

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *E.J. Cooper & Son Pty Ltd v Townsville City Council & Anor*  
[2021] QPEC 20

PARTIES: **E.J. COOPER & SON PTY LTD**  
(appellant)

v

**TOWNSVILLE CITY COUNCIL**  
(respondent)

**and**

**CHIEF EXECUTIVE, DEPARTMENT OF  
TRANSPORT AND MAIN ROADS**  
(co-respondent by election)

FILE NO/S: 4894 of 2013

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 31 March 2021

DELIVERED AT: Brisbane

HEARING DATE: 12, 13, 14, 15, 16, 19, 20, 21, 22 and 23 October 2020, 3, 4  
and 6 November 2020 and 11 December 2020 with further  
material received to 10 February 2021.

JUDGE: Rackemann DCJ

ORDER: **The appeal is dismissed.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal  
against refusal of a development application under the  
*Integrated Planning Act 1997* – application for a preliminary  
approval for a material change of use to develop a large rural  
holding into a master planned residential community  
supported by other uses – where the development application  
also sought a variation to the planning scheme – the operation  
of statutory provisions in relation to such applications –  
whether the application for a preliminary approval for the  
material change of use must be assessed against the  
provisions of the Planning Scheme sought to be varied – what  
weight should be given to the more recent planning  
documents – whether proposal should be refused having  
regard to the nature of the proposed uses, its likely impact on

amenity, potential for reverse amenity impacts, infrastructure requirements, traffic impacts or having regard to issues of flooding or stormwater quality - whether the proposal conflicts with the planning documents – whether the application ought be approved having regard to grounds/matters in favour of the proposal – whether there is a need sufficient to support approval – likely benefits in times of flood – benefits from stabilizing and rehabilitating eroded parts of the site – other matters in favour – whether the development should be approved in part – whether the variations component of the application should be approved

CASES:

*Aldi Stores v Redland City Council* [2009] QPELR 602

*Bell v Brisbane City Council, Gold Coast City Council* (2018) 230 LGERA 374

*Brown v BCC* [2005] QPELR 629

*Gold Coast City Council v K & K (GC) Pty Ltd* (2019) 239 LGERA 409

*Lewiac Pty Ltd v Gold Coast City Council and Another* (2011) 180 LGERA 117

*Lipoma Pty Ltd & Anor v Redland City Council & Anor* [2020] QCA 180

*Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 Qd R 302

*Nerinda Pty Ltd v Redland City Council* [2019] 1 Qd R 523

*Redland City Council v Aldi Stores* [2009] QCA 346

*Redland City Council v King of Gifts (Qld) Pty Ltd* [2020] QCA 41

*Residential Developments Australia Pty Ltd v Brisbane City Council* [1990] QPELR 121

*Stockland Development v Sunshine Coast Regional Council* [2014] QPELR 52

*Weightman v Gold Coast City Council* [2003] 2 Qd R 441

*Woolworths Ltd v Maryborough City Council (No 2)* [2006] 1 Qd R 273

LEGISLATION:

*Integrated Planning Act 1997* (Qld) ss 1.3.2, 3.1.6, 3.5.5, 3.5.5A, 3.5.14, 3.5.14A, 4.1.50(1), 4.1.52(1), (2)

*Integrated and Other Legislation Amendments Act 2003* (Qld)

*Planning Act 2016* (Qld) s 289(2)

*Sustainable Planning Act 2009* (Qld) ss 329, 802, 819

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SOLICITORS: Thynne + Macartney for the appellant  
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## Background

- [1] This is the oldest appeal within this Court. It was commenced in 2013 against the deemed refusal of a development application made in December 2008. It is more than 10 years since the development application was subject to public notification. The approval sought by the appellant is for the purposes of facilitating the future development of a large rural holding south west of the developed part of Townsville, within the former Thuringowa Shire, at the foothills of the Pinnacles. It proposes a master planned residential community, supported by other uses and facilities.
- [2] The delay in progressing the matter was explained in the evidence of the appellant's representative, whose statement revealed, amongst other things, that:
- (a) the land was purchased, for the purpose of future development in 2007, in the belief that "common sense dictated" (although the planning scheme did not) that land at Pinnacles would be next in line for development;<sup>1</sup>
  - (b) the development application was lodged on 23 December 2008;
  - (c) in 2009 the Council commenced work on a new planning scheme. It was also, at that time, unsupportive of the development application;<sup>2</sup>
  - (d) the appellant, it seems, spent some years unsuccessfully attempting to persuade the Council that its proposal ought be supported in the new planning scheme;<sup>3</sup>
  - (e) by a letter dated 22 May 2013,<sup>4</sup> the Council advised that its concerns in relation to the ongoing operational and maintenance costs of additional infrastructure required for the proposal and the absence of need for additional land to be zoned for urban purposes (or that Pinnacles should be the next growth front) had not been allayed; the appellant thereupon chose to institute the subject appeal; and
  - (f) following the institution of the appeal, many experts were engaged to<sup>5</sup> provide advice. The appellant subsequently spent an extended period of time unsuccessfully attempting to negotiate a resolution. Eventually it accepted that it would not succeed and with "additional pressure from the Court to progress the appeal" the matter eventually came on for hearing.

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<sup>1</sup> Ex 62 para 12.

<sup>2</sup> Ex 62 para 31, 33.

<sup>3</sup> Ex 62 paras 34-37.

<sup>4</sup> Ex 63 para 38.

<sup>5</sup> Ex 62 paras 41-45.

- [3] The extent of delay in this case is quite exceptional. It should not be taken to be a precedent for the level of patience which this Court will exhibit in respect of delay, even where matters are large and/or complex.

### **The Site**

- [4] The subject site is located at 360 Round Mountain Rd, Pinnacles, Townsville and is more particularly described as Lot 4 on SP132604. It is a relatively large holding of 1,189ha in area. It is improved with a farm house, fencing, some rural outbuildings and informal tracks.
- [5] The site features a relatively flat plain in the central and eastern parts of the site and a more elevated section in the foothills of the Harvey Range. There are two main creeks (Stoney Cr and Middle Cr) which traverse the site in a generally west/east direction. There are other minor streams.
- [6] The site adjoins other rural allotments. There is also some rural/residential sized allotments a little further to the east. Reflecting its rural location, the site is removed from urban facilities. The distance from the centre of the site to the supermarket at Rasmussen was variously described as approximately 8km<sup>6</sup> or 6km or more<sup>7</sup> by road. Similarly it is not currently served by other infrastructure to a standard that would be necessary to support development of the kind intended.

### **The Proposal**

- [7] The development application was made under the Integrated Planning Act 1997. The application sought two things as follows:
- (a) a preliminary approval for a material change of use, described in the development application as a “mixed use residential community comprising of residential, commercial, light industrial, community and open space and land uses within 9 separate neighbourhoods, to a maximum building height of 3 storeys or 12m”, and
  - (b) a variation to the planning scheme to change the level of assessment for 45 uses (from impact assessable) and to nominate applicable codes for uses and for the assessment of applications for reconfiguration and for operational works.
- [8] The intention is for development to be guided by a new Pinnacles Development Plan (PDP). That plan includes codes. One is the Pinnacles District Code (PDC). The purpose of the PDC is to achieve the Overall Outcomes and objectives for the PDP area. Its Overall Outcomes contain broad statements of intent. Specific Outcomes of the PDC provide an intent for each of the Precincts.

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<sup>6</sup> T6-36.

<sup>7</sup> Ex 50 para 14.

- [9] The Residential Precinct intends “*primarily*” to be a suburban area for a range of housing types of varying scale and density. That may include a mix of dual occupancies, multiple dwellings and aged care and retirement villages. Density is to be generally low (10 dwellings per net hectare) to medium (15 dwellings per net hectare within “easy walking distance” (defined as 400m)) of Local Centre and Mixed Use Town Centre Precincts and parkland. Densities are not to exceed the maximum dwelling yield identified on Map 2 and on subsequent approved DLUPs.
- [10] The Mixed Use Town Centre Precinct envisages a single large shopping complex with retail uses up to 6,000m<sup>2</sup> and offices and commercial premises up to 7,000m<sup>2</sup>. Possible uses include indoor recreation (cinemas or gyms), education facilities, restaurant, hotel or short-term accommodation, office, place of worship and medical centre. It is intended to be “*an employment centre for the wider Pinnacles residential community*”.
- [11] The Local Centre Precincts are to generally serve catchments of 1,000 to 2,000 households and include convenience shopping, personal services, catering shops, restaurants, community facilities, healthcare services and offices, and service stations. Retail uses of up to 200m<sup>2</sup> and up to 800m<sup>2</sup> for offices and commercial premises are envisaged.
- [12] The Light Industry and Enterprise Land Use Precinct is to accommodate a “*broad range*” of light industrial, manufacturing and servicing, large-scale retail uses, storage facilities, distribution centres, sales and hire yards and similar uses. “*Retail showrooms and bulky good land uses*” are also envisaged. The area is intended to act as an employment generator.
- [13] The Community Use Precinct is the preferred location for education facilities as well as possible social and community services, health, recreational and entertainment facilities. Child care centres, community residences, cultural facilities, institutional residences, hospitals, retirement villages, medical centres, and outdoor recreational and places of worship are envisaged. The application report referred to up to 3 primary schools and 2 high schools.
- [14] The Open Space Precinct was intended to incorporate parkland, together with remnant vegetation, riparian corridors and watercourses with ancillary facilities and pathways. There have been changes, discussed later, as to what may be done in the open space precinct.
- [15] Another code is the Detailed Land Use Plan Code (DLUP Code) which is provided for under the PDC. A Detailed Land Use Plan (DLUP) must be approved for each neighbourhood prior to any application for any further development. A DLUP for each neighbourhood would be the subject of a code assessable “material change of use” application, provided it is generally in accordance with the approved PDP. The DLUP must be assessed against the DLUP Code and the PDP. The DLUP would establish cadastral boundaries for Precincts, and a framework for the location of land



uses, roads, parks, stormwater drainage and other infrastructure. A DLUP would establish “*in principle*” support for land use areas and criteria for future applications.

- [16] The Overall Outcome for the DLUP Code is that a DLUP is generally in accordance with the approved PDP including Maps 1 to 4.<sup>8</sup> The term “generally in accordance” is defined in s 4.2 of the DLUP Code. It relevantly includes that precincts nominated within the DLUP are located as indicated on the approved PDP Map 1 and the probable solutions of the DLUP Code; residential densities and yields do not exceed those nominated on the approved PDP Map 2; maximum GLA for other uses do not exceed those nominated in the PDC; the DLUP achieves the Overall Outcomes within the PDC; and infrastructure of a sufficient capacity is available, or can be made available for the area the subject of the proposed DLUP. Specific Outcomes are stated for each of the neighbourhood areas (NH1-NH9).
- [17] The proposal is to concentrate development generally into the flatter parts of the site, whilst retaining the two creeks to which reference has been made. The open space otherwise is concentrated mainly in the western part of the site. The projected ultimate residential lot yield was 5,100 lots. That was contained within the application report itself, and more particularly within the PDP. With changes that have since been made to the proposal (discussed later), that number of residential lots is unlikely to be realised if the proposal were to proceed, since the changes have significantly reduced the extent of land that would be available for development.
- [18] The PDP identifies the applicable codes for future development applications within the PDP area. Those codes are the PDC and DLUP Code as well as certain codes forming part of the planning scheme. The PDP defines the planning scheme by reference to the Townsville City Plan 2005 (CP 2005) up to and including amendment 17 of 2008. On its face the proposal seeks to apply those codes to development that would take place well into the future. Senior Counsel for the appellant at one point foreshadowed an application to amend the proposal so that the relevant codes would be those current from time to time, but later informed the Court that no such application would be made.
- [19] There have been changes to the proposal in the course of the appeal, and more are foreshadowed or would be required in the event that the Court were to deliver a judgment indicating that the appeal would be allowed subject to the formulation of appropriate terms of order. Prior to the hearing the plans were changed to reflect a seven stage development with, amongst other things:
- (a) a reduced development footprint and consequential increase in open space; and
  - (b) the introduction of a vegetation and watercourse buffer.

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<sup>8</sup> and that infrastructure and services technical reports are submitted to demonstrate the need for and capacity of trunk infrastructure.

- [20] In the course of the hearing a further amended plan was produced, which further reduced the development footprint and further increased the open space. The proposal was also changed such that stormwater infrastructure, such as detention basins, are now to be kept out of the open space areas and are instead to be included within the development footprint (as are the parks and, indeed any uses save for road crossings).<sup>9</sup> That was to address the difficulty that the open space was previously being relied on for disparate and potentially conflicting purposes given its ecological value. Other aspects of the PDP would require attention prior to any final orders in the appellant's favour.

### **Statutory Framework**

- [21] It has already been observed that the development application was made in 2008, during the currency of the Integrated Planning Act (IPA). That was superseded by the Sustainable Planning Act (SPA) which was, in turn, superseded by the Planning Act (PA).
- [22] The appeal to this Court was commenced during the currency of SPA. At the time SPA commenced, the development application had been made under IPA but not decided. Accordingly, it was required to be dealt with and decided as if IPA continued to apply.<sup>10</sup> Further, any appeal was required to be heard and decided under IPA.<sup>11</sup> The proceeding having commenced before PA, the position was, for it, effectively preserved under s 311 of the PA.
- [23] It is common ground that if the appeal is allowed and the development application approved, the approval will take effect as a variation approval for the purposes of the PA.<sup>12</sup>

### **The Decision Framework under IPA**

- [24] Not all applications for preliminary approvals are for master planned developments or seek any variation to the effect of the planning scheme, but some are of that kind. Section 3.1.6 of IPA made provision for preliminary approvals that approved a material change of use and overrode a local planning scheme instrument in certain ways. The subject development application was for such an approval and was subject to impact assessment which, under IPA, was to be carried out pursuant to s 3.5.5. Relevantly, s 3.5.5(2) provided that, if the application was for "development" in a planning scheme area, the assessment was required to be carried out having regard to a number of things, including the planning scheme.
- [25] "Development" was defined, for the purposes of IPA, in s 1.3.2 to include, relevantly for current purposes, making a material change of use of premises. The application

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<sup>9</sup> T11-7.

<sup>10</sup> s 802 of SPA.

<sup>11</sup> s 819 of SPA.

<sup>12</sup> A preliminary approval under IPA is taken to be a "preliminary approval to which s 242 applies" under SPA (s 808(2)) which, in turn, is taken to be a variation approval (s 289(2) of PA).

for a preliminary approval for the material change of use was therefore required to be assessed pursuant to s 3.5.5 having regard to, inter alia, the planning scheme. That the component of the application which sought approval for the development was required to be assessed, in the case of impact assessable applications, pursuant to s 3.5.5 was expressly contemplated by s 3.5.5A(2)(b). Further, the explanatory notes to the legislation<sup>13</sup> that amended IPA to include s 3.5.5A stated, in part, that:

“Although sections 3.5.4 and 3.5.5 establish criteria for the assessment of all development (including development the subject of an application under section 3.1.6) the Act currently contains no guidance about assessing the part of such an application that seeks to vary the local planning instrument.”

