
<u>Environmental Management</u>		
11.	Provide either offset planting or offset payment for koala habitat trees to be removed as indicated in the BAAM Report 0362-001 Draft C dated 22/04/2014. Any removal will need to be accounted for as an offset or replanted in accordance with the South East Queensland Koala Conservation State Planning Regulatory Provision (Table 6, Column 2 Item 2), provide either offset planting (at a ratio of 3 new trees for every one tree removed) or offset payment in accordance with the Environmental Offsets Act 2014 online calculator at: https://environment.ehp.qld.gov.au/offsets-calculator The calculator requires the relevant residual impact/offset area in hectares. In accordance with Section 4.3.10 of the Queensland Environmental Offsets Policy Version 1.1, the offset area is based on an average tree density of 250 trees per hectare.	As part of the first development application for a development permit.
12.	Ensure that any offset planting is carried out within the area identified as	Ongoing.

Private Open Space on the Structure Plan within the approved Plan of Development. These offset plantings must be at least 10 metres away from structures on the site and on adjoining neighbouring properties and at least 3 metres from site boundaries.

Prescribed Period

13. The prescribed period for this Preliminary Approval is ten (10) years, starting the day the Preliminary Approval takes effect.

N/A

Advice: Pursuant to Section 343 of the Sustainable Planning Act 2009.

ADDITIONAL APPROVALS

This preliminary approval does not authorise development to occur.

The following further Development Permits and/or Compliance Permits are necessary to allow the development to be carried out.

- Any development listed as assessable development in the Tables of Assessment in the Plan of Development or Redlands Planning Scheme (where not varied by the Plan of Development).

REFERRAL AGENCY CONDITIONS

- Queensland Department of State Development, Infrastructure and Planning (DSDIP)
Refer to the attached correspondence from the DTMR dated 27/02/2015 (DSDIP reference SDA-0914-014631).

ASSESSMENT MANAGER ADVICE

- Live Connections**
Redland Water is responsible for all live water and wastewater connections. Contact *must* be made with Redland Water to arrange live works associated with the development.
Further information can be obtained from Redland Water on 1300 015 561.
- Coastal Processes and Sea Level Rise**
Please be aware that development approvals issued by Redland City Council are based upon current lawful planning provisions which do not necessarily respond immediately to new and developing information on coastal processes and sea level rise. Independent advice about this issue should be sought.
- Hours of Construction**
Please be aware that you are required to comply with the *Environmental Protection Act* in regards to noise standards and hours of construction.
- Survey and As-constructed Information**
Upon request, the following information can be supplied by Council to assist survey and engineering consultants to meet the survey requirements:
 - A map detailing coordinated and/or levelled PSMs adjacent to the site.
 - A listing of Council (RCC) coordinates for some adjacent coordinated PSMs.
 - An extract from Department of Natural Resources and Mines SCDM database for each PSM.

d) Permanent Survey Mark sketch plan copies.

This information can be supplied without charge once Council received a signed declaration from the consultant agreeing to Council's terms and conditions in relation to the use of the supplied information.

Where specific areas within a lot are being set aside for a special purpose, such as building sites or environmental areas, these areas should be defined by covenants. Covenants are registered against the title as per Division 4A of the *Land Title Act 1994*.

- Services Installation

It is recommended that where the installation of services and infrastructure will impact on the location of existing vegetation identified for retention, an experienced and qualified arborist that is a member of the Australian Arborist Association or equivalent association, be commissioned to provide impact reports and on site supervision for these works.

- Fire Ants

Areas within Redland City have been identified as having an infestation of the Red Imported Fire Ant (RIFA). It is recommended that you seek advice from the Department of Agriculture, Fisheries and Forestry (DAFF) RIFA Movement Controls in regards to the movement of extracted or waste soil, retaining soil, turf, pot plants, plant material, baled hay/straw, mulch or green waste/fuel into, within and/or out of the City from a property inside a restricted area. Further information can be obtained from the DAFF website www.daff.qld.gov.au

- Cultural Heritage

Should any aboriginal, archaeological or historic sites, items or places be identified, located or exposed during the course or construction or operation of the development, the *Aboriginal and Cultural Heritage Act 2003* requires all activities to cease. For indigenous cultural heritage, contact the Department of Environment and Heritage Protection.

- Fauna Protection

It is recommended an accurate inspection of all potential wildlife habitats be undertaken prior to removal of any vegetation on site. Wildlife habitat includes trees (canopies and lower trunk) whether living or dead, other living vegetation, piles of discarded vegetation, boulders, disturbed ground surfaces, etc. It is recommended that you seek advice from the Queensland Parks and Wildlife Service if evidence of wildlife is found.

- Environment Protection and Biodiversity Conservation Act

Under the Commonwealth Government's *Environment Protection and Biodiversity Conservation Act* (the EPBC Act), a person must not take an action that is likely to have a significant impact on a matter of national environmental significance without Commonwealth approval. Please be aware that the listing of the Koala as vulnerable under this Act may affect your proposal. Penalties for taking such an action without approval are significant. If you think your proposal may have a significant impact on a matter of national environmental significance, or if you are unsure, please contact Environment Australia on 1800 803 772. Further information is available from Environment Australia's website at www.ea.gov.au/epbc

Please note that Commonwealth approval under the EPBC Act is independent of, and will not affect, your application to Council.