[26] That part of the application which stated the way in which it was sought to vary the effect of any applicable local planning instrument (the variation) was not making application for a form of development. That part of the application fell to be assessed pursuant to s 3.5.5A. By reason of 3.5.5A(2) that part of the application was required to be assessed having regard to a number of matters including the consistency of the proposed variations with aspects of the planning scheme, other than those sought to be varied and the result of the assessment of the “development” (the material change of use) under, relevantly, s 3.5.5.

[27] Decisions on development applications requiring impact assessment under IPA were subject to the provisions of s 3.5.14. That included the following provision (underlining added):

“(2) If the application is for development in a planning scheme area, the assessment manager’s decision must not—

(a) compromise the achievement of the desired environmental outcomes for the planning scheme area; or

(b) conflict with the planning scheme, unless there are sufficient grounds to justify the decision despite the conflict.”

[28] As has already been observed, that part of the application which sought a preliminary approval for the material change of use was for “development” in the planning scheme area. Accordingly, s 3.5.14(2) applied to a decision on that part of the application.

[29] Section 3.5.14A made specific provision for decision or applications under s 3.1.6 as follows (underlining added):

“(1) In deciding the part of an application for preliminary approval mentioned in section 3.1.6 that states the way in which the applicant seeks approval to vary the effect of any applicable

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<sup>13</sup> *Integrated and Other Legislation Amendments Act 2003*.

local planning instrument for the land, the assessment manager must–

- (a) approve all or some of the variations sought; or
- (b) subject to section 3.1.6(3) and (5)–approve different variations from those sought; or
- (c) refuse the variations sought.

[30] It is apparent that that does not refer to the part of the application that seeks a preliminary approval of the material change of use (that being caught by s 3.5.14), but rather only applies to the part of the application which sought the variation. That is clear both from the introductory paragraph in s 3.5.14A(1) and from the nature of the orders referred to in the subparagraphs. The relevant explanatory note said that the provision was to compliment s 3.5.5A. It did not contain a similar conflict/grounds test, but did go on to provide, in part, as follows:

“(2) However–

- (a) to the extent development applied for under other parts of the application is refused, any variation relating to the development must also be refused; and
- (b) the assessment manager’s decision must not compromise the achievement of the desired environmental outcomes for the planning scheme area; and...”

Since the material change of use is development applied for under another part of the application, s 3.5.14A requires refusal of the variations in the event that the MCU is refused.

[31] It was submitted, on behalf of the appellant that, although the substance of its proposal, on any view, flies in the face of the planning scheme in force at the time the development application was made, s 3.5.14(2) is not engaged in the sense that there is no relevant conflict, because only a preliminary approval is sought. Reliance was placed on the reasons of McMurdo JA in *Lipoma Pty Ltd & Anor v Redland City Council & Anor*<sup>14</sup> when considering the corresponding provisions of SPA (referred to, for convenience, as the Nerinda point).

[32] In the written submissions it was contended, for the appellant, that the effect of His Honour’s approach was that, in so far as the identification of conflict with the planning scheme is concerned, there ought be no assessment of the proposed material change of use against those parts of the planning scheme sought to be varied. Accordingly it was submitted that no conflict arises in this case. It was however, acknowledged that s 3.5.5 requires the material change of use to be assessed having regard to the planning scheme. In that regard Mr Gore QC contended that, even

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<sup>14</sup> [2020] QCA 180.

accepting the approach of McMurdo JA, the planning scheme provisions remain a relevant consideration, but on the basis of there being a general discretion as to approval or refusal of the application. That discretion would then be exercised against the background of the planning scheme being a relevant consideration, rather than triggering the conflict/grounds test.<sup>15</sup> I find it difficult to see how the provisions could have that effect. Further, it was submitted that when a preliminary approval is sought, it is inherent that care needs to be taken in applying the planning scheme as the embodiment of the public interest.

- [33] In *Lipoma*, the Court of Appeal considered an appeal from a decision of this Court which ultimately refused a submitter appeal against an approval of a development permit for a reconfiguration and a preliminary approval for a material change of use for a mixed use development that included a shopping centre. The argument proceeded on the basis that s 329 of SPA, which contained a conflict/grounds provision, was engaged. That section fell within Subdivision 3 of Part 5 of Chapter 6 of SPA, dealing with decision rules for applications under s 242.
- [34] In his reasons, McMurdo JA expressed the opinion that it was “very arguable” that s 329 was not engaged. He drew a distinction between s 326, which falls within the decision rules generally, and s 329, which deals with applications under s 242. His Honour said:

“[95] A decision to grant a preliminary approval, varying the effect of the scheme in a certain respect, will not cause a conflict which would engage s 329 in many, and perhaps most cases. If there would be no conflict between one part of the scheme as varied and any other part of the scheme, s 329 would not be engaged.”

His Honour’s observations were obiter and did not address the different parts of an application for a preliminary approval. I was informed that His Honour’s observations were not responsive to any submission made in that case.

- [35] As has already been observed, an application for a preliminary approval for a material change of use may also seek to vary the effect of a local planning instrument (a variation), but it does more than just seek the variation. It seeks a preliminary approval for a material change of use (the MCU component). The legislation distinguishes between the components. Indeed, the assessment of the MCU component must be had regard to when assessing the variation component<sup>16</sup> and the decision on the MCU component can be decisive of the part which seeks the variation, since, as has been observed, in the event that the MCU component is refused, the variation must also be refused.<sup>17</sup>
- [36] Whilst, in the event the MCU component is approved, the proposed variation is assessed for consistency only with aspects of the planning scheme other than those

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<sup>15</sup> T13-22.

<sup>16</sup> s 3.5.5A(2)(b).

<sup>17</sup> s 3.5.14(A)(2)(a) of IPA.

sought to be varied,<sup>18</sup> that is not so in relation to the MCU component. That follows from s 3.5.5A of IPA, which expressly makes s 3.5.5A(2), including the constraint in sub-paragraph (d), applicable only to “the part” of the application. Section 3.5.5A(1) provides that the relevant “part” is that which is seeking the variation. The MCU component of the application (the part that seeks approval for development) is a different part and is assessed, in this case, pursuant to s 3.5.5 as is expressly contemplated by 3.5.5A(2)(b). That part of the application is for development in a planning scheme area and so, on the face of the provisions, is subject to the conflict/grounds test in s 3.5.14(2). It is difficult to see any justification for reading s 3.5.14(2) as subject to an unexpressed qualification that, in conducting the conflict/grounds test with respect to the MCU, conflict with those parts of the planning scheme sought to be varied in the other component of the application should be ignored.

- [37] If the position were otherwise then a proposed material change of use that conflicts with the planning scheme would have to confront the conflict/grounds provisions in s 3.5.14 if only a development permit were sought, but would escape such scrutiny if a preliminary approval was first obtained which also varied the scheme so as to facilitate the later grant of a development permit (by varying the effect of the conflicting provisions). I do not consider that the provisions had that purpose or effect. It has already been noted that variations can only be granted in respect of development (here an MCU) that is approved. The provisions operate so that, if a preliminary approval for a material change of use that conflicts with the scheme can be justified, then approval may also be given to a request to vary the effect of the local planning instrument that will apply in relation to the subsequent applications required to ultimately facilitate the development to which a preliminary approval is being given. In assessing the requested variations consideration will be given to the extent to which, if made, they would be consistent with the other (non varied) provisions of the scheme. There is nothing surprising about that.
- [38] In *Nerinda Pty Ltd v Redland City Council*,<sup>19</sup> Bowskill J said as follows with respect to the provisions under SPA:

“[50] Subdivision 3 sets out the “decision rules – application under section 242.” This subdivision applies in deciding the part of an application for a preliminary approval that states the way in which the applicant seeks approval to vary the effect of any applicable local planning instrument (s 327). The test in s 329(1)(b) is worded in the same way as s 326 – that the decision must not conflict with a relevant instrument unless there are sufficient grounds to justify the decision despite the conflict. But the meaning of “relevant instrument” is different. Section 329(2) defines “relevant instrument” to mean a matter or thing

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<sup>18</sup> s 3.5.5A.

<sup>19</sup> [2019] 1 Qd R 523.

mentioned in s 316(4)(c) or s 316(4)(d), other than a State planning regulatory provision, that the assessment manager must have regard to in assessing the part of the application. Section 316(4)(d) in particular presents quite a different lens through which to consider the part of an application which seeks approval to vary parts of the planning scheme – that is, *consistency* of the proposed variations with aspects of the local planning instrument, *other than the aspects sought to be varied*.

[51] ... apart from the summary at [22] of the Decision, his Honour does not draw any distinction, in the course of his reasons, between his analysis of the part of the preliminary approval which seeks to vary parts of the planning scheme, and any other part of it (relevantly, the part seeking approval for a material change of use).

[52] Although the applicant seemed to submit, on this application for leave to appeal, that there was no basis for any consideration of conflict with the parts of the planning scheme that it sought to vary, by its application for preliminary approval, I am not persuaded that accords with a proper construction of the provisions. The application for preliminary approval also sought approval for a material change of use, which presumably was required to be considered under ss 313 or 314. It does not seem correct to construe the provisions in such a way that a developer could apply for a preliminary approval, inter alia, seeking to vary the effect of planning scheme provisions, so that a different level of assessment would apply in the future (relevantly, here, code assessment for a large shop, where impact assessment would previously have applied) without the assessment manager (or the Court standing in its shoes) at some point giving consideration to whether that was an appropriate thing to do, having regard to conflict with the (unvaried) planning scheme provisions, and whether there are public interest grounds to approve, despite the conflict.<sup>20</sup>

[39] In my respectful view similar observations to those at paragraph 52 of Her Honour's reasons apply in relation to the relevant provisions of the IPA. I would have no great difficulty with the observations of McMurdo JA in *Lipoma* if they applied only to the operation of s 329 in relation to the variation part of an application for preliminary approval, but they do not cause me to conclude that the MCU component of the application does not attract the provisions of s 3.5.14 of IPA, including those in relation to conflict/grounds in relation to the provisions of the planning scheme including those sought to be varied in the event that the MCU is approved. In this

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<sup>20</sup> See also the footnote to this paragraph of Her Honour's reasons.

case however, I would have reached the same conclusion as to the merits even had I proceeded on the basis that the relevant provisions of the planning scheme (including those sought to be varied) were simply a matter to have regard to in the assessment under s 3.5.5 leading to the exercise of a general discretion. In that regard I would, in this case, have, in any event, placed significant weight upon the fact that the proposed material change of use flies in the face of the planning scheme.

- [40] I also do not accept that the fact that the application is for a preliminary approval means that a significantly different level of care needs to be taken in relation to the application of the planning scheme as the embodiment of the public interest, at least in relation to assessment of the MCU component. As I have previously observed, the gravity of conflict between an application for a material change of use and the planning scheme cannot be put at nought simply because the applicant applies to vary the effect of a planning scheme so as to obviate the conflict.<sup>21</sup>
- [41] Acknowledging that his client’s proposal is contrary to the applicable planning instrument, Mr Gore QC likened the development application to an application for rezoning under older statutory regimes. In my view it is best to focus on the relevant provisions of the applicable regime but, to the extent that the comparison has any validity, it should be noted that, under the earlier regime, such approvals were not there for the asking in relation to development that was prohibited under the existing zoning. The change from the existing zoning had to be justified and the statement of intent of the existing zoning was a relevant consideration.<sup>22</sup>
- [42] The respondent alleges that a decision to approve the application would both compromise the achievement of desired environmental outcomes (DEOs), and conflict with provisions of the planning scheme (which also include the DEOs<sup>23</sup>). The words “compromise” and “conflict” are to be given their ordinary meaning. To compromise is to clearly threaten, imperil or endanger.<sup>24</sup> Conflict means to be at variance or disagree with.<sup>25</sup> Senior Counsel for the appellant did not dispute that there may be circumstances where a decision would conflict with a DEO (which is part of the planning scheme) so as to trigger the conflict/grounds test albeit that achievement of the DEO was not compromised.<sup>26</sup>
- [43] In a sense, it is now not possible for any decision to compromise the (future) achievement of a DEO in a planning scheme which ceased to have effect years ago. It was submitted, for the respondent, that since the development application must be decided under the old planning scheme, the Court ought approach the compromise issue as if that scheme were still in place and its DEOs were still current and capable

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<sup>21</sup> *Stockland Development v Sunshine Coast Regional Council* [2014] QPELR 52 at [19].

<sup>22</sup> *Residential Developments Australia Pty Ltd v Brisbane City Council* [1990] QPELR 121.

<sup>23</sup> *Lewiac Pty Ltd v Gold Coast City Council and Another* (2011) 180 LGERA 117.

<sup>24</sup> *Brown v BCC* [2005] QPELR 629, 631 [9]; *Aldi Stores v Redland City Council* [2009] QPELR 602, 604 [16].

<sup>25</sup> *Redland City Council v Aldi Stores* [2009] QCA 346 at [17]-[19]; *Woolworths Ltd v Maryborough City Council (No 2)* [2006] 1 Qd R 273, 286 [23].

<sup>26</sup> T14-29.



of being achieved or their achievement capable of being compromised. That is perhaps another way of saying that the question now is whether it would have had that compromising effect. That submission is, I consider, correct, but my decision does not rely on that because, for the reasons discussed later, I am of the view that the appeal should, in any event, be dismissed even if it is assumed, favourably to the appellant, that any conflict would not be accompanied by a compromise of the achievement of the DEOs of the applicable 2003 planning scheme.

[44] In considering whether there are sufficient grounds, reference is often made to the following three step process described in *Weightman v Gold Coast City Council*<sup>27</sup> per Atkinson J in respect of similar provisions of the then Local Government (Planning and Environment) 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.”

[45] The provision of IPA refers to “sufficient grounds” rather than “sufficient planning grounds” and the passage from *Weightman* must be read subject to that qualification. Grounds are defined in IPA, as matters of public interest. They do not include the personal circumstances of an applicant, owner or interested party.<sup>28</sup>

[46] The consideration of whether grounds are sufficient has been the subject of recent Court of Appeal authority in *Bell v Brisbane City Council*<sup>29</sup>, *Gold Coast City Council v K & K (GC) Pty Ltd*<sup>30</sup> and *Redland City Council v King of Gifts (Qld) Pty Ltd*.<sup>31</sup> Those decisions emphasise the planning scheme provisions as an expression of public interest, at least in a prima facie way. It was said in *K & K* that:<sup>32</sup>

“It is, in general, against the public interest to approve a development that conflicts with the Planning Scheme. To justify such a development it must be demonstrated that the desired deviation from the Planning Scheme serves the public interest to an extent greater than the maintenance of the status quo. The public interest that is to be

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<sup>27</sup> [2003] 2 Qd R 441.

<sup>28</sup> Schedule 10.

<sup>29</sup> (2018) 230 LGERA 374.

<sup>30</sup> (2019) 239 LGERA 409.

<sup>31</sup> [2020] QCA 41.

<sup>32</sup> At para 67.

satisfied by the proposed development must be greater than the public interest in certainty that the terms of a Planning Scheme will be faithfully applied.”