NEGOTIATION OF A DECISION

You are entitled to make representations to Council about this decision in accordance with Section 361 of the *Sustainable Planning Act 2009*.

DEEMED APPROVAL (APPROVAL UNDER s331)

This application has been deemed approved under Section 331 of the *Sustainable Planning Act 2009*.

SUBMISSIONS

There were 9 properly made submissions about the application. The name and address of the principal submitter for each properly made submission are as follows:

	Name of Principal Submitter	Address
1.	Lanrex Pty Ltd and IVL Group Pty Ltd t/a TownCentre Victoria Point	1st Floor Victoria Point Tavern 349-369 Colburn Avenue Victoria Point QLD 4165
2.	Management of Victoria Point Lakeside	Victoria Point Lakeside Shopping Centre 7-27 Bunker Road Victoria Point QLD 4165
3.	Rededge Partners Pty Ltd	C/- PO Box 1210 New Farm QLD 4005
4.	CMM Planning	PO Box 3322 Norman Park QLD 4170
5.	Dexus Property Group	PO Box R1822 Royal Exchange NSW 1225
6.	Lipoma Pty Ltd	PO Box 1914 Surfers Paradise QLD 4217
7.	Joseph Verrills	137 Boundary Road Thornlands QLD 4164
8.	David Mendels	15 Milner Place Thornlands QLD 4164
9.	R A Vidler	239 Panorama Drive Thornlands QLD 4164

RIGHTS OF APPEAL

A copy of the rights of appeal under Section 461 and Section 462 of the *Sustainable Planning Act 2009* for Applicants is appended, together with Division 11 Part 1 (Chapter 7) of the Act which deals with the making of an Appeal to the Planning and Environment Court.

A Submitter for a development application may also appeal to the Planning and Environment Court. Information about Submitter appeal rights for the Planning and Environment Court is set out in Sections 462, 463 and 464 of the *Sustainable Planning Act 2009*.

Applicants and Submitters may also have a right to appeal to the Building and Development Dispute Resolution Committee. For further details, please refer to the *Sustainable Planning Act 2009* Chapter 7, Part 2.

OTHER DETAILS

Should you wish to obtain more information about Council's decision please contact Council's Planning Assessment team on (07) 3829 8999 or DAmailbox@redland.qld.gov.au. Electronic copies of this Decision Notice are also available online at www.redland.qld.gov.au or at Council offices.

Yours sincerely



for
Chris Vize
Service Manager
Planning Assessment
Assessment Manager - Delegate

Encl

City Planning & Assessment Customer Feedback

We would like your feedback about your dealings with City Planning & Assessment, and suggestions for continuous improvement.

To take a quick survey please visit the website below, or scan the QR Code with your smart phone device.

<http://www.redland.qld.gov.au/Haveyoursay/Pages/Customer-feedback.aspx>



Sustainable Planning Act

Division 8 Appeals to court relating to development applications and approvals

461 Appeals by applicants

- (1) An applicant for a development application may appeal to the court against any of the following—
 - (a) the refusal, or the refusal in part, of the development application;
 - (b) any condition of a development approval, another matter stated in a development approval and the identification or inclusion of a code under section 242;
 - (c) the decision to give a preliminary approval when a development permit was applied for;
 - (d) the length of a period mentioned in section 341;
 - (e) a deemed refusal of the development application.
- (2) An appeal under subsection (1)(a), (b), (c) or (d) must be started within 20 business days (the *applicant's appeal period*) after—
 - (a) if a decision notice or negotiated decision notice is given—the day the decision notice or negotiated decision notice is given to the applicant; or
 - (b) otherwise—the day a decision notice was required to be given to the applicant.
- (3) An appeal under subsection (1)(e) may be started at any time after the last day a decision on the matter should have been made.

462 Appeals by submitters—general

- (1) A submitter for a development application may appeal to the court only against—
 - (a) the part of the approval relating to the assessment manager's decision about any part of the application requiring impact assessment under section 314; or
 - (b) the part of the approval relating to the assessment manager's decision under section 327.
- (2) To the extent an appeal may be made under subsection (1), the appeal may be against 1 or more of the following—
 - (a) the giving of a development approval;
 - (b) any provision of the approval including—
 - (i) a condition of, or lack of condition for, the approval; or
 - (ii) the length of a period mentioned in section 341 for the approval.
- (3) However, a submitter may not appeal if the submitter—
 - (a) withdraws the submission before the application is decided; or
 - (b) has given the assessment manager a notice under section 339(1)(b)(ii).
- (4) The appeal must be started within 20 business days (the *submitter's appeal period*) after the decision notice or negotiated decision notice is given to the submitter.

Sustainable Planning Act

Division 11 Making an appeal to court

481 How appeals to the court are started

- (1) An appeal is started by lodging written notice of appeal with the registrar of the court.
- (2) The notice of appeal must state the grounds of the appeal.
- (3) The person starting the appeal must also comply with the rules of the court applying to the appeal.
- (4) However, the court may hear and decide an appeal even if the person has not complied with subsection (3).

482 Notice of appeal to other parties—development applications and approvals

- (1) An appellant under division 8 must give written notice of the appeal to—
 - (a) if the appellant is an applicant—
 - (i) the chief executive; and
 - (ii) the assessment manager; and
 - (iii) any concurrence agency; and
 - (iv) any principal submitter whose submission has not been withdrawn; and
 - (v) any advice agency treated as a submitter whose submission has not been withdrawn; or
 - (b) if the appellant is a submitter or an advice agency whose response to the development application is treated as a submission for an appeal—
 - (i) the chief executive; and
 - (ii) the assessment manager; and
 - (iii) any referral agency; and
 - (iv) the applicant; or
 - (c) if the appellant is a person to whom a notice mentioned in section 465(1) has been given—
 - (i) the chief executive; and
 - (ii) the assessment manager for the development application to which the notice relates; and
 - (iii) any entity that was a concurrence agency for the development application to which the notice relates; and
 - (iv) the person who made the request under section 383 to which the notice relates, if the person is not the appellant; or
 - (d) if the appellant is a person mentioned in section 466(1)—
 - (i) the chief executive; and
 - (ii) the responsible entity for making the change to which the appeal relates; and
 - (iii) the person who made the request to which the appeal relates under section 369, if the person is not the appellant; and

- (iv) if the responsible entity is the assessment manager—any entity that was a concurrence agency for the development application to which the notice of the decision on the request relates; or
 - (e) if the appellant is a person to whom a notice mentioned in section 467 has been given—the entity that gave the notice.
- (2) The notice must be given within—
- (a) if the appellant is a submitter or advice agency whose response to the development application is treated as a submission for an appeal—2 business days after the appeal is started; or
 - (b) otherwise—10 business days after the appeal is started.
- (3) The notice must state—
- (a) the grounds of the appeal; and
 - (b) if the person given the notice is not the respondent or a co-respondent under section 485—that the person may, within 10 business days after the notice is given, elect to become a co-respondent to the appeal by filing in the court a notice of election in the approved form.

483 Notice of appeals to other parties—compliance Assessment

- (1) An appellant under division 9 must, within 10 business days after the day the appeal is started, give written notice of the appeal to—
- (a) if the appellant is a person to whom an action notice, compliance permit or compliance certificate has been given—
 - (i) the compliance assessor who gave the notice, permit or certificate; and
 - (ii) if the compliance assessor was a nominated entity of a local government and a copy of the request for compliance assessment was given to the local government under section 402—the local government; or
 - (b) if the appellant is a person to whom a notice mentioned in section 470(1) has been given—
 - (i) the entity that gave the notice; and
 - (ii) if the entity that gave the notice was a nominated entity of a local government and the written agreement of the local government was required to give the notice—the local government.
- (2) The notice must state the grounds of the appeal.

484 Notice of appeal to other parties—other matters

- (1) An appellant under division 10 must, within 10 business days after the day the appeal is started, give written notice of the appeal to—
- (a) if the appeal is under section 471—the local government and coordinating agency for the application for approval of the master plan; or
 - (b) if the appeal is under section 472 or 475—the local government; or
 - (c) if the appeal is under section 478—the entity that gave the notice the subject of the appeal; or
 - (d) if the appellant is a person to whom an enforcement notice is given—the entity that gave the notice and if the entity is not the local government, the local government; or

- (e) if the appellant is a person dissatisfied with a decision about compensation—the local government that decided the claim; or
 - (f) if the appellant is a person dissatisfied with a decision about acquiring designated land—the designator; or
 - (g) if the appellant is a party to a proceeding decided by a building and development committee—the other party to the proceeding.
- (2) The notice must state the grounds of the appeal.

485 Respondent and co-respondents for appeals under div 8

- (1) Subsections (2) to (8) apply for appeals under sections 461 to 464.
- (2) The assessment manager is the respondent for the appeal.
- (3) If the appeal is started by a submitter, the applicant is a co-respondent for the appeal.
- (4) Any submitter may elect to become a co-respondent for the appeal.
- (5) If the appeal is about a concurrence agency's response, the concurrence agency is a co-respondent for the appeal.
- (6) If the appeal is only about a concurrence agency's response, the assessment manager may apply to the court to withdraw from the appeal.
- (7) The respondent and any co-respondents for an appeal are entitled to be heard in the appeal as a party to the appeal.
- (8) A person to whom a notice of appeal is required to be given under section 482 and who is not the respondent or a co-respondent for the appeal may elect to be a co-respondent.
- (9) For an appeal under section 465—
 - (a) the assessment manager is the respondent; and
 - (b) if the appeal is started by a concurrence agency that gave the assessment manager a notice under section 385—the person asking for the extension the subject of the appeal is a co-respondent; and
 - (c) any other person given notice of the appeal may elect to become a co-respondent.
- (10) For an appeal under section 466—
 - (a) the responsible entity for making the change to which the appeal relates is the respondent; and
 - (b) if the responsible entity is the assessment manager—
 - (i) if the appeal is started by a person who gave a notice under section 373 or a pre-request response notice—the person who made the request for the change is a co-respondent; and
 - (ii) any other person given notice of the appeal may elect to become a co-respondent.
- (11) For an appeal under section 467, the respondent is the entity given notice of the appeal.