- [47] In *Bell*, McMurdo JA spoke of cases which might justify approval notwithstanding conflict.<sup>33</sup> Reference was made to cases where relevant circumstances had changed, or the scheme was based on a factual error or had not anticipated a need for a certain development in the public interest. Those are examples of where it might be concluded that the provision with which there is conflict is not, in fact, a reflection of the public interest.
- [48] If the demonstration of sufficient grounds focused only on the point of conflict and was limited to circumstances in which the conflict could be justified by demonstration that the relevant provision no longer embodies the public interest then there would appear to be little scope for the operation of the third limb of the *Weightman* test. That limb calls on the decision maker, having considered whether the conflict could be justified by grounds going to the part of the application in conflict, to look to see whether the “grounds in favour of the application as a whole are, on balance, sufficient”. Certainly the third limb must now be read in light of the more recent Court of Appeal authority and, in particular, its caution against approaching such provisions on the basis of a general weighing of factors.<sup>34</sup>
- [49] The recent cases have however, not disapproved of *Weightman*. Further, one of the examples<sup>35</sup> given by the learned President in paragraph 68 of the reasons in *K & K* appears to be an example of a third limb consideration. The appellant, in this case, relied upon some third limb grounds. I have proceeded on the basis that the third limb of *Weightman* remains relevant in the consideration of whether there are sufficient grounds. That limb is not necessarily given any more or less weight.<sup>36</sup> Further, as was said in *Woolworths Ltd v Maryborough City Council (No 2)*<sup>37</sup>, it would be a mistake to treat the *Weightman* formulation as if it were a code.

### **Onus and Nature of Appeal**

- [50] The appeal proceeds as a hearing anew.<sup>38</sup> The appellant bears the onus of establishing that the appeal should be upheld.<sup>39</sup> The Court must decide the appeal on the basis of the laws and policies applying when the application was made, but may give weight to any new laws and policies the Court considers appropriate.<sup>40</sup>

### **The Planning Documents**

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<sup>33</sup> At para 68.

<sup>34</sup> *K & K* para [48].

<sup>35</sup> That involving need satisfied by a non-conflicting component overriding conflict created by another component.

<sup>36</sup> *Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 Qd R 302 at 322.

<sup>37</sup> [2006] 1 Qd R 273 at 286.

<sup>38</sup> s 4.1.52(1) of IPA.

<sup>39</sup> s 4.1.50(1) of IPA.

<sup>40</sup> s 4.1.52(2).

- [51] The development application was made during the life of the Thuringowa Town Planning Scheme (TPS 2003), which first took effect in 2003. The appeal must be decided on the basis of that planning scheme, however the Court may give such weight as it considers appropriate to any new laws and policies.<sup>41</sup> The conflict/grounds provisions discussed earlier only apply in relation to the TPS 2003.
- [52] On 27 October 2014 the new Townsville City Plan (CP 2014) commenced. It was prepared in accordance with SPA, but has subsequently been amended to align with the PA. That planning scheme has been the subject of various amendments since its commencement.
- [53] The provisions of CP 2014 are, in my view, worthy of considerable weight. They represent the contemporary expression of the planning intent for the City of Townsville as a whole (not just the old Thuringowa) in a document that has now been in force for a considerable period of time. It is appropriate that the provisions of the document be afforded considerable weight particularly in relation to a large, long term proposed development of obvious significance in relation to the planning strategy for Townsville, involving the creation of a substantial new community composed of a range of urban activities within what is currently a rural part of the city. As Mr Gore QC himself said “this is a major development which will be a feature of Townsville for a long time”.<sup>42</sup> The appellant points out that the planning intent of CP 2014 is not markedly different from that in the TPS, but the continuation of that intent into CP 2014 (notwithstanding the passage of time), and the provisions now giving effect to it, are of significance.
- [54] The appellant complains of the unfairness of affording weight to CP 2014, given that it commenced well after the lodgement of the development application. It also points to the expiration of the time for it to now make a development application (superseded planning scheme). This appeal falls for determination at a time when CP 2014 is in force and has been for some years, because of the appellant’s failure to pursue its rights more swiftly. It delayed, for years, in instituting any appeal against Council’s deemed refusal, whilst trying to influence the content of the new planning scheme which it knew was then being formulated. It then delayed in the prosecution of the appeal whilst the planning scheme took effect and continued in effect for years. That it, in the meantime, let its right to make a development application (superseded planning scheme) pass is a matter for it. I do not consider that matters of fairness dictate that no or no significant weight be afforded to CP 2014.
- [55] The appellant complains that the Council has given other approvals inconsistent with CP 2014. In particular, it points to the approval of a development referred to as Wingate. That does not, in my view, create a sufficient justification for this Court to ignore the provisions of CP 2014, or attach little or no weight to them in relation to the subject site. The planning strategy, particularly as it relates to the subject site, has

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<sup>41</sup> s 4.1.52 of IPA.

<sup>42</sup> T13-99.

not been shown to have been overtaken or affected in a way that would justify the subject proposal by reason of the other approvals.

- [56] The appellant claims that the reasons for the treatment of its land as rural in CP 2014, particularly with respect to amenity, do not call for refusal. Those matters are considered later. That might affect the extent or gravity of discord between the proposal and CP 2014, in a particular respect or respects, but does not justify giving other than significant weight to the document more generally. The utility of the site for its zoned purpose is dealt with later in these reasons.
- [57] Earlier in 2020 the North Queensland Regional Plan (NQRP) took effect. It is the pre-eminent plan for the region and is intended to guide planning and decision-making by all State Government agencies. Its principal aim is to determine how land use and infrastructure planning can best support economic growth and population change over the next 25 years and beyond. That aim is identified as being achieved by, relevantly: *“more efficient patterns of development to put an end to Townsville’s urban sprawl, thereby reducing cost pressures on infrastructure provision and services”*. The plan is intended to guide strategic planning and decisions including land use planning by both state and local governments; the assessment of development applications; and infrastructure planning, prioritisation and funding decisions made by all levels of government, and other infrastructure agencies.
- [58] Given the nature and importance of the subject application, as described earlier, some weight should be given to NQRP, notwithstanding the complaints of the appellant (which were in like terms to its objections to weight being afforded to CP 2014). Having regard to how recently the NQRP has been published however, consideration of matters of fairness are more significant which, in turn, results in me attaching less weight to it. I would have been loath to refuse the application solely because of conflict with the NQRP. That is however, not the case. Indeed my ultimate conclusion would have been no different had no weight been afforded to the NQRP.

### **The Issues**

- [59] The parties tendered an agreed abbreviated list of issues which were the focus of the hearing. Some of those issues, such as whether weight should be given to the planning documents which came into effect after the development application was made and the extent to which the assessment of the development application is carried out on the basis of the provisions of the town planning scheme sought to be varied, have already been addressed. Some of the remaining issues relate to the variation component of the development application, but the focus of the evidence and argument was on the MCU component. That will be addressed first. The issues in that regard went to the extent of conflict between the proposal (subject to appropriate conditions) and the planning documents, and matters that could satisfy the conflict/grounds test with respect to conflict with the TPS 2003 or that should be

taken into account when considering the weight to be afforded to the proposal's discord with the provisions of the more recent planning documents.<sup>43</sup>

## **The Conflict/Matters Raised Against the Proposal**

### **(i) Residential and Other Urban (Non-rural) Use**

#### **(a) TPS 2003**

[60] Under the TPS 2003 the land was included within the Rural Planning Area and the Rural 40 sub-area. Unsurprisingly, master planned estates for suburban residential and other urban development were not contemplated in that area. Residential, industrial and centres development was promoted in other planning areas. Even Mr Buckley, the town planner engaged by the appellant, saw the conflict between the MCU component of the application and at least some provision of the TPS as "very major".<sup>44</sup>

[61] The respondent relied on 4 DEOs namely:

- DEO 1 in relation to nature;
- DEO 4 in relation to city image amenity and lifestyle;
- DEO 5 in relation to economy, and
- DEO 6 in relation to land use patterns.

[62] Of particular relevance in this respect is DEO 6, which is that:

"the city's land use patterns create cohesive communities that balance economic, social and environmental considerations"

That is a statement about land use patterns which is expressed at a high level of generality. It is however, intended to be achieved by strategies set out in s 2.6.2, which include by establishing the city's urban growth boundaries to create an efficient urban form. As is observed later, the proposal is outside those boundaries and conflicts with that aspect of the strategy to achieve the DEO. The nature, scale and location of the proposal relative to the intended land use pattern suggest that approval would have a compromising effect, but with respect to the DEO. There is conflict with the strategy even if it were assumed, favourably to the appellant, that it does not go so far as to compromise the achievement of the DEO.

[63] The respondent also drew attention to DEO 5 which is that:

"Economic development in the city is strong, diversified, supports local employment and enhances quality of life"

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<sup>43</sup> Or, on the appellant's case (that the provisions of TPS 2003 are also only a matter to be considered) with TPS 2003 as well.

<sup>44</sup> T11-57.

That is also an objective which is expressed at a high level of generality. Attention was directed to the relevant city strategies for the achievement of DEO 5 which include:

- “(a) protecting land and providing an adequate supply of land for employment generating development (at a local, regional, state or national scale) and the future expansion of employment generating land uses in designated locations”

The respondent alleged conflict on the basis that the proposal seeks to facilitate retail, commercial and industrial development on land that is not in a designated location. The provision seeks to protect and provide an adequate supply of land in designated locations. It does not, in terms, say that all employment generating development must be in designated locations. In any event, the primary issue in relation to the nature of the land use is whether it is appropriate to allow for a new master planned community, of the scale proposed, on the subject site, notwithstanding the provisions of the planning scheme that do not contemplate such development in this location. If such development is appropriate, then it would be justifiable, in the community interest, to provide an appropriate level of non-residential uses to support that community, even if that involved a level of conflict with this provision.

[64] There was a character statement for the Rural Planning Area in s 3.1.1 of the TPS 2003. It provided, in part, that:

“... ”

- (a) At the Commencement Date, premises within the Rural Planning Area consisted of:
  - (i) Rural Development of varying scale and intensity; and
  - (ii) other development that may be inconsistent with the future intent for the Rural Planning Area described below.
- (b) The Rural Planning Area is intended for Rural Development that contributes to the amenity and landscape of the area in particular –
  - (i) buildings and structures are sited to protect the amenity of adjoining premises and contribute to maintaining the rural landscape;
  - (ii) Rural Development is located, designed and constructed to minimise potential adverse environmental impacts;
  - (iii) development is compatible with the rural landscape or has a nexus with Rural Development; and
  - (iv) development is adequately serviced by infrastructure.
- (c) Reconfiguring a Lot does not result in –

- (i) the fragmentation or alienation of land; and
- (ii) the reduction of the capability of the land resource to provide a Rural Living Area.

...

- (f) Development, other than Rural Development, is only located in the Rural Planning Area where no viable alternative location exists, and where that development will not detrimentally affect rural amenity and the rural landscape.
- (g) Three sub-areas are identified for the Rural Planning Area based on land capacity and lot sizes – the Rural 10 sub-area, the Rural 40 sub-area and the Rural 400 sub-area. These sub-areas are shown on map 31 and –

...

- (ii) the Rural 40 sub-area is intended for agricultural, aquaculture and animal husbandry on a minimum lot size of 40 hectares; and

...”

[65] Rural Development was defined to include:

“Agriculture  
 Animal Husbandry  
 Aquaculture  
 Host Farm  
 Intensive Animal Husbandry  
 Rural Accommodation Units  
 Rural Dwelling  
 Rural Home Occupation  
 Rural Industry”

[66] The proposed MCU conflicts with the character statement. Whilst the appellant contends that the proposal will not detrimentally affect rural amenity and landscape (matters discussed later), sub-paragraph (b) relates to the intent for “Rural Development” that contributes in a certain way. The proposal is not for Rural Development. Sub-paragraph (b)(iii) expressly contemplates development with a nexus with Rural Development, but the subject proposal has no such nexus. Sub-paragraph (f) envisages development other than Rural Development only where, amongst other things, no viable alternative location exists. That has not been demonstrated to be the case. The proposal does not seek a development approval for

reconfiguration, but the MCU contemplates subdivision of lots to suburban residential densities, much smaller than those contemplated by sub-paragraph (g) and not for the uses contemplated and with the effect of alienating the land from rural use (sub-paragraph (c)). There is conflict even if the appellant's case on rural amenity and landscape was accepted (which it is not).

[67] There was also a Rural Planning Area Code, the purpose of which was to ensure that development within the Rural Planning area is consistent with the character of the Rural Planning area described in the character statement. The respondent drew attention, in particular, to the following performance criteria (and their acceptable solutions).

<b>PART A</b>	
<b>Performance Criteria</b>	<b>Acceptable Solutions for Self-Assessable and Assessable Development</b>
<b>CHARACTER AND BUILT FORM</b>	
<p>P2. A separation distance between <b>Rural Development</b> and Sensitive Receptors is provided to prevent adverse impacts of spray drift, odour, noise, smoke, dust, vibration and ash</p>	<p>A2. The separation distance between a Sensitive Receptor and Rural Development is at least –</p> <p>(a) for the Rural 10 sub-area, the Rural 40 sub-area and the Rural 400 sub-area –</p> <p>(i) 300m for aerial chemical spray drift; and</p> <p>(ii) 100m for ground applied spray drift; and</p> <p>(iii) 300m for odour; and</p> <p>(iv) 300m for long term day time noise (6am – 10pm).</p> <p>(b) for the Rural 10 sub-area –</p> <p>(i) 60m for intermittent noise and 500m for long term night time noise (10pm – 6am); and</p> <p>(ii) 150m for dust, smoke and ash.</p>



	(c) for the Rural 40 sub-area and the Rural 400 sub-area, 40m for intermittent noise.
<b>PART B</b>	
<b>Performance Criteria</b>	<b>Acceptable Solutions for Assessable Development Only</b>
<b>LOT SIZE</b>	
<p>P5. The proposed Rural Living Area maintains farm holdings capable of sustainable production in terms of –</p> <p>(a) capability of the land to support the development;</p> <p>(b) provision of services;</p> <p>(c) suitability for the development;</p> <p>(d) availability of water suitable for the development, and</p> <p>(e) sustainability of proposed development practices.</p>	<p>A5. Lot sizes are at least –</p> <p>(a) 10 hectares in the Rural 10 sub-area; or</p> <p>(b) 40 hectares in the Rural 40 sub-area; or</p> <p>(c) 400 hectares in the Rural 400 sub-area.</p>
<b>AMENITY</b>	
<p>P6. Development, other than <b>Rural Development</b>, is only located in the Rural Planning Area where no viable alternative location exists.</p>	<p>A6. No acceptable solution prescribed.</p>
<p>P7. Development will not detrimentally affect the existing and future rural amenity and landscape of the Rural Planning Area, taking into account –</p> <p>(a) the manner in which the proposed development will affect the desired future character of the area; and</p> <p>(b) the degree of impact on the area.</p>	<p>A7. No acceptable solution prescribed.</p>

The proposal seeks to facilitate<sup>45</sup> subsequent subdivision that is in obvious conflict with P5<sup>46</sup> (Lot size). There has been no demonstration of the no viable alternative location test in P6 (Amenity). In the appellant's written submissions conflict with the code was acknowledged<sup>47</sup> (subject to the Nerinda point). P5 and P6 were described as "blunt" provisions. They are provisions of clear intent with which the proposal conflicts. Compliance or otherwise with P2 and P7 is discussed later in relation to character/amenity impacts.