486 Respondent and co-respondents for appeals under div 9

- (1) For an appeal under section 468 or 469—
 - (a) the compliance assessor is the respondent; and

- (b) if the compliance assessor is a nominated entity of a local government and the appeal relates to a matter required by a local government—the local government is a co-respondent.
- (2) However, if the appeal is only about a matter required by the local government, the compliance assessor may apply to the court to withdraw from the appeal.
- (3) For an appeal under section 470—
 - (a) the entity that gave the notice to which the appeal relates is the respondent; and
 - (b) if the entity mentioned in paragraph (a) is a nominated entity of a local government and the local government did not agree to the request mentioned in section 470(1)—the local government is a co-respondent.
- (4) However, if the appeal is only about the local government's refusal of the request, the entity that gave the notice to which the appeal relates may apply to the court to withdraw from the appeal.

487 Respondent and co-respondents for appeals under div 10

- (1) This section applies if an entity is required under section 484 to be given a notice of an appeal.
- (2) The entity given notice is the respondent for the appeal.
- (3) However, if under a provision of the section more than 1 entity is required to be given notice, only the first entity mentioned in the provision is the respondent.
- (4) The second entity mentioned in the provision may elect to be a co-respondent.

488 How an entity may elect to be a co-respondent

An entity that is entitled to elect to be a co-respondent to an appeal may do so, within 10 business days after notice of the appeal is given to the entity, by following the rules of court for the election.

489 Minister entitled to be party to an appeal involving a State interest

If the Minister is satisfied an appeal involves a State interest, the Minister may, at any time before the appeal is decided, elect to be a party to the appeal by filing in the court a notice of election in the approved form.

490 Lodging appeal stops particular actions

- (1) If an appeal, other than an appeal under section 465, 466 or 467, is started under division 8, the development must not be started until the appeal is decided or withdrawn.
- (2) If an appeal is about a condition imposed on a compliance permit, the development must not be started until the appeal is decided or withdrawn.
- (3) Despite subsections (1) and (2), if the court is satisfied the outcome of the appeal would not be affected if the development or part of the development is started before the appeal is decided, the court may allow the development or part of the development to start before the appeal is decided.

Between: **LIPOMA PTY LTD (ACN 002 203 581)** Appellant
And: **REDLAND CITY COUNCIL** Respondent
And: **NERINDA PTY LTD (ACN 001 325 720)** Co-Respondent

NOTICE OF APPEAL

Filed on 18 December 2015

Filed by: Minter Ellison, solicitors for the Appellant
Service address: Waterfront Place, 1 Eagle Street, BRISBANE QLD 4000
Phone: (07) 3119 6000 (Attention: Russell Bowie)
Fax: (07) 3119 1000
Email: Russell.Bowie@minterellison.com
DX: 102 BRISBANE

Lipoma Pty Ltd (ACN 002 203 581) care of Minter Ellison, Waterfront Place, 1 Eagle Street, Brisbane in the State of Queensland appeals to the Planning and Environment Court at Brisbane against the decision of the Redland City Council to approve, subject to conditions, an application for a Preliminary Approval (under Section 242 of the *Sustainable Planning Act 2009*) for a Material Change of Use for a Mixed Use Development and a Development Permit for Reconfiguring a Lot (1 lot into 2 lots) in relation to the land described hereunder and seeks the following orders or other relief:

1. That the appeal be allowed;

NOTICE OF APPEAL

Filed on behalf of the Appellant

Form PEC-1

MINTER ELLISON
Lawyers
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email
Russell.Bowie@minterellison.com
Reference 1122046

2. That the application be refused; and
3. Such further or other orders as the court may deem appropriate.

PARTICULARS OF THE DECISION THE SUBJECT OF THE APPEAL

The street address of the relevant land is:	128-144 Boundary Road, Thornlands, Queensland
The real property description is:	Lot 3 on SP117065
Name of local authority making decision:	Redland City Council
Date of local authority's decision:	18 November 2015
Applicant:	Nerinda Pty Ltd (ACN 001 325 720)
Type of application made:	Preliminary Approval (under Section 242 of the <i>Sustainable Planning Act 2009</i>) for a Material Change of Use for a Mixed Use Development and a Development Permit for Reconfiguring a Lot (1 lot into 2 lots).