[68] The TPS 2003 also included an Urban Growth Boundaries Code, which was supported by a map of the urban growth boundaries. The subject site is beyond those boundaries. The purpose of the code was as follows:

**“Urban Growth Boundaries Code**

Purpose: The purpose of this code is to ensure:

- (a) development occurs in an orderly, efficient and cost effective manner;
- (b) the community is provided with a reasonable level of infrastructure service;
- (c) Council Infrastructure and State Government Infrastructure is coordinated and provided in an orderly, efficient and cost effective manner;
- (d) areas outside the City's Urban Growth Boundaries are retained for economic, social and environmental purposes such as agricultural land, visual and natural resource protection, significant water catchments and World Heritage Areas; and
- (e) development within the City's Urban Growth Boundaries –
  - (i) does not prejudice premises for urban development in the long term;
  - (ii) creates vibrant and liveable communities; and
  - (iii) provides an example for sustainability in the City.”

[69] Matters relating to efficiency and cost effectiveness are discussed later, but the proposal is in conflict with sub-paragraph (d) in that the land falls within the area outside the urban growth boundary and is not to be retained for purposes such as those nominated.

[70] The performance criteria and acceptable solutions in the code include the following:

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<sup>45</sup> subject to further approvals.

<sup>46</sup> The land is suitable for grazing although its productive value is low.

<sup>47</sup> paras 204-207.

<b>PART A</b>	
<b>Performance Criteria</b>	<b>Acceptable Solutions for Self-Assessable and Assessable Development</b>
P1. Urban development –  (a) occurs in an orderly, efficient and cost effective manner;  (b) maintains a reasonable level of service to the existing community; and  (c) provides infrastructure in an orderly, efficient and cost effective manner.	A1. Urban development occurs within the defined Urban Growth Boundaries defined on map 5.6.
P2. Areas outside the City’s Urban Growth Boundaries are retained for non-urban development.	A2. No acceptable solution prescribed.
<b>PART B</b>	
<b>Performance Criteria</b>	<b>Acceptable Solutions for Assessable Development Only</b>
P2. Areas outside the City’s Urban Growth Boundaries are retained for non-urban development.	A2. No acceptable solution prescribed.

P1 relates to matters which are discussed later, but, in any event, the proposal is in conflict with P2. The written submissions for the appellant acknowledged conflict with this code (subject to the Nerinda point) and described P2 as a “blunt” provision.<sup>48</sup> It is a provision of clear intent with which the proposal conflicts.

- [71] For the reasons given, the MCU component conflicts with the TPS 2003 in relation to the use to which the land is intended to be put. That at least<sup>49</sup> triggers the conflict/grounds test. That conflict will be even stronger if some other issues are determined against the appellant, but the degree of conflict is strong and major in any event and my ultimate decision is not dependent on establishing further conflict.

**(b) CP 2014**

<sup>48</sup> paras 204, 208.

<sup>49</sup> assuming, favourably to the appellant, that it does not amount to a compromise of DEO’s.

[72] The proposal, in relation to land use, also flies in the face of CP 2014. Under that planning scheme the site is included in the Rural Zone. CP 2014 contains a Rural Zone Code the purpose<sup>50</sup> of which is to:

- “(a) provide for a wide range of rural uses including cropping, intensive horticulture, intensive animal industries, animal husbandry, animal keeping and other primary production activities;
- (b) provide opportunities for non-rural uses that are compatible with agriculture, the environment, and the landscape character of the rural area where they do not compromise the long-term use of the land for rural purposes; and
- (c) protect or manage significant natural features, resources, and processes, including the capacity for primary production.”

and the “particular purpose” of which is to “ensure”:

- “(a) the productive capacity of all rural land and opportunities to diversify and add value to rural production are maximised, within the ecological constraints of the land;
- (b) the character and landscape values of non-urban land are maintained; and
- (c) urban or rural residential development does not expand into rural zoned land.”

[73] Matters in relation to landscape character, natural features and ecological constraints are considered later, but even putting those to one side, the proposal flies in the face of the particular purpose of the code which is quite limited in terms of the type of non-rural uses envisaged in the zone. The purpose speaks of non-rural uses that are compatible with certain things “where they do not compromise the long term use of the land for rural purposes”. The particular purpose seeks to ensure that urban development does not expand into the zone.

[74] The site is within a grazing precinct. The code contains performance outcomes and acceptable outcomes that include:

<p><b>PO20</b></p> <p>Reconfiguration is limited to reflect the suitability of the land for primarily grazing purposes and to protect water</p>	<p><b>AO20</b></p> <p>The minimum lot size in the precinct is 400ha.</p>
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<sup>50</sup>

s 6.6.1.2.

quality and ecological and landscape values.	
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The site has been, and is being, used for grazing. The proposal would facilitate reconfiguration which does not reflect the suitability of the land for grazing, although, it should be acknowledged, that while suitable for grazing, its rural productive value for that purpose is low.<sup>51</sup>

- [75] The containment of growth of urban development is a matter to which the CP 2014 is otherwise directed. That is unsurprising, given that urban sprawl has been a feature of Townsville’s development in the past.
- [76] The strategy framework of CP 2014 sets the policy direction for the planning scheme and forms the basis for ensuring that appropriate development occurs within the planning scheme area for the life of the planning scheme.<sup>52</sup> Theme 3.3, which relates to “shaping Townsville”, states that the planning scheme allocates land for housing, business and community uses, sufficient to meet Townsville’s need for at least 25 years.<sup>53</sup> It earlier states<sup>54</sup> that the planning scheme designates sufficient land supply for future greenfield development and that “the city will not grow outwards beyond the areas designated in the foreseeable future”.
- [77] Against that background, the city shape and housing element<sup>55</sup> contains a specific outcome in relation to “city shape and urban containment” which provides, in part, as follows:

“(1) The growth of Townsville will occur within the city’s existing urban and rural residential areas, and in areas identified for urban expansion through the Emerging community zone. Urban and rural residential development does not occur outside land identified for these purposes.”

The application flies in the face of this by proposing urban development outside the land identified for such purposes.

- [78] The relevant land use strategies include:<sup>56</sup>

“Zoning designations closely reflect the strategic intentions regarding the extent of urban growth. Development outside these areas will not be supported.

Major greenfield areas are included in the Emerging community zone to facilitate master planning and orderly development in accordance

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<sup>51</sup> T11-80.  
<sup>52</sup> s 3.1(1).  
<sup>53</sup> s 3.3.1(1).  
<sup>54</sup> s 3.2.5.  
<sup>55</sup> s 3.3.2.  
<sup>56</sup> S 3.3.2.2.

with best practice neighbourhood planning principles for accessibility, density, land use mix, street networks and lot configuration...”

The proposal is for major greenfield development for urban purposes outside the emerging community zone or any other zoning designation consistent with such intent.

- [79] The specific outcomes for the strong and connected community element<sup>57</sup> include that “non-urban land is protected to define the edges to the city and to protect non-urban landscape values. Urban and rural residential development does not occur in rural areas”. The land use strategies in support of that include<sup>58</sup> that “a primary strategy implemented through the planning scheme is the containment of urban growth within the designated area”. The description of the strategy as a “primary strategy through the planning scheme” is an indication of its significance in the context of the document. The proposal flies in the face of those provisions.
- [80] The transport, accessibility and mobility element<sup>59</sup> and the integrated infrastructure planning and provision element<sup>60</sup> link the city shape to the optimum transport outcomes<sup>61</sup> and most efficient provision of infrastructure.<sup>62</sup> The proposal is not for a site that is serviced or currently planned to be serviced with transport and other infrastructure. The appellant’s proposal to provide infrastructure is considered later, but the traffic outcomes, whilst acceptable, are not optimum and the provision of infrastructure not efficient.
- [81] The land use strategies for the natural assets element<sup>63</sup> include the statement that “the city shape and settlement pattern has been determined to avoid further expansion of urban or rural residential development beyond existing developed areas. This will avoid increasing pressures on environmentally important values”. The proposal does not accord with that strategy.
- [82] The land use strategy in support of the sustainability element provides, in part, that the city shape and settlement pattern established under the planning scheme provisions underpins the growth of a more sustainable Townsville in which transportation and fossil fuel use will be better managed. That is yet another illustration of the importance CP 2014 places on the city shape and settlement pattern (including appropriate land use).
- [83] The industrial land element includes a specific outcome<sup>64</sup> that industrial development does not expand beyond areas zoned for industrial purposes or identified as industry

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<sup>57</sup> s 3.4.4.1(4).

<sup>58</sup> s 3.4.4.2.

<sup>59</sup> s 3.3.5.

<sup>60</sup> s 3.3.6.

<sup>61</sup> s 3.3.5.1(2).

<sup>62</sup> s 3.3.6(2) – see also s 3.3.6 linking land use and development pattern to the efficient and cost effective provision of infrastructure.

<sup>63</sup> s 3.5.2.2.

<sup>64</sup> s 3.6.2.1(5).

area on the strategic framework maps. The proposed material change of use includes an industrial component on land beyond that zoned or identified for industry. If the proposal were otherwise justified however, (which for the reasons stated herein it is not) it may have been appropriate to permit an industrial component within the new community.

- [84] The natural economic resources element contains specific outcomes which seek to avoid further fragmentation of rural land, even when there is a lack of viability.<sup>65</sup> The proposal seeks to facilitate urban development which would not only fragment rural land, but alienate the subject site from rural use.
- [85] The proposal is in strong conflict with CP 2014 by reason of the nature of its proposed use for the subject site which is fundamentally at odds with the clear strategy of the planning scheme particularly in relation to the shape of the city and the direction of further urban development. That is a matter to which I attach significant weight.

### (c) NQRP

- [86] The NQRP is based on an expected growth in population in the region and, in particular, in Townsville. In the “context” part of the document it is said that Townsville’s urban sprawl will be put to an end.<sup>66</sup> Goal 3 is liveable, sustainable and resilient communities that promote living in the tropics. There is, in that regard, a discussion in relation to Townsville of, amongst other things, an urban consolidation policy to prevent the continuation of an inefficient and expensive development pattern and of the lack of need, based on current supply, for residential development to continue outside of Townsville’s existing urban area. The relevant regional outcome adopted in the NQRP is as follows:

“3.1 The development pattern for the North Queensland region delivers consolidated and efficient growth for urban areas.”

- [87] The regional policies in support of that outcome include the following policy which is specific to Townsville:

“3.1.5 Townsville’s urban residential development is to be contained within the Townsville Urban Area. Urban residential development within the Townsville Urban Area does not occur outside land identified for these purposes.”

The Townsville Urban Area is identified in Map 6 and is based on the existing extent of land zoned for urban purposes in the Townsville City Plan (2014), the priority infrastructure area under the Local Government Infrastructure Plan and land adjoining these zones that have been approved for urban purposes. It does not extend to the subject site.

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<sup>65</sup> s 3.6.4.1(3).

<sup>66</sup> Ex 9 pg 9.

- [88] Whilst the appellant may argue about efficiency<sup>67</sup> (a matter discussed later in the context of infrastructure), its proposal does not constitute a consolidation and does involve urban residential development outside of the urban area contrary to policy 3.1.5. The proposed use flies in the face of the NQRP. That is a matter of weight. I have already dealt with the weight that I am prepared to afford the NQRP. In this case, the conflict simply serves to reinforce the ultimate conclusion which I have otherwise reached.

**(d) Conclusion on Residential and Other Urban (Non-Rural) Use**

- [89] The proposal to use the subject site for residential development at suburban densities and for other urban uses conflicts with all relevant planning documents. It conflicts with TPS 2003, triggering the conflict/grounds provision and also with the more recent planning documents which are a matter of weight. Mr Buckley did not cavil with the proposition that the identification of where urban development is and is not to occur is an important planning objective of planning schemes. So much appears from the following exchange under cross-examination:<sup>68</sup>

MR JOB: The conflicts that I think you acknowledge – sorry. I’ll put it this way: one of the conflicts involves the fact that what is proposed here is a large urban form of development in a location where the planning instruments – all three of them – indicate urban development is not to occur?---Correct.

And that’s an imported planning objective; the identification of where urban development is and is not to occur?---Yes. Spatially planning schemes convey that.

- [90] Mr Buckley sought to call in aid the fact of past urban approvals as, in some way, helping to justify continuing that sprawl, by approval of the subject application, as Mr Perkins pointed out however,<sup>69</sup> the planning documents have provided a policy response which seeks to prevent that. Mr Buckley seemed to acknowledge that in the following exchange which occurred during Mr Buckley’s testimony:<sup>70</sup>

HIS HONOUR: Mr Buckley, if you go to page 2 of your individual report?---Yes.

At paragraph 14 is where you talk about Townsville conveying a sprawl-like phenomenon?---Yes.

In forming your views did you take it that the town plan encourages that, or discourages that sprawling further or is neutral about it?---Well, to answer the – there’s two parts of your question, your Honour.

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<sup>67</sup> as discussed later, the assumption of the obligation to provide or pay for the cost of infrastructure does not mean that its provision is efficient.

<sup>68</sup> T11-32.

<sup>69</sup> T11-95.

<sup>70</sup> T11-43.



The scheme, I think, seeks to arrest it, yes, by limiting the amount of areas it shows as preferred urban. So that's probably a fair call about the current scheme. But the – a lot of the spread out nature of Townsville is historical, and – and some of that would be in accordance with planning policies. Some would just predate planning schemes. But the growth of Upper Ross I'm reasonably familiar with from living in the north in the eighties and, you know, it just appears, in my – my observation as a planner, just to get more concentrated and more – a reality, if you like, of that urban frontier.

But do you accept that approval of this proposal would lead to some continuation of sprawl?---Yes. That – the sprawl, as indicated by what comments I've said, your Honour, is not unusual in the context of Townsville historically and what's on the ground.

- [91] Mr Perkins rightly saw the application as seeking approval for an initiative or strategy at odds with, and dilutive of, the planned strategy for urban development in the planning documents.<sup>71</sup> Whilst there are other alleged conflicts (discussed later), I consider the conflict in relation to the land use to be serious and, indeed, sufficient to be decisive because, for the reasons given later, I do not find the matters raised to justify approval to be persuasive, or sufficiently persuasive, to cause me to allow the appeal and grant the development approval. In so far as the TPS 2003 is concerned, that is either on the basis of satisfaction of the conflict/grounds test (which I find not to be satisfied) or on the basis of exercising a discretion having given consideration to the relevant provisions of TPS 2003 in assessing the application, as the appellant submitted is appropriate in the case of an application for a preliminary approval. The provisions of the subsequent planning documents have, as I have indicated, been treated as a matter of weight.

## **(ii) Landscape Character and Visual Amenity**

- [92] Reference has already been made to the provisions of TPS 2003 for the Rural Planning Area that relate to amenity and landscape. DEO 4 is also of relevance. It provides as follows:

### **“2.4.1 DEO 4**

The City's valuable features, built environment and land use pattern result in a distinct sense of place and local identity, and are vibrant, safe and healthy, with access to community and cultural facilities and services.

The city strategies in supporting that DEO include:

### **2.4.2 City Strategies**

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<sup>71</sup> Ex 34 para 160.

DEO 4 is intended to be achieved by –

(a) protecting or enhancing the City’s natural and built environment as an integral part of the City’s Landscape Character Types.

(b) reinforcing the City’s character through effective siting, design and layout of development that –

(i) reflects community expectations;

(ii) promotes safety and security;

(iii) reflects local and desired character;

(iv) enhances local identity and lifestyle;

(v) contributes to the formation of a sense of place; and

(vi) responds to the City’s tropical climate.”

...

[93] CP 2014 contains specific outcome 3.4.4.1 and the associated land use strategy 3.4.4.2 extracted earlier, which set their face against development such as is proposed in rural areas.

[94] The purpose of the Rural Zone Code, which has previously been set out, refers to the opportunities for non-rural uses which are compatible with, amongst other things, the landscape character of the rural area and includes a particular purpose that the character and landscape values of non-urban land are maintained.

[95] Issues of this kind were addressed in the evidence of Mr McGowan, who was called by the appellant. His report summarised his opinion as follows:

“48 The assessment undertaken to inform this statement revealed that, while the proposed development would change the appearance and character of the subject site, that change would not be detrimental in terms of the overall values and quality of the local visual environment. Furthermore, the provision of open space and landscape buffers across the site and at the edges of the site will ensure the amenity of adjoining properties will be appropriately maintained.

49 Regarding the provisions referenced in the relevant reason for refusal:

a) the proposed development can be seen to satisfy P1 (in so far as it relates to visual amenity concerns) and P7 of the Rural Planning Area Code;

b) while it is not rural development, the proposed development will achieve an appropriate level of compatibility with the rural landscape remaining in the area, as sought by the character statement referenced in the Purpose of the Area Code; and

c) while the development would not satisfy P6 nor item (f) of the character statement for the Rural Planning Area, the consequence of this non-compliance is not significant in terms of visual amenity concerns. The non-compliance is technical, does not result in any unacceptable impacts and therefore should not result in refusal of the proposal.”

[96] In forming his opinions, Mr McGowan was influenced by the proposed retention of a large area of open space, including the parts of the site he thought of most value (the main waterways and the slopes) and the concentration of development on the lower, flatter areas of the site, to which there is limited visibility from beyond the site. He did not think that the proposed development would make any positive contribution to the rural landscape, but considered that it would not offend it.<sup>72</sup>

[97] These issues were also considered by the town planners. Mr Buckley thought the development would reinforce the city’s character and sense of place because it would be the logical “bookend” of the Upper Ross urban corridor, rather than a new front or corridor.<sup>73</sup> Mr Perkins, on the other hand, did not see the proposed large scale urban development of land in the rural land use category as reinforcing planned local and desired city character, reflecting community expectations or contributing to the planned sense of character.<sup>74</sup> Further, he pointed out that the proposal involves the large scale urbanisation of rural land, which he did not regard as consistent with the provisions of the character statement<sup>75</sup> for the Rural Planning Area or the Rural Planning Area Code<sup>76</sup> in relation to rural landscape character and rural character and amenity. He rejected Mr Buckley’s bookend argument, pointing out that the site does not adjoin nor is immediately adjacent to urban development that either exists or is planned for<sup>77</sup> and to which it would provide a bookend. I found that to be persuasive.

[98] In the course of his testimony, Mr McGowan:

- (a) confirmed that the proposed development would itself not appear as rural in character, but rather as suburban development.<sup>78</sup> In my view that is not insignificant because the site is itself a large holding within the area,

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<sup>72</sup> T5-53.

<sup>73</sup> Ex 34 para 120, Ex 43 para 19.

<sup>74</sup> Ex 34 para 123.

<sup>75</sup> Ex 34 para 126.

<sup>76</sup> Ex 34 para 127.

<sup>77</sup> T11-74.

<sup>78</sup> T5-38, T5-30.

such that the approximate north-south dimension of the development would be up to 4.4km and up to 2.5km east-west;<sup>79</sup>

- (b) described one of the qualities of the current “sense of place” as an “openness” bordering on “emptiness” with dispersed built forms and structures;<sup>80</sup>
- (c) described the “local identity” in the Rural Planning Area as substantially the same, but would factor in landscape features;<sup>81</sup>
- (d) conceded that the development would not result in openness or emptiness, in so far as the developed parts of the site are concerned;
- (e) conceded that the siting, design and layout of the development does not reflect the local rural character that exists;<sup>82</sup>
- (f) conceded that if a rural landscape is sought, then the outcome would be compromised;<sup>83</sup>
- (g) having suggested that the development would appear as a logical and sensitive extension of suburban and rural residential development,<sup>84</sup> acknowledged that there was a break between the site and nearby rural residential development, such that there would be no continuous extension<sup>85</sup> (something which Mr Perkins also pointed out<sup>86</sup>) and that suburban development to the north-east is some 8.5km away.<sup>87</sup> Further it became evident that there was little about the design of the proposal that was sensitive, aside from its location on the flatter parts of the site.<sup>88</sup> The logic he relied upon was that all land up to the edge of the range ought to be developed.<sup>89</sup> There is, of course, no warrant in the planning documents for urban or suburban development or for a character or landscape of that kind to sprawl out to the edge of the range;
- (h) accepted that, notwithstanding Mr Buckley’s description of the site as a bookend, there is further undeveloped land to the south-east that forms part of the sub-coastal plain;<sup>90</sup>

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<sup>79</sup> T5-34.

<sup>80</sup> T5-48.

<sup>81</sup> T5-48, 49.

<sup>82</sup> T5-50.

<sup>83</sup> T5-49.

<sup>84</sup> Ex 42 para 44 and T5-30.

<sup>85</sup> T5-30.

<sup>86</sup> T11-75.

<sup>87</sup> T5-29.

<sup>88</sup> T5-32, 33.

<sup>89</sup> T5-33.

<sup>90</sup> T5-34, 35.

- (i) agreed that development on the more elevated parts of the site would be visible from Moncrieff Road, and also from Laudham Road.<sup>91</sup> It would also be visible from the Lake Ross wall walking track, in respect of which car parking areas, to facilitate access to the wall for locals and tourists, is available. From that viewpoint, more of the site would be visible, including the upper parts and some of the lower parts.<sup>92</sup> The evidence associated with reservoirs came later from Mr Gould (who had not discussed it with Mr McGowan<sup>93</sup>), but they will likely be visible also;
- (j) was asked about the impacts of substantially increased traffic upon visual amenity and character. He agreed that busy traffic can be unpleasant.<sup>94</sup> The external roads to be upgraded presently have low traffic volumes, and consequently would have a rural character.<sup>95</sup> Some of the houses on those sites are quite visible to the roads.<sup>96</sup> The increase in traffic volumes by reason of the development will be very substantial. I accept that those increases would occur over time, but they will incrementally contribute to a change in character;
- (k) also acknowledged that the implementation of the development would result in an area of land which is not currently illuminated becoming noticeably illuminated.<sup>97</sup> Obviously, that would not have a rural character.<sup>98</sup> He agreed that would be an adverse impact.<sup>99</sup> Further, street lighting, if installed on the upgraded local external roads, would also represent a material change to the existing rural character of that locality. So too would the visible presence of traffic movements on those roads at night,<sup>100</sup>

[99] In those circumstances I am satisfied that:

- (i) the proposed development would lead to a dramatic change of character of the subject site, particularly in those parts to be developed;
- (ii) Mr McGowan's work demonstrates that the topography and siting of the proposed development is such that the visibility of the developed parts of the site from beyond the site would be more limited than might otherwise be the case, but
- (iii) having regard to the matters which emerged during Mr McGowan's testimony, the development would nevertheless also have some adverse

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<sup>91</sup> T5-38, 39.

<sup>92</sup> T5-39.

<sup>93</sup> T8-24.

<sup>94</sup> T5-41/1-14.

<sup>95</sup> T5-41/25-32.

<sup>96</sup> T5-41/34-39.

<sup>97</sup> T5-45/35 to T5-46/6.

<sup>98</sup> T5-46/24.

<sup>99</sup> T5-46/25-27, although he did not think that would be significant.

<sup>100</sup> T5-46/33-39.

impact beyond its borders in ways which, viewed collectively, are not insignificant.

- [100] I did not find Mr Buckley’s “bookend” argument persuasive. It has already been observed that there is further land beyond the subject site. Further, as Mr Perkins pointed out,<sup>101</sup> a bookend seems to imply that something is located at an end point of something. Here the proposed development would not build upon, or extend from, any like existing development. It is separated from the nearest urban or suburban development.
- [101] The proposal at least conflicts with, if not compromises the achievement of, the DEO. The developed parts of the site would detract from the achievement of a built environment and land use pattern with a distinct sense of place and local identity. It is at odds with what exists, is planned or would reasonably be expected. At best it attempts to minimise external views to most of itself. It does not avoid conflict.
- [102] Insofar as the Rural Planning Area character statement is concerned, the proposal conflicts with sub-paragraph (b). It may be recalled that subparagraph (b) appears to relate to rural development or to development that has a nexus with rural development. The proposal is neither in character. Even putting that to one side and even acknowledging the attempts to contribute to the maintenance of the rural landscape and achieve a level of compatibility with the rural landscape by hiding the development areas, as much as it can, from the outside world, it fails to achieve compatibility or to contribute to maintenance of the rural landscape when regard is had to what would be observed from within the large site. Even putting that to the side, there remains sufficient impact (ie on appreciation beyond the site) to conclude (as I do) that the provision is not satisfied.
- [103] The proposal also conflicts with the Rural Planning Area Code because, for the reasons already discussed it proposes development:
- (i) within the Rural Planning Area that is not consistent with the character of the Rural Planning Area described in the character statement and so conflicts with the purpose of the code; and
  - (ii) that would detrimentally affect the existing and future rural amenity and landscape of the Rural Planning Area and so conflicts with P7. The manner in which it would have that effect has been discussed. The degree of impact on the area would, I am satisfied, be significant.
- [104] As for CP 2014, which is a matter of weight, for the reasons already discussed, the proposal conflicts with:
- (i) specific outcome 3.4.4.1(4) because it does not protect non-urban land in order to, amongst other things, protect non-urban landscape values;
  - (ii) s 6.6.1.2 of the purpose of the Rural Zone Code in that:

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<sup>101</sup> T11-74, 75.

- it proposes non-rural uses that are not compatible with the landscape character of the rural area, and
- is inconsistent with the maintenance of character and landscape values
- is inconsistent with PO20 in that it contemplates subsequent subdivision which is not limited to reflect, amongst other things, landscape values.

My conclusion on this issue supports the ultimate conclusion which I would have reached in any event in relation to the appeal.

### (iii) Ecology

[105] Unsurprisingly, the planning documents contain provisions which seek to respect ecological values. DEO 1 of TPS 2003 is that important regional ecosystems maintain the integrity of, and contribute to, a healthy, safe and liveable city environment. It directs the reader to map 2 which shows the site with important regional ecosystems and with habitat corridors. The mapping appears to be indicative and the ecological experts agreed that map 2 does not provide a reasonable representation of the ecological features of the site. Their work provides evidence of the values and their location within the site. The DEO is to be achieved by a number of city strategies including designing and integrating infrastructure and development to minimise the potential adverse impacts on the city's natural environment.<sup>102</sup>

[106] The respondent pointed to provisions applicable to the Rural Planning Area in TPS 2003 which require rural development to minimise potential adverse environmental impacts. The proposal is not however, for development of that kind.

[107] The purpose of the Natural Areas Code in TPS 2003 is:

**“Purpose:** The purpose of this code is to –

- (a) conserve, maintain and enhance natural areas to protect Biodiversity values, which include ecosystem, species and genetic diversity;
- (b) protect and manage important areas, processes and species; and
- (c) maintain or establish Habitat Corridors between the Hillsides and Escarpments and the Coast.”

[108] P1, P2 and P3 of that code refer to environmental corridors, habitat corridors and of concern regional ecosystems identified on map 5.2. The mapping does not coincide

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<sup>102</sup> s 2.1.2(c)

with the evidence of the ecologists and accordingly the respondent did not rely on those provisions.

- [109] The purpose of the Urban Growth Boundaries Code in TPS 2003 states that areas outside the city's Urban Growth Boundaries are retained for, amongst other things, environmental purposes. The inclusion of the site on the environmental mapping suggests that is a relevant purpose, at least in part.
- [110] As already noted CP 2014 provides, in s 3.5.2.2, in setting out land use strategies for the natural assets element, that avoiding further expansion of urban or rural residential development beyond existing designated areas will avoid unnecessary pressure on environmentally important values.
- [111] Ecological considerations are of relevance to the Rural Zone within which the site is included in CP 2014. The Rural Zone Code's statement of purpose includes that it is to "protect or manage significant natural features, resources and processes".<sup>103</sup> The overall outcomes include that "the environmental...values of all rural land are maintained".<sup>104</sup> Further, P020, which relates to the grazing precinct in which the site falls required reconfiguration to be "limited to...protect...ecological...values."
- [112] The purpose of the Natural Assets Overlay Code is to:
- (a) protect areas of environmental significance, and the ecological processes and biodiversity values of terrestrial and aquatic ecosystems;
  - (b) maintain ecosystem services and other functions performed by Townsville's natural areas; and
  - (c) protect water quality, ecosystem health and the natural hydrological functioning of waterways, wetlands and their riparian areas.

It is said that the purpose of the code will be achieved through the following overall outcomes:

- (a) development avoids or minimises direct and indirect impacts on areas of environmental significance and their associated ecological functions and biophysical processes;
- (b) development provides for the protection or enhancement of a linked network of habitat areas, including maximising opportunities for rehabilitation and restoration of degraded ecosystems, ecological communities, remnant vegetation and connecting corridors wherever possible;
- (c) development, including infrastructure, is located and designed to maintain or enhance ecological functions including facilitation of

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<sup>103</sup> 56.6.1.2(1)(c)

<sup>104</sup> 56.6.1.2(3)(f)



wildlife movement for native terrestrial and aquatic species and native and migratory avian species;

- (d) the water quality values and ecological functions of wetlands, waterways and their riparian areas and buffers are protected or enhanced;
- (e) development maintains, protects or enhances the natural hydrological regime and functioning of waterways and wetlands, including surface and ground waters and their interaction;
- (f) fragmentation of remnant vegetation and habitat areas is avoided to maintain ecological function and biodiversity values, and to maintain or increase the resilience of natural assets to threatening processes, including climate change; and
- (g) development incorporates appropriate buffering and mitigation strategies to avoid or minimise potential damage to natural areas and other environment assets.