The grounds of appeal are:

1. The Co-Respondent made a development application to the Respondent seeking Preliminary Approval (under Section 242 of the *Sustainable Planning Act 2009*) for a Material Change of Use for a Mixed Use Development and a Development Permit for Reconfiguring a Lot (1 lot into 2 lots) (the **Application**):
2. On or about 27 February 2015, the Appellant lodged a submission in respect of the Application which was accepted by the Respondent and was not withdrawn.
3. By letter dated 30 November 2015 the Respondent notified the Appellant that it resolved to approve, subject to conditions, the Application for the reasons set out in the Decision Notice.
4. The Application should be refused for the following reasons:
 - (a) Having regard to the relevant provisions of the Redlands Planning Scheme and the circumstances of the case, the Application should be refused.
 - (b) Having regard to the matters required to be considered as required by the *Sustainable Planning Act 2009* the Application should be refused.

- (c) The Application conflicts with the South East Queensland Regional Plan.
- (d) The Application conflicts with the Redlands Planning Scheme, including the:
 - (i) Desired Environmental Outcomes in the Scheme particularly as they relate to the development of centres; and
 - (ii) Kinross Road Structure Plan Overlay.
- (e) There are not sufficient grounds to justify approval of the Application despite the conflict.
- (f) When regard is had to the relevant provisions of the draft City Plan 2015 and appropriate weight given to the planning strategies provided for in that Scheme, the Application should be refused.
- (g) The proposed development would prejudice the orderly and balanced planning of the area.
- (h) The proposed development comprises out of centre development.
- (i) The Application conflicts with the South East Queensland Koala Conservation State Planning Regulatory Provisions.
- (j) The proposal is contrary to good town planning principles.
- (k) There is no need for the development proposed in the Application at the location proposed nor to the extent proposed.
- (l) The Application fails to take proper account of existing retail facilities and approved retail facilities.
- (m) The proposed development would create or exacerbate a traffic hazard by virtue of traffic generated by the proposed development.
- (n) Existing road access to the Land cannot adequately accommodate the traffic that would be generated by the proposed development of the land.
- (o) The proposed access arrangements for the development are not acceptable.

- (p) The proposed development would adversely affect the amenity of the area because of increased noise and noise later into the night than presently experienced.
- (q) The proposed development, in particular the proposed hotel, will adversely impact on the amenity of the area.
- (r) The proposed development will result in incompatible land uses in the area.
- (s) The proposed reconfiguration is in conflict with the intended use for the Land pursuant to the Redlands Planning Scheme.
- (t) Having regard to the provisions of the Redlands Planning Scheme and the present use of land adjoining the subject site, the proposed reconfiguration is not appropriate for the development of the land.



Solicitors for the Appellant

If you are named as a respondent in this notice of appeal and wish to be heard in this appeal you must:

- (a) **within 10 business days after being served with a copy of this Notice of Appeal, file an Entry of Appearance in the Registry where this notice of appeal was filed or where the court file is kept; and**
- (b) **serve a copy of the Entry of Appearance on each other party.**

The Entry of Appearance should be in the Form PEC - 5 for the Planning and Environment Court.

If you are entitled to elect to be a party to this appeal and you wish to be heard in this appeal you must:

- (a) **within 10 business days of receipt of this Notice of Appeal, file a Notice of Election in the Registry where this Notice of Appeal was filed or where the court file is kept; and**
- (b) **serve a copy of the Notice of Election on each other party.**

The Notice of Election should be in Form PEC – 6 for the Planning and Environment Court.

**IN THE PLANNING AND ENVIRONMENT COURT
HELD AT: BRISBANE**

No. of 2016

Between: LANREX PTY LTD ACN 010 740 191 ATF IDL INVESTMENT TRUST & IVL
GROUP PTY LTD ACN 163 553 231 (ABN 30 553 002 938) TRADING AS
LANREX PROPERTY AND TOWN CENTRE VICTORIA POINT Appellants

And: REDLAND CITY COUNCIL Respondent

And: NARINDA PTY LTD AS TRUSTEE Co-respondent

NOTICE OF APPEAL

Filed on: 4 January 2016
Filed by: McCullough Robertson Lawyers
Rachel Jones
Service address: Level 11, Central Plaza Two
66 Eagle Street
BRISBANE QLD 4000
Phone: 07 3233 8888
Fax: 07 3229 9949
Email: rjones@mccullough.com.au

Lanrex Pty Ltd ACN 010 740 191 atf IDL Investment Trust & IVL Group Pty Ltd ACN 163 553 231
(ABN 30 553 002 938) Trading As Lanrex Property and Town Centre Victoria Point c/o McCullough
Robertson, Level 11, Central Plaza Two, 66 Eagle Street, Brisbane, in the State of Queensland appeal
to the Planning and Environment Court at Brisbane against the decision of the Respondent made on
18 November 2015 approving a development application made by the Co-respondent for a preliminary
approval (under section 242 *Sustainable Planning Act 2009* (Qld) for a material change of use – Mixed
Use Development and reconfiguration of a lot (1 lot into 2 lots) (**Proposed Development**) in respect
of premises located at 128-144 Boundary Road, Thornlands and identified as Lot 3 on SP117065
(**Premises**) (the **Development Application**).