[113] The performance outcomes and acceptable outcomes include the following:

<p><b>PO11</b></p> <p>Corridors and linkages are provided to supplement and create additional ecological corridors and habitat linkages along waterways, drainage lines, ridgelines, coastlines and other areas where possible.</p>	<p>No acceptable outcome is nominated.</p>
<p><b>PO12</b></p> <p>Development facilitates unimpeded use and movement of terrestrial and aquatic fauna that are associated with or are likely to use an ecological corridor as part of their normal life cycle by:</p> <ul style="list-style-type: none"> <li>(a) ensuring development, including roads, pedestrian access and in-stream structures, does not create barriers to the movement of fauna along or within ecological corridors;</li> <li>(b) providing effective wildlife management infrastructure to direct fauna to locations where wildlife movement infrastructure has been</li> </ul>	<p>No acceptable outcome is nominated.</p>

<p>provided to enable fauna to safely negotiate a development area; and</p> <p>(c) separating fauna from potential hazards through the use of appropriate barriers and buffers.</p>	
<p><b>PO16</b></p> <p>Development provides a buffer to a waterway, in order to:</p> <p>(a) protect or enhance habitat values, connectivity and other ecological processes and values;</p> <p>(b) protect water quality and aquatic conditions;</p> <p>(c) maintain natural micro-climatic conditions;</p> <p>(d) maintain natural hydrological processes;</p> <p>(e) prevent mass movement, gully erosion, rill erosion, sheet erosion, tunnel erosion, stream bank erosion, wind erosion, or scalding; and</p> <p>(f) prevent loss or modification of chemical, physical or biological properties or functions of soil.</p> <p>Any setbacks or other areas required for bushfire management, safety, recreation, maintenance or any other purpose, are provided in addition to a vegetated buffer provided for ecological purposes.</p>	<p>No acceptable outcome is nominated where in an urban residential zone or centre zone.</p> <p>Elsewhere (including the Emerging community zone, Rural residential zone or industry zones):</p> <p><b>AO16</b></p> <p>Other than where cropping for forestry for wood production, a development-free buffer is provided and maintained, extending from top of the bank of a waterway and with a minimum width of:</p> <p>(a) where in the Wet Tropics bioregion:</p> <p style="padding-left: 40px;">(i) stream order 1 to 4: 25m; or</p> <p style="padding-left: 40px;">(ii) stream order 5 and above: 50m;</p> <p>OR</p> <p>(b) in all other regions (Brigalow Belt North Bioregion or the Einasleigh Uplands Bioregion):</p> <p style="padding-left: 40px;">(i) stream order 1 or 2: 25m; or</p> <p style="padding-left: 40px;">(ii) stream order 3 or 4; 50m; or</p> <p style="padding-left: 40px;">(iii) stream order 5 and above: 100m;</p> <p><b>Editor's note</b> – Natural assets planning scheme policy no. SC6.9 contains Figure SC6.9.1 which identifies stream orders and bioregions. This information may also be obtained from the relevant state agency.</p> <p><b>Editor's note</b> – Where a development requires multiple buffers to be established by this code to protect watercourses, corridors, wetlands or core</p>

	habitat, the greatest distances required by this code will prevail to the extent of any inconsistency.
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- [114] The ecological features of the site and their location within the site were the subject of examination by the ecology experts. Mr Agnew (called by the appellant), in particular, implemented field studies involving 27 survey person days over a three month period. Dr Watson (called by the respondent) agreed that the work done by Mr Agnew<sup>105</sup> was comprehensive.<sup>106</sup> The work ultimately led to the production of an Ecological Features Plan (EFP) for the site.
- [115] The experts agreed that, subject to some exceptions, the EFP “provides a reasonably accurate description of the ecological features existing on the subject site, limited only by the scale of mapping”.<sup>107</sup> Given the field surveys, Mr Agnew’s evidence is that the EFP would be accurate to within a matter of meters.<sup>108</sup> In the second ecology JER Dr Watson stated that if development be allowed on the site then the EFP should be used as a constraints basis for the development layout.<sup>109</sup> The EFP was also referred to in the fourth ecology JER as “the agreed description of the extent of ecological values across the site (limited only by scale)”.<sup>110</sup>
- [116] The EFP shows a number of ecological features across the site. As Dr Watson fairly acknowledged, he agreed with Mr Agnew that the proposed master plan retains the highest conservation priorities of the site.<sup>111</sup> In particular, it is proposed to retain habitat type 1, located in the western part of the site and the west/east corridors provided along the two major watercourses of Stoney and Middle Creeks that link to it. They are the most important ecological features<sup>112</sup> in the circumstances, including having regard to the Harvey Range which lies to the west.<sup>113</sup>
- [117] In his testimony, Dr Watson was critical of the width of the proposed corridors to be retained along Stoney and Middle Creeks. The proposal was subsequently changed to provide corridors of no less than 250m at any point, to accord with what Dr Watson had attested was his preference.<sup>114</sup> Dr Watson had indicated that would resolve his concerns regarding corridors in an east/west direction.<sup>115</sup>

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<sup>105</sup> and by Dr Hassall.

<sup>106</sup> T5-4.

<sup>107</sup> Ex 17 pg 10.

<sup>108</sup> T4-26.

<sup>109</sup> Ex 17 pg 16, para 6.3.

<sup>110</sup> Ex 19 pg 6, para 24

<sup>111</sup> T5-3.

<sup>112</sup> Agnew T4-36, T4-38, 39, Watson T 5-13.

<sup>113</sup> T4-36.

<sup>114</sup> T5-11.

<sup>115</sup> T5-11.

- [118] Dr Watson had also indicated that such a change would not completely resolve his residual concerns. He referred, in particular, to other drainage lines identified either on the EFP or yet to be identified by later ground truthing. He also referred to the need to ensure that the resolution of non-ecological values did not compromise the ecological outcome. He nevertheless thought it possible to resolve the ecological issues.<sup>116</sup>
- [119] The proposed master plan does not retain all of the ecological features shown on the EFP. There are a number of streams/drainage lines (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> order) shown on the EFP. The master plan does not include all parts of all streams in the open space. That did not trouble Mr Agnew, because he saw the exclusion of the lower order streams/drainage lines as insignificant in relation to retention of the key ecological features and biodiversity values of the site.<sup>117</sup> He regarded the large mapped area of remnant vegetation dominating the western part of the land and the riparian environments associated with Stoney and Middle Creeks, which are to be retained, as standing in clear contrast to the balance of the site.<sup>118</sup> He described the streams/drainage lines or parts thereof to be developed as more like linkages along drainage lines, which are distinctly different from the characteristics and values of Stoney and Middle Creek and the remnant vegetation on the western part of the site. He agreed with the characterisation of his view as being that they are linkages, but not as high quality as Stoney and Middle Creeks.<sup>119</sup>
- [120] In JER2 Mr Agnew said<sup>120</sup> that, whilst he agreed with the overarching objective of retaining and protecting the fauna habitat and habitat values on the site, in his view the “key requirements” were centred on the retention, buffering and management of the remnant vegetation in the west and the riparian environments associated with both Stoney and Middle Creeks. Dr Watson, on the other hand, was not prepared to accept the loss of values associated with the lower order streams or parts thereof shown on the EFP and the north/south connections they provide.<sup>121</sup> He pointed out that all are identified as ecological features on the EFP. He was also looking for the protection of other drainage lines that might later be identified by ground truthing.<sup>122</sup>
- [121] In relation to unmapped streams, Dr Watson drew attention to a passage in the second ecology JER where it states that, while watercourses as per VMA vegetation supporting mapping were included in the EFP, that mapping does not represent all the watercourses and drainage lines across the site and that detailed site based ground truthing and mapping is necessary to accurately map their location.<sup>123</sup> As has already been acknowledged, Dr Watson had however, in the same JER, said that the EFP should be used as a constraints map for the development layout. Further, in his

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<sup>116</sup> T5-11.

<sup>117</sup> Ex 19 pg 5, para 20.

<sup>118</sup> Ex 37 pg 2.

<sup>119</sup> T4-38, 39.

<sup>120</sup> Ex 17 pg 13.

<sup>121</sup> Ex 19 pg 4 para 18, Ex 48 pg 71.

<sup>122</sup> T5-11.

<sup>123</sup> Ex 48 pg 7, para 7.

testimony, he said that it is perhaps unnecessary for all of the streams to be retained. He agreed that he was not troubled by the fact that some would be developed. When questioned about what he thought might be required to maintain a north/south connection, he pointed to what he described as two or three major drainage lines or linkages in the south of the site and said that there might be more protection and rehabilitation of those.<sup>124</sup> He went on to suggest that, if he had been advising, he might have suggested 3 or 4 x 100 metre wide corridors in the south.

- [122] Subsequent to Dr Watson's evidence the master plan was changed to retain more of the water courses/drainage lines in the southern area such that there are now to be 5 connections to the south western boundary with dimensions of 100m or more. Further, there have been changes in the north to increase setbacks from the mapped watercourses. Those changes now provide for the retention of many (although not all) of the watercourses/drainage lines throughout the site, both in the north and the south, to provide linkages, including north/south linkages, in addition to the retention of the watercourses of highest significance (Stoney Creek and Middle Creek) and the east/west corridor they provide to/from the remnant vegetation to the west. The changes were obviously responsive to the evidence of Dr Watson.
- [123] In contending that the proposal, even as now changed, conflicts with the various provisions extracted earlier which relate to impact on ecological values, the respondent contended that the planning provisions are not concerned with only protecting "key features" of ecological value as was Mr Agnew's focus. Reference was also made to what were referred to as uncertainties in relation to what is proposed in relation to rehabilitation and dedication of open space, although there remains the opportunity to address matters by conditions (or in later approvals).<sup>125</sup>
- [124] I accept that consideration should be given to the ecological features of the site beyond those considered by Mr Agnew to be the key features. That does not mean however, that every drainage line on the site must be retained. As has already been observed, even Dr Watson was prepared to concede that not all the lower order watercourses/drainage lines necessarily must be retained. He was not troubled by the prospect of some being developed. Some extent of loss of those features can be accepted as insignificant and so as not inconsistent with a conclusion that, in so far as the retention of open space is concerned, what is now proposed is consistent with the maintenance of ecological value and the minimisation of impact.
- [125] The loss of land providing habitat and/or corridor/linkage and/or biodiversity value is not the only potential ecological impact of the proposal. As Dr Watson said, there is a need to ensure that the resolution of other issues does not adversely affect the ecological outcome. There were two issues which the agricultural land use experts agreed required resolution, but with respect to which the ecologists had not considered the consequences of the required measures.

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<sup>124</sup> T5-14.

<sup>125</sup> Subject to argument, that may be by conditions of an approval of the application and/or in later approvals.

- [126] The need to manage feral animals, including pigs, was recognised by both the ecology experts and the agricultural land use experts. Current management practices for the control of feral animals such as wild pigs will have to change.<sup>126</sup> In his testimony, Mr Sutherland proposed an electric fence around the perimeter of the site to completely enclose the site, including open space areas in steep parts of the site. Mr Thompson explained that such fences can be successful, in the control of feral animals, by channelling them to a place where they can be trapped and destroyed. He had never seen the measure used in a residential estate before and explained that the fencing must be distanced from the estate itself, but, for maintenance reasons, he would not put it so far back as to be on the perimeter of the site where it is steep.<sup>127</sup> The appellant embraced that. Mr Thompson saw the fencing as being in the “large residual green area” and that may, he acknowledged, have consequences for the design of the works in the green space.<sup>128</sup>
- [127] This evidence came after the ecologists’ evidence was concluded. They were not recalled. There was no evidence from them as to the extent to which (if at all) such fencing would also affect native fauna or have any other ecological impact. In the course of oral submissions Mr Gore QC did not cavil with my suggestion that that was unsatisfactory.<sup>129</sup>
- [128] The site is affected by severe erosion associated with sodic and highly dispersive soils. The hardening of the catchment that would result from development as proposed, would increase runoff and the velocity,<sup>130</sup> duration and frequency of flooding in all events<sup>131</sup> thereby potentially worsening the erosion hazard and sediment export from the site. It is proposed to undertake works to stabilise and rehabilitate those areas. Both Mr Sutherland and Mr Thompson<sup>132</sup> gave evidence that this would involve work in the watercourses, including armouring (rock lining). Mr Thompson, whose evidence I prefer as to the extent of what is likely to be required, testified that “quite a lot” of armouring would be required and reshaping the bed. Whilst Mr Sutherland, at one point, suggested that the works could fit with what the ecologists seek,<sup>133</sup> there was no evidence from the ecologists about the impact of such measures from an ecological perspective.<sup>134</sup> That was so notwithstanding that the need for comment from the ecologists about the impacts of erosion or of protection works to prevent erosion was raised by Mr Clark in stormwater JER3.<sup>135</sup>
- [129] There are other consequences of development. Bringing urban development, as proposed, to the site necessarily brings some threats to ecological values. As Dr

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<sup>126</sup> Ex 26 pg 3.

<sup>127</sup> T10-72.

<sup>128</sup> T10-76.

<sup>129</sup> T14-32, 33 – in these footnotes T14 refers to the hearing on 11/12/2020 which, on the transcript, is erroneously recorded as day 1.

<sup>130</sup> although Mr Collins thought that a no significant worsening of velocity could be achieved – T3-51.

<sup>131</sup> T3-51, Ex 47 pg 63, paras 15, 16.

<sup>132</sup> T10-57, T-10-71.

<sup>133</sup> T10-56, 57.

<sup>134</sup> T13-75, 76.

<sup>135</sup> Ex 14 pg 7 para 10b.

Watson explained, the development brings more people and more activity to the site including more traffic, lighting and noise. This gives rise to the prospect of “edge effects”, including the potential for the escape of exotic flora. More vehicle movements also brings a greater risk of collision with native fauna. The fauna has less opportunity to move freely without added threats in the landscape.<sup>136</sup> Domestic animals would also be a threat unless they are effectively controlled.<sup>137</sup> Mr Agnew accepted that the development would bring such threats.<sup>138</sup>

- [130] The use of the land for rural activities, also has some impact, or potential for impact, but the site has the values found by the ecologists notwithstanding its use for grazing. Mr Agnew acknowledged that development of the land as proposed would be associated with a “wider sweep of negative impacts”.<sup>139</sup> Further the ecologists acknowledged the increasing awareness of sustainable farming and grazing practices.<sup>140</sup> In this context it is unsurprising that both Mr Agnew and Dr Watson expressed the opinion, which I accept, that keeping the site as a rural holding is a preferable outcome, from an ecological perspective, than permitting it to be developed as proposed.<sup>141</sup>
- [131] Mr Gore QC sought, in the course of re-examination of Mr Agnew, to recover something of Mr Agnew’s concession in this regard. He asked Mr Agnew to assume that the habitat in the western part of the site would, if the proposal proceeded, be dedicated to a public body, but that that would not occur if the land remained as a rural holding. Asked about how he would rank the options on that assumption, Mr Agnew did describe the dedication as superior, but on the basis that it was accompanied by a management plan to be implemented with the application of additional resources.<sup>142</sup> It should be noted, in this respect that, while Mr Agnew assumed dedication to an agency prepared to assume responsibility for ongoing maintenance, no detailed proposal for dedication has been formulated and no agency prepared to accept the dedication has been identified. Dr Watson pointed out that dedication of the ecologically significant areas would be accompanied with quite a sizeable burden for any body accepting the dedication.<sup>143</sup>
- [132] Asked then to consider the proposal with such a dedication, Mr Agnew said it (the dedication) would be a “positive association” with the proposed development and agreed with the proposition that it would be an “acceptable ecological outcome”. None of that however, takes away from the point that the proposed development would, even assuming the dedication of part or all the open space, bring ecological threats to the site to a greater extent than if it was retained as a rural holding. I accept Dr Watson’s evidence that the proposed conversion of a large area to urban

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<sup>136</sup> Watson T5-2, 3.