The Appellants seek the following orders or judgment:

NOTICE OF APPEAL
Filed on behalf of the Appellants
Form PEC-1

McCullough Robertson
Level 11, Central Plaza Two
66 Eagle Street
BRISBANE QLD 4000
GPO Box 1855, BRISBANE QLD 4001
Phone: 07 3233 8888
Facsimile: 07 3229 9949
Our ref: RAJ:SAM:167688-00001

- (a) that the Appeal be allowed;
- (b) that the Development Application for the Proposed Development be refused;
- (c) the Appellants be awarded its costs of the appeal; and
- (d) such further or other orders as may be appropriate.

The grounds of appeal are:

- 1 The Premises has an area of approximately 6.254 hectares and is covered by the Kinross Road Structure Plan Overlay in the Redlands Planning Scheme version 6.2 (**Planning Scheme**).
- 2 In the Kinross Road Structure Plan, the Premises is divided into the following sub-precincts:
 - (a) 4b - Urban Residential Housing;
 - (b) 3b - Medium Density Residential Housing; and
 - (c) 7e - Greenspace Network.
- 3 The Premises are also subject to the following other overlays:
 - (a) Bushland Habitat Overlay;
 - (b) Flood Storm and Drainage Constrained Land Overlay;
 - (c) Road and Rail Noise Impact Overlay; and
 - (d) Waterways Wetlands and Moreton Bay Overlay.
- 4 The existing use of the Premises is for small crop farming purposes.
- 5 On 25 July 2014, the Co-Respondent through its consultant, Urban Systems Pty Ltd (**Co-Respondent's Consultant**), lodged the Development Application with the Respondent.
- 6 On 26 September 2014, the Respondent issued an acknowledgment notice to the Co-Respondent.

- 7 The Department of State Development, Infrastructure and Planning, as it was then known, was a referral agency for the Development Application.
- 8 The Development Application was subject to impact assessment, requiring public notification in accordance with the SPA.
- 9 The Development Application was subject to public notification from 15 January 2015 to 27 February 2015. During public notification, nine properly made submissions were received.
- 10 On 10 February 2015, the Appellants lodged a properly made submission under the SPA regarding the Development Application.
- 11 On 2 December 2015, the Respondent gave the Appellant Lanrex Pty Ltd written notice of the Respondent's decision to approve the Development Application subject to conditions.
- 12 The Development Application should be refused because a decision to approve it conflicts with the Planning Scheme.
- 13 A decision to approve the Development Application conflicts with the following provisions of the Planning Scheme:
- (a) desired environmental outcome no.6 – economic development (section 3.1.7 of the Planning Scheme) which seeks to ensure Redland City has a diverse, dynamic and sustainable economy with increasing levels of employment opportunity through a network of multi-purpose centres where:
 - (i) development occurs in accordance with Redland City's centre network;
 - (ii) the City centres are geographically defined by the extent of the centre zones in the case of district, neighbourhood and local centres; and
 - (iii) the primacy of the City's centres network shall be protected by discouraging outer centre development outside of the centre areas (section 3.1.7 (1)(a) of the Planning Scheme);

- (b) the strategic framework (section 3.2.3 of the Planning Scheme), in particular the following strategies:
- (i) (1)(k) which seeks to ensure development of centres is in accordance with a functional network, with the Principal Activity Centres at Capalaba, Cleveland and a Major Centre Victoria Point;
 - (ii) (3)(a) which encourages the development of centres in accordance with a functional network, with individual centres of varying levels differentiated from one another on the basis of a centres matrix that distinguishes centre role and function, scale and use composition;
 - (iii) (5)(g) which states the strategy for the medium density residential housing precinct (precinct 3 is supporting the vitality and vibrancy of the mixed use local centre precinct and the line haul public transport corridors along Boundary Road and Panorama Drive;
 - (iv) (5)(h) which states the strategy for sub-precinct 3b – Medium Density Residential – Boundary Road and Panorama Drive is providing low-rise medium density residential development in close proximity to line haul bus services along Boundary Road and Panorama Drive; and
 - (v) (11)(c) which states the Planning Scheme regulates the potential impact of development on the safe and efficient functioning of the road network through the allocation of zones, the application of road design standards and payment of infrastructure contributions towards the provision and upgrading of the road network;
- (c) the Kinross Road Structure Plan, which specifies a residential collector road with esplanade treatment through the site, which residential collector road is not provided by the Proposed Development;
- (d) the Kinross Road Structure Plan overlay code (section 5.15 of the Planning Scheme), including overall outcome 5.15.8(2)(a)(ii) which seeks to ensure uses and other

development reinforce the specific development intent for each land use precinct.