<sup>137</sup> T4-60, 61.

<sup>138</sup> T4-61-63.

<sup>139</sup> T4-63.

<sup>140</sup> T4-57, T5-2.

<sup>141</sup> Agnew T4-63, Watson Ex 48 p 73, T5-3.

<sup>142</sup> T4-73.

<sup>143</sup> T4-75.

development cannot be considered to be a good ecological outcome<sup>144</sup> and that keeping the land in its rural use is preferable from an ecological perspective.<sup>145</sup>

[133] It was rightly pointed out, for the appellant, that it is well established that this Court traditionally approaches the assessment of a development proposal on the basis of what is acceptable, rather than what is utopian. That general approach must however, take account of the provisions of the planning documents. This is not a site where urban development is contemplated.

[134] It has already been observed that, pursuant to TPS 2003, the site is beyond the urban growth boundary. Further, as has also been observed, CP 2014 states that the city shape and settlement pattern has been determined to avoid expansion of urban or rural residential development beyond designated areas and that “this will avoid increasing pressures on environmentally important values”. The evidence demonstrates that the site does indeed have ecological values and that the proposed development would bring pressure upon those values, such that, even with the mitigation measures proposed (including open space retention/dedications, rehabilitation and management), it is not to be preferred, from an ecological perspective, to the retention of the land as a rural holding. That might not, of itself, warrant refusal (putting to one side the gaps in the evidence on specific matters discussed above) but it underscores the public interest in adhering to the duly adopted planning strategy.

[135] Whilst the most recent edition of the master plan appears to set aside sufficient open space (assuming appropriate rehabilitation, dedication and management) assuming development of the site for urban purposes is otherwise acceptable, the gap in the evidence concerning the ecological impacts of measures proposed by the agricultural land experts means that I am left short of being satisfied that the proposal would satisfy those planning provisions, referred to earlier, which relate to ecological impacts and respect for values. Further, the fact that the type of development proposed would constitute a greater ecological threat compared with the retention of the land as a rural holding underscores the public interest in adhering to the planning strategy with respect to land use.

#### **(iv) Amenity – Noise**

[136] The potential noise impact of some controversy related to the generation of traffic movements. Mr King accepted that the substantial increase in traffic on nearby roads external to the site would create a change in the ambient noise environment.<sup>146</sup> That change would however, occur gradually, over many years, as the development progresses, rather than in a sudden and dramatic way. Accordingly it is unlikely to be perceived as a nuisance (assuming that road traffic noise impacts are assessed against appropriate standards in later applications). The change in the ambient noise environment by reason of the substantial increase in traffic external to the site is

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<sup>144</sup> Ex 48 para 32.

<sup>145</sup> T5-3.

<sup>146</sup> T3-29, 30.



however, likely to have some eroding effect on the rural character and amenity of the area through which the road network passes, even though that impact is one that would occur in an incremental way.

- [137] This is not a case where noise impact in and of itself warrants a refusal of the application. Rather the noise impact would contribute, to some extent, to the way in which the proposal would impact upon the rural character and amenity of the area (although that contribution is not something on which my ultimate conclusion depends).

**(v) Reverse Amenity and Impact on Nearby Rural Land Use**

- [138] The site is surrounded by lots which have, or may in the future have, land uses to which the proposed residential uses on the subject site might have some sensitivity. To the east south east of the site lie rural lots ranging from 230 to 340 ha used for grazing (with one used for a solar farm). South-east of the site lies rural living uses (mainly associated with equine uses) on 40 ha lots. To the immediate north lies rural living type uses on 40-80 ha lots. A quarry lies to the north west. There is an obvious concern not to place sensitive land uses, such as residential uses at suburban densities, where they might be adversely affected by adjoining or nearby legitimate uses of a different kind (here a quarry and rural uses) with the potential for creating a nuisance for the former or a constraint for the latter. Increasing the number of sensitive receptors tends to increase the potential for complaint.<sup>147</sup> Some people are, of course, more sensitive than others and it is not unknown for residential development adjoining rural activities to generate complaint even when buffers are established to comply with requirements.<sup>148</sup>

- [139] The respondent drew attention to:
- DEO 5 of the TPS and, in particular, City Strategy 2.5.2(b)(iii) which speaks of protecting primary industries;
  - DEO 6 of the TPS and, in particular, City Strategy 2.6.2(c) which speaks of protecting land from encroachment by incompatible development;
  - P2 of the Rural Planning Area Code (extracted earlier) which seeks provision of a separation distance between Rural Development and Sensitive Receptors to prevent adverse impacts of spray drift, odour, noise, smoke, dust, vibration and ash;
  - S 3.3.2.1(2) of CP 2014, which speaks of urban uses being adequately buffered from nearby rural land, and
  - S 6.6.1.2(b) of CP 2014 which speaks of providing opportunities for non-rural uses that are compatible with, amongst other things, agriculture and do not compromise the long-term use of the land for rural purposes.

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<sup>147</sup> T3-24.

<sup>148</sup> T3-25.

[140] These matters were the subject of consideration by Mr King (engaged by the appellant) and Ms Richardson (engaged by the respondent), who produced a joint report with no areas of disagreement. Mr King also produced a separate report for the hearing and testified at the hearing.

[141] In their joint report, the experts agreed that:

- (a) existing quarry operations do not pose a significant constraint to the proposed development, although more detailed investigations should be done as part of the application process for each stage, to determine if additional noise mitigation measures and/or revised buffers are required;
- (b) whilst dust impact assessment reports should also be done for development applications for future stages of the proposed development, practicable dust mitigation solutions are likely to be available;
- (c) the location of a certain air strip does not constrain future residential development;
- (d) certain separation buffers would need to be incorporated in order to comply with those specified in the Rural Planning Area Code in relation to noise and spray drift.

[142] The appropriate buffers for spray drift vary depending upon whether the spray is applied at ground level or by air. The existing situation is such that the buffers can be readily incorporated. Mr King's evidence was that a minimum buffer of 25m and a maximum of 50m would presently be sufficient, but that there should be a further assessment when later applications are made.<sup>149</sup> Accordingly, the proposal is to frame the variation part of the approval in such a way as to require the appropriate buffers to be decided at the time of future applications in relation to each stage. That is, in my view, appropriate.

[143] As was pointed out for the respondent, it is at least possible that this might lead to a not insignificant reduction in development yield. Mr King accepted, for example, that the separation distance for aerial spraying is a minimum of 300m.<sup>150</sup> Accordingly he had shown on Figure 1 to his appeal reports<sup>151</sup> a range of setback lines being 50m, 100m (relevant setback to ground applied spray) and 300m. Mr King added that reduced buffers might be acceptable if they are vegetated.<sup>152</sup>

[144] The effect of the proposal on agriculture in the area was also assessed by Mr Sutherland (engaged by the appellant) and Mr Thompson (engaged by the respondent). Having described the subject site and the surrounding rural uses they agreed, in their joint report, as follows:

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<sup>149</sup> Ex 35 para 22, T3-22.

<sup>150</sup> T3-27.

<sup>151</sup> Ex 35 pg 12.

<sup>152</sup> T3-29.

“The proposed master plan would result in the fragmentation of these rural and rural living scale land uses. Current management practises such feral animals [sic], weed control strategies, pasture management involving the use of fire and farm biosecurity strategies which are currently appropriate on these larger-scale rural zone lots will have to be adjusted to avoid conflict with the proposed non rural uses.”

- [145] Mr Sutherland recommended a buffer of 40m to agricultural land and a perimeter electrified fence for the control of feral animals. The buffer may, of course, need to be wider to take account of the recommendations of other experts. As has already been observed, Mr Thompson did not believe it desirable for the fence to follow the boundary in the steeper parts of the site. He suggested, persuasively in my view, that it would be better located to fit within an overall feral animal control program and in a place where it is most likely to be easily maintained. As has been noted, the ecologists were not asked to consider whether they had any concerns about the electrified fence.
- [146] In so far as buffers are concerned, it was pointed out, for the appellant, that conditions of approval can be prepared that provide for the future assessment of the proposed development, as the development permit stage, which require particular buffers to agricultural uses to be provided, in the event that those nearby agricultural uses change in the future.
- [147] There would be some adjustment potentially required by neighbours if the proposal proceeded. Although Mr Sutherland had agreed, in the joint report, that adjustments would be required, he appeared to find it difficult, in the course of his testimony, to explain the detail of that. His testimony in this respect was less than helpful,<sup>153</sup> but Mr Thompson was able to be of greater assistance.
- [148] Feral animals such as pigs, could not be baited or shot from a distance, as is currently the case. As Mr Thompson pointed out, the proposed fencing should be designed in conjunction with neighbours to direct the animals to a place where they are trapped for eradication. The most economical pelletised weed control agent would no longer be appropriate.<sup>154</sup> There would need to be improved systems for burning<sup>155</sup> and additional attention to prevention of biosecurity breaches by, for example, someone straying onto a property.<sup>156</sup> The proposal would therefore, be of some consequence for surrounding rural uses, but the impacts are in the nature of adjustments and are not, in my view, undue. Mr Thompson accepted that buffers could be put in place to minimise the reverse amenity impacts.<sup>157</sup> Wild animal management fencing can be implemented along the lines he suggested.

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<sup>153</sup> see T10-62-65.

<sup>154</sup> T10-73.

<sup>155</sup> T10-74.

<sup>156</sup> T10-72.

<sup>157</sup> T10-74.

[149] For the reasons given, I am of the view that the proposal can be carried out in a way that adequately protects primary industries in adjacent rural land and does not compromise their long term use for rural purposes. Whilst the proposed use may be potentially incompatible in this rural area, any reverse amenity conflict of these kinds<sup>158</sup> can, I am satisfied, be adequately addressed in the ways indicated, including by the provision of appropriate buffers to be finally determined as part of subsequent development approvals. The proposed development ought not be refused on this basis.

**(vi) Infrastructure**

[150] The planning documents are, unsurprisingly, concerned with ensuring that development is provided with infrastructure in an efficient and cost effective manner. In that regard:

(i) City strategy 2.6.2(b)(iv), in support of DEO 6 of TPS 2003, provides that the DEO is intended to be achieved by, amongst other things, establishing the city's urban growth boundaries to create an efficient urban form by, amongst other things, establishing a land use pattern that is consistent with the location and capacities of existing infrastructure items, plans and programs of service providers.

(ii) The Urban Growth Boundaries Code in TPS 2003 includes the following purpose:

“(c) Council infrastructure and state government infrastructure is coordinated and provided in an orderly, efficient and cost effective manner”

And the following performance criterion:

“P1. Urban Development

(c) Provides infrastructure in an orderly, efficient and cost effective manner”.

(iii) The strategic framework in CP 2014 includes the following provisions in relation to the “integrated infrastructure planning provision” element<sup>159</sup>:

**“City Shape**

(1) Land use and development patterns support the efficient and cost-effective provision of infrastructure and community facilities.

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<sup>158</sup> impacts on visual amenity and character are considered elsewhere.

<sup>159</sup> s 3.3.6.

- (2) The city shape and activity centres hierarchy describes in the strategic framework establish the basis for the most efficient provision of infrastructure to meet community needs over 25 years. In particular, it minimises the dilution of infrastructure investment across multiple development fronts. While upgrades will be required in the infill developments areas, these costs will be less than those that would be involved in continued outward expansion of the urban area”.
- (iv) One of the actions identified in the Regional Plan as required to achieve its principal aim is “more efficient patterns of development to put an end to Townsville’s urban sprawl, thereby reducing cost pressures on infrastructure provision and services”.

[151] The land, the subject of the proposal, is not serviced by the infrastructure needed for the proposed development. The Council has no plans to provide the infrastructure.<sup>160</sup> The land is outside the priority infrastructure area (PIA) and the current Local Government Infrastructure Plan (LGIP).<sup>161</sup> The proposal is for urban development of presently unserviced rural land so as to expand the urban area in a way not contemplated by Council’s infrastructure planning. It is at odds with the land use pattern referred to in the strategy in support of DEO 6 of TPS 2003.

[152] The appellant’s proposal is, in effect, to relieve Council of the cost of the provision of infrastructure. In that regard, it proposes as follows:

- (i) It will (in addition to constructing internal roads) upgrade the external local road network in accordance with the infrastructure agreement it has entered into with the State (discussed later). This would ultimately require it to treat with the respondent in its capacity as the local road authority.
- (ii) It will provide water infrastructure internally and to connect to the Council’s main at Kelso. Supply for phase 1 of the development would be by extension from Kelso. An on-site reservoir storage would be provided in phase 2 and 3.
- (iii) An on-site sewage collection, treatment and disposal system is proposed, to be funded by a body corporate for the life of the development. Presumably the body corporate’s responsibility would include the connections from each property within the development.
- (iv) The provision of local and district parks.

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<sup>160</sup> T8-12.

<sup>161</sup> T8-13.

- [153] The proposed development might also have potential to affect the efficiency of provision of other services or facilities (eg garbage collection), but they were not the focus of attention.
- [154] It was pointed out, for the respondent, that meeting the cost of providing infrastructure, over and above that which exists or is planned, in order to facilitate the unplanned conversion of part of the rural area to urban use does not obviate the consequent financial burden upon the Council. Whilst the Council might get the infrastructure (at least the water and road upgradings – the sewage being retained by a body corporate) at no cost, it then assumes the maintenance and, ultimately, replacement costs associated with that (upgraded) infrastructure.
- [155] There was more debate, amongst the experts and the lawyers, about whether it was fair to have regard to maintenance and replacement costs of infrastructure, or infrastructure upgrades, provided at no capital cost to the Council. It was noted that the planning scheme provisions speak of provision of infrastructure, rather than its maintenance. It seems to me however, that the respondent is right to point out that permitting development to occur where it cannot be provided with infrastructure in an orderly, efficient and cost effective way, has financial implications beyond the initial capital outlay.
- [156] Reference was made to the fact that the creation of lots generates more rate revenue. That may be so, but that will occur whether new lots are created on a site such as the subject or on sites which align with infrastructure planning. Mr Gore QC, in oral submissions, acknowledged weakness in the rates argument.<sup>162</sup>
- [157] There was debate about attempts to quantify the operating/renewal costs and compare them to other developments. It is unnecessary for me to dwell on the detail of that. Ultimately Mr Gould appeared to accept that the proposed development costs in this regard would be at least higher than others.<sup>163</sup> In any event there are clearly costs associated with the infrastructure to be provided to this development notwithstanding that the capital costs will be met. In oral submissions, Mr Gore QC said, in effect, that he had instructions to submit to a condition for his client to cover operating/renewal costs.<sup>164</sup>
- [158] It was pointed out, by the respondent, that, in addition to the cost matters discussed above, there is a further planning dimension. As Mr Gould confirmed, existing infrastructure within the urban area has spare capacity to accommodate further residential development within that area.<sup>165</sup> Development outside the planned urban area has the potential to consume some of that spare capacity and/or divert development from areas planned to make use of the spare capacity. For example, in so far as traffic is concerned, Mr Trevilyan persuasively argued<sup>166</sup> that it would be

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<sup>162</sup> T14-42.