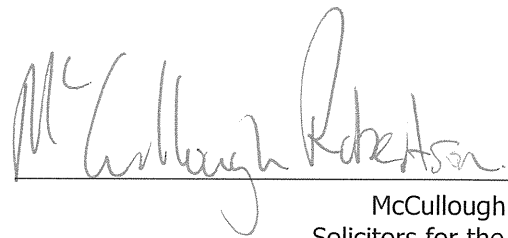
Relevantly:

- (i) the specific development intent for Precinct 1 Mixed Use Local Centre is to provide limited retail and commercial services to meet the convenience needs of the surrounding residents;
- (ii) the Proposed Development will provide retail and commercial services to a broader catchment than residents surrounding Precinct 1 and at a higher level than merely meeting the convenience needs of those residents;
- (iii) the specific development intent for sub-precinct 3b – Medium Density Residential Housing – Boundary Road and Panorama Drive states it is intended for the sub-precinct to provide for low-rise medium density residential development in close proximity to line haul bus services along the public transport corridors on Boundary Road and Panorama Drive; and
- (iv) the Proposed Development will include non residential uses contrary to the requirement for residential uses on the Premises; and
- (e) the Kinross Road Structure Plan with respect to the Premises, deliberately limits the preferred uses to residential and open space, and does not contemplate or support the non-residential aspects of the Proposed Development, despite an existing approval for a local convenience centre on the Premises.

14 The Respondent's centres network and hierarchy in the Planning Scheme appropriately reflects forecasted growth in the Planning Scheme area, as there have been nine revisions of the Planning Scheme (disregarding the current version 7) since the Kinross Road Structure Plan was established, and eleven since the City's centre network was established in version 1 (disregarding the current version 7).

15 There is no need for the Proposed Development the subject of the Development Application and it will have an adverse economic impact on existing retail developments in the vicinity.

- 16 The Development Application will cause unacceptable traffic impacts, including:
- (a) failing to provide the residential collector road with esplanade treatment through the site as required by the Kinross Road Structure Plan Map 1;
 - (b) impacts on the proposed Boundary Road and Panorama Drive accesses;
 - (c) impacts on the Boundary Road/Panorama Drive intersection; and
 - (d) increasing traffic congestion and conflict in the local road network, for which insufficient mitigation measures have been proposed.
- 17 There are not sufficient grounds to justify approval of the Development Application notwithstanding the conflicts with the Planning Scheme.
- 18 Accordingly, the Development Application should be refused.



McCullough Robertson
Solicitors for the Appellants

If you are named as a respondent in this notice of appeal and wish to be heard in this appeal you must:

- (a) within 10 business days after being served with a copy of this Notice of Appeal, file an Entry of Appearance in the Registry where this notice of appeal was filed or where the court file is kept; and**
- (b) serve a copy of the Entry of Appearance on each other party.**

The Entry of Appearance should be in Form PEC – 5 for the Planning and Environment Court.

If you are entitled to elect to be a party to this appeal and you wish to be heard in this appeal you must:

- (a) within 10 business days of receipt of this Notice of Appeal, file a Notice of Election in the Registry where this Notice of Appeal was filed or where the court file is kept; and**
- (b) serve a copy of the Notice of Election on each other party.**

The Notice of Election should be in Form PEC – 6 for the Planning and Environment Court.



In the Planning and Environment Court
Held at: Brisbane

No. 44 / 2016

Between: **VICTORIA POINT LAKESIDE PTY LTD** Appellant

And: **REDLAND CITY COUNCIL** Respondent

And: **NERINDA PTY LTD** Co-Respondent

NOTICE OF APPEAL

Filed on: / /2016

Filed by: McCarthy Durie Lawyers
 Service Address: Level 9, 239 George Street, Brisbane QLD 4000
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 E-mail: iann@mdl.com.au

TAKE NOTICE that Victoria Point Lakeside Pty Ltd (A.C.N 106 781 757) care of Centre Management, Lakeside Shopping Centre, 7/27 Bunker Road, Victoria Point in the State of Queensland hereby appeals to the Planning and Environment Court at Brisbane against the decision of the abovenamed Respondent to approve, with conditions, the Co-Respondent's development application for 'Mixed Use Development – 1 into 2 Reconfiguring a Lot and Preliminary Approval for Material Change of Use' ("the Development Application") in respect of land at located at 128-144 Boundary Road,

FEF:	\$4129-
INIT:	KE
REG:	4403658
ENT:	

NOTICE OF APPEAL
 Filed on behalf of the Appellant
 Form PEC-1

McCarthy Durie Lawyers
 Level 9
 239 George Street
 BRISBANE QLD 4000
 Telephone: 07 3370 5100
 Facsimile: 07 3390 3861
 Ref: 162711:IAN

Thornlands more particularly described as Lot 3 on SP 117065 ("the subject land") in the State of Queensland, and in lieu thereof seeks the following orders or other relief:

- a) an Order that this Appeal be allowed;
- b) an Order that the Development Application be refused; and
- c) such further or other Orders, including as to costs, as the Court deems meet.

BACKGROUND

- 1) The subject land:
 - a) contains an area of approximately 6.254 hectares with frontages to Boundary Road of approximately 160 metres and Panorama Drive of approximately 320 metres;
 - b) is substantially cleared of all vegetation and farmed for small crops with an irrigation dam in the north west corner;
 - c) is categorised Urban Footprint in the South East Queensland Regional Plan and is designated Medium Density Residential Housing (3b), Urban Residential Housing (4b) and Green Space Network (7e) in the Respondent's Town Plan and Kinross Road Structure Plan;
 - d) is affected by various Overlays contained within the Respondent's Planning Scheme including Flood Prone, Storm Tide and Drainage Constrained Land, Bush Land Habitat, Kinross Road, Road and Rail Noise Impacts and Waterways, Wetlands and Moreton Bay Overlays; and
 - e) is generally located within a precinct of semi-rural and commercial businesses (flower farm, landscape and garden supplies, farm produce and convenience stores).