<sup>163</sup> T8-65, 66.

<sup>164</sup> T14-42.

<sup>165</sup> T8-16.

<sup>166</sup> T12-20, Ex 32 pg 9 para 55.

desirable, from an infrastructure delivery standpoint, to have development occur closer to Townsville first.

[159] The proposal is discordant with the planning documents with respect to infrastructure. That does not cease to be so just because the developer is prepared to meet the capital and operational/renewal costs of the required infrastructure. It still sits uneasily with the planning documents and a sound planning approach of marrying new development with existing and planned infrastructure. I accept Mr Perkins' evidence to the effect that what is proposed is not orderly and efficient.<sup>167</sup> That tends against approval of the development application, although my ultimate conclusion is not reliant on that.

[160] Mr Gore QC, in the course of oral submissions,<sup>168</sup> adopted the position that whilst covering the costs might not make his client's proposal comply, it takes the "sting" out of the conflict, such that the Court ought not refuse the development application on this ground if it were otherwise minded to allow the appeal. That it relieves the cost consequences is a consideration, but it is still contrary to the planning strategy. In any event, for the reasons stated herein, I am not otherwise minded to allow the appeal.

**(vii) Traffic**

[161] The respondent contends that the traffic impacts of the proposal have not been shown to be satisfactory and that a decision to approve the development application would conflict with the following provisions of TPS 2003:

- (i) strategy 2.6.2(d) for DEO 6 which refers to developing and maintaining a transport network considering frictional, functional and impact characteristics which amongst other matters, improves accessibility; facilitates efficient and convenient access and mobility within and through the City for all transport and travel modes and reflects the road function and protects areas from inappropriate traffic movements; encourages walking and cycling through the provision of direct, safe and secure routes to local facilities such as shops and schools; and
- (ii) General Development Code paragraphs (a) and (b) of the purpose of the transport part of the code (s 5.5.3) which refer to development providing for the efficiency and safety of the transport network; convenient access and movement of, relevantly, private vehicles, cyclists and pedestrians; and
- (iii) Performance criteria P1 (a), (b), (c), (d) of that code, which provide as follows:

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<sup>167</sup> T11-75.

<sup>168</sup> T14-43.

“P1. The City’s transport network comprises an integrated hierarchy of roads, bikeways, public transport routes and pedestrian paths that safely and efficiently serves the needs of the community.

The transport network

- (a) has design features, that convey the primary function of each type of road and encourages driver behaviour, speeds, access, acoustic environment and traffic volumes that are appropriate to that function;
- (b) encourages walking and cycling and a safe environment for pedestrians;
- (c) provides a high level of internal accessibility within neighbourhoods and appropriate external connections for vehicles, pedestrian, and cycle movements;
- (d) deters through traffic from neighbourhood areas and creates safe conditions for local road users, pedestrians and cyclists.”

[162] The development is proposed to have road access to the north via the local road network of Sterritt Road, Laudberg Road, Allambie Lane and Beck Drive to the state-controlled road network. It has already been observed that the appellant has entered into an infrastructure agreement with the State that it will upgrade the local road network and the access to the State-controlled Ring Road. The conditions of that agreement include as follows:

“1.1 The Proponent agrees that:

- (1) it will limit the development of the Development Land to no more than 1,000 Residential Lots until such time as the following road works have been constructed to the Department’s satisfaction:
  - (a) the Beck Drive / Townsville Ring Road Upgrade; and
  - (b) the duplication of Beck Drive to a four lane divided form (from Allambie Lane to the Townsville Ring Road).
- (2) it will carry out the following external road works prior to obtaining approval for a plan of subdivision or the commencement of use of the first developed Residential Lot the subject of the Requested Approval:



- (c) Upgrade of Laudberg Road from an unsealed road to a two-lane collector Type C plus 4 bridges (2 x 10m span and 2 x 25m span);
  - (d) Upgrade of Sterritt Road (from the development to Allambie Lane) from an unsealed road to a two-lane collector Type C; and
  - (e) Upgrade Allambie Lane (from Sterritt Road to South Beck Drive) from a two-lane Collector type C to Sub Arterial Type B plus 2 bridges (1 x 200m span and 1 x 50m span); and
- (3) it will limit the development of the Development Land to no more than 5,100 Residential Lots.”

[163] It may be noted that clause 1.1(1) does not oblige the appellant to undertake the works with respect to Beck Drive and its intersection with the Ring Road. The evidence is to the effect that Beck Drive will likely be upgraded in any event.

[164] The upgrades would have the effect of carrying traffic from the proposed development to the preferred access point of the State-controlled road network. The agreement also required a very substantial financial contribution of \$26,295,600 (to be indexed), payable in stages, for the upgrade of road infrastructure to mitigate the impact of the development on the State-controlled road network.

[165] In the course of the appeal it was put to Mr Collins (the appellant’s flooding and stormwater expert) that it would be desirable for the local roads to be upgraded to a Q100 standard. The appellant, by Mr Gore QC, indicated it would accept a condition to that effect.<sup>169</sup> Mr Collins’ evidence is that upgrades to that standard could be achieved without significant adverse affect to other properties, although it appears from Mr Gould’s evidence (discussed later) that an alternative to Beck Road will likely be necessary for flood free access. A condition as to upgrading to a Q100 standard is supported by the co-respondent by election.

[166] Should the proposal proceed then there would need to be provision for public transport. Infrastructure for that (e.g. bus stops and stopping/turning bays) can be provided. The appellant volunteered that a condition of approval could require it to provide private bus services to existing public transport stops until such time as a critical mass of population is established to cause the development to be serviced by public transport.

[167] The traffic evidence was unduly complicated. There were seven joint reports completed over many years, with the identity of the traffic engineers undergoing change in the meantime. There were also statements of evidence for the hearing as

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<sup>169</sup> T3-55.

well as substantial evidence in chief, which made the evidence something of a moving feast of the kind which has thankfully become rare in recent times.

[168] The evidence of Mr Williams (the traffic engineer called by the co-respondent by election) understandably was more focussed on the effectiveness of the infrastructure agreement in safeguarding the State-controlled road system. The difference between Mr Douglas (called by the appellant) and Mr Trevilyan (called by the respondent) focussed more on the local road network and whether the appellant had yet done enough work to demonstrate that a preliminary approval was appropriate from a traffic perspective.

[169] There were ultimately four areas of debate in relation to traffic as follows:

- (i) Whether the modelling/analyses was appropriate.
- (ii) Whether the analysis of intersections ought to have been of wider compass.
- (iii) Whether the proposed upgrades to Beck Drive are inappropriate and unable to be carried out.
- (iv) Whether the proposal would render the reverse curve on Sterritt and Laudberg roads unsafe.

**(a) Modelling**

[170] The respondent claims that the impact of the proposal on the road network has not been appropriately modelled. The evidence refers to a number of models or modelling exercises.

[171] Modelling was undertaken by the DTMR to inform the planning of the Ring Road 5 project, including a new interchange at Beck Drive. All the traffic experts agreed, in the sixth traffic JER, that the outputs from the modelling appeared to indicate that the proposal could proceed up to 5100 lots on the basis of upgrades to Beck Drive (and the ramps onto the Ring Road), Laudberg Road, Sterritt Road and Allambie Lane. It was also agreed that a suite of works on local roads and at local intersections would likely be required.<sup>170</sup>

[172] Mr Trevilyan raised a concern about what seemed to be a very low trip generation rate used in the model. All the experts agreed that further investigation was required. Subsequently, the traffic engineers consulted the custodian of the Council's traffic model for the area (which does not include the subject proposal). That revealed that both models shared the same base parent demographic and trip generation rates per household (from ABS data) and were calibrated to traffic count data.

[173] The appellant commissioned additional modelling from Bitzios which updated the DTMR modelling in relation to road upgrades. The results suggested that the proposal can proceed to 5100 lots with, amongst other things, the upgrading of Beck Drive to

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<sup>170</sup> Ex 32 pg 4.

4 lanes, with the first 1000 lots being able to proceed with Beck Drive in its current 2 lane form. The assumed trip generation rate was 3.54.<sup>171</sup>

- [174] Mr Trevilyan did not regard any of the models as “fit for purpose” to understand the operation of the access corridor, and maintained his concern that the development, as represented in the model, was not generating enough external vehicle movements. The debate ultimately focused on the latter point.
- [175] Notwithstanding the fact that the DTMR and Council models used the same trip generation rates, Mr Trevilyan rightly maintained that the assumed trip generation rate was inappropriate to apply in assessing the impact of the proposal on the local road network, particularly in the early stages of the development. As he pointed out, the rate of vehicle movements that are generated beyond the site will vary depending on the extent of facilities within the development. The greater the range of facilities available within the development, the fewer trips will be generated beyond the development for the purpose of accessing facilities. As Mr Douglas conceded in cross examination,<sup>172</sup> “for the first smaller number of lots the trip generation rates will be higher and they’ll taper off as it becomes more self-contained”.
- [176] Similarly, the greater the number and range of facilities provided within the local catchment served by the local road network (external to the site) within which the development is located, the fewer trips will involve use of the State-controlled road network beyond that catchment. As Mr Williams observed in the course of cross examination,<sup>173</sup> the traffic generation from the development to/from the most immediate local road may be higher, at a localised level, but the numbers reduce as the traffic is distributed to facilities within the catchment. Accordingly a lower rate may be appropriate for assessing the impacts on the Townsville Ring Road, for example. There was no substantial challenge to Mr Williams’ evidence that the modelling was fit for purpose from a state-controlled network point of view.<sup>174</sup>
- [177] The consequence of the above is that whilst the trip generation rate of 3.54 may be appropriate for assessing the impact of the proposal on the State-controlled road network, particularly once the development is more self sustaining,<sup>175</sup> it is not appropriate for use in assessing the impact of the proposal at a more local level in the early stages when fewer facilities are provided. Mr Douglas accepted that the assumed rate was likely to be an understatement in the early years<sup>176</sup> and, in particular, that the traffic generated from the first 1000 lots (Stage 1) was likely to be higher than projected by the rate assumed in the model.<sup>177</sup> Indeed for the ultimate development to

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<sup>171</sup> T9-83, T9-85, Ex 33 pg 54.

<sup>172</sup> T9-83.

<sup>173</sup> T9-97.

<sup>174</sup> T9-96.

<sup>175</sup> Mr Trevilyan would use a rate of 4.25 upd for the total development, but the likely generation rates are not an exact science.

<sup>176</sup> T9-85.

<sup>177</sup> T9-86, T9-88.

get down to a rate of 3.54 requires a full master planned community with its attendant facilities.<sup>178</sup>

[178] Mr Douglas pointed out that only a preliminary approval was being sought and there are plenty of opportunities to conduct more traffic studies to get actual traffic generation rather than forecasting it.<sup>179</sup> He suggested that the concern about the generation rate could be accommodated by limiting the first stage to say 650 lots (instead of 1000), with actual traffic surveys better informing subsequent applications.<sup>180</sup> Alternatively, bringing forward the upgrading of Beck Drive, (which is the only road upgrading proposed to be required after the development commences) would overcome the need to restrict stage 1 to 650 lots for capacity reasons.<sup>181</sup>

[179] On the basis of the above evidence I am satisfied that the modelling demonstrates that, from a capacity perspective, development is unlikely to have an undue detrimental affect on the State-controlled road network.<sup>182</sup> I am also satisfied that the modelling provides a satisfactory basis for concluding, at least for the purposes of a preliminary approval, that the development, once completed, will, subject to the various road upgradings, be serviced by the identified local road network (between the site and the Ring Road) with sufficient capacity. I am further satisfied that Beck Drive, in its current form, has some spare capacity to accommodate some development generated traffic, but I do not accept that it has been demonstrated that Stage 1 of the proposal can appropriately proceed to 1000 lots in advance of an upgrade of that road. I accept the submission for the appellant (consistent with the approach of Mr Douglas), that to the extent further modelling (and road upgrades consequential upon that modelling) is required, it can appropriately be addressed at the development permit stage. Any preliminary approval should therefore, be on terms which are consistent with that opportunity being reserved to that stage.

### **(b) Intersection Analysis**

[180] Mr Trevilyan was also rightly concerned that the appellant had not, at least initially, carried out a SIDRA analysis of the likely performance of affected intersections (and the identification of any required upgrades). In JER7 he said it was very unusual for any assessment not to include at least some SIDRA modelling at key locations.<sup>183</sup> He maintained that this ought to have been done for intersections within the “impact assessment area” or “zone of influence” of the development, defined, relevantly for intersections, as all intersections where any peak hour movement is increased by 5% or more.

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<sup>178</sup> T9-88.

<sup>179</sup> T9-89.

<sup>180</sup> T9-86, T9-89.

<sup>181</sup> T9-90.

<sup>182</sup> Noting that the appellant is to pay a financial contribution to mitigate the impacts on the state-controlled road network.

<sup>183</sup> Ex 33 pg 8 para 25.

- [181] Mr Douglas accepted Mr Trevilyan’s premise<sup>184</sup> and responded by carrying out, in his appeal report, SIDRA intersection modelling for what he described as every substantial intersection south of Harvey Range Road. In so doing he believed he had done the exercise to the extent necessary. He made the point that Harvey Range Road, the Ring Road and Thurringowa Road/Riverway Drive are state-controlled roads and “once you get to those three roads, you’ve – you’ve effectively diffused the vast majority of the traffic”.<sup>185</sup>
- [182] The analysis was carried out for the 1000 lot and the full development scenarios and resulted in the conclusion that, for both scenarios, all intersections that would meaningfully service the development will operate within acceptable limits given the assumed road upgradings. The 1000 lot scenario would be affected by the generation rate issue discussed earlier, but, as has been observed, the analysis supported the full development scenario as well.
- [183] In so far as other intersections are concerned, Mr Douglas said that to assess all minor T intersections where passing traffic increased by greater than 5% would be an “endless exercise,”<sup>186</sup> not done in the assessment of some other large developments with similarly wide ranging traffic impacts.<sup>187</sup> Having considered the busier intersections and found them to work satisfactorily, he did not see the benefit in assessing all the minor intersections and looking at those further afield that are remote from the locality. He thought that was particularly so at the preliminary approval stage, bearing in mind that “there’s a lot of other moving parts here” and that the exercise is based on 2030 forecasts.<sup>188</sup>
- [184] Mr Trevilyan was not persuaded that further intersections ought not have been analysed. He pointed out that the Riverway Drive/Ross River Road intersection was not analysed, even though the impact on it is more than 5%. It should be acknowledged that is the intersection of 2 State-controlled roads,<sup>189</sup> and the appellant has entered into an infrastructure agreement with the co-respondent which includes substantial monetary contributions to fund the upgrade of road infrastructure to mitigate impact on the State-controlled road network. Whilst an untied monetary contribution