- 2) The Co-Respondent's development application was lodged with the Respondent on or about 12 August 2014 and deemed "properly made" on or about 12 September 2014.
- 3) The Co-Respondent's development application was deemed Code Assessable and Impact Assessable and required referral to the State Development, Infrastructure and Planning.
- 4) The development application sought:
 - a) a preliminary approval for Material Change of Use from agriculture activities to a Neighbourhood Centre of up to 5,700m² retail and associated used of up to 1,175m², a Mixed Residential Development and Greenspace dedication;
 - b) a preliminary approval to vary the provisions of the Respondent's Planning Scheme in accordance with a proposed Plan of Development; and
 - c) a development permit for Lot Reconfiguration to create two master lots, one being for Residential and Greenspace Precinct and one for the proposed Neighbourhood Centre Precinct incorporating a full line Coles Supermarket (4,100m²), Coles Express Service Station, large chemist (500m²), Tavern (850m²), Medical Centre (225m²) and Specialty Shops (1,100m²).
- 5) The subject land already has a development approval (3 April 2013) for a commercial centre (1,000m²).
- 6) The Appellant, by its dually authorised agent Victoria Point Lakeside Centre Management, lodged a properly-made submission with the Respondent on or about 9 February 2015 objecting to the development proposal and stating reasons why the development application should not be approved.

- 7) By its Decision Notice of 25 November 2015 the Respondent purported to approve the development application, which Decision Notice was notified to the Appellant on or about 7 December 2015.

GROUNDINGS OF THE APPEAL:

- 8) The development application should be refused because of the fundamental conflicts with the Respondent's Planning Scheme and in particular:
- a) the proposed development is inconsistent with the Network of Centres described in the Planning Scheme's Strategic Framework (notably section 3.2.3 Strategies for the City) which sets out in detail a planned network of the commercial centres. The Strategic Framework does not mention any proposal for a centre at the subject location;
 - b) the development proposal is entirely inconsistent with the Kinross Road Structure Plan which dictates a centrally located mixed use Neighbourhood Centre to service the local neighbourhood, and such proposed Neighbourhood Centre is in an entirely different location to that proposed by the Co-Respondent;
 - c) the development proposal substantially exceeds the proposed Neighbourhood Centre and proposes a commercial precinct of District Centre size;
 - d) the proposed uses (retail, warehouse and tavern) are entirely inconsistent with the Kinross Road Structure Plan land designations and what is expected in a Neighbourhood Centre as defined by the Redland Planning Scheme;
 - e) the development proposal includes additional vehicle access points to Panorama Drive and Boundary Road, which access points are entirely

inconsistent with the Kinross Road Structure Plan. The proposal for additional vehicle access points onto Boundary Road and Panorama Drive, particularly with the proposed vehicle movements, is entirely inappropriate and unsafe;

- f) the development proposal does not adequately address landscaping and acoustic treatments along the Boundary Road and Panorama Drive frontages, which is entirely inconsistent with the Kinross Road Structure Plan;
 - g) the development proposal will substantially impact, detrimentally, on the existing District Centres of Cleveland (“Cleveland Principle Activity Centre”) and Victoria Point (“Victoria Point Major Centre”) and thus the development proposal is in substantial conflict with the Desired Environmental Outcomes of the Respondent’s Planning Scheme (DEO 6 – Economic Development); and
 - h) the development proposal does not demonstrate, and there is no, need or economic need for a commercial centre such as that proposed by the Co-Respondent.
- 9) The development proposal would be a significant over-development of the subject land.
- 10) There are no sufficient town planning grounds to justify the decision purporting to approve the development application, particularly having regard to the conflicts identified in the proceeding paragraphs.
- 11) In the premises the Appeal should be allowed and the development application refused.

PARTICULARS OF THE APPELLANT

Name: Victoria Point Lakeside Pty Ltd
Residential or business address: C/- Victoria Point Lakeside Centre Management
7/27 Bunker Road Victoria Point 4165
Solicitor's name: Ian Neil
Firm name: McCARTHY DURIE LAWYERS
Address for services: Level 9, 239 George Street
BRISBANE QLD 4000
Telephone: (07) 3370 5100
Facsimile: (07) 3390 3861
E-mail address: iann@mdl.com.au

Signed:



Description: Solicitor for the Appellant

Dated:

5 JANUARY 2016.

To the Respondent and the Co-Respondent:

If you intend to contest this Appeal, you should within 10 days of your being served with this Notice of Appeal:

- a) file an Entry of Appearance in the Registry at the place where the application is to be heard; and
- b) serve a copy of the Entry of Appearance on each other party.

The Entry of Appearance should be in the form set out in Form PEC – 6 for the Planning and Environment Court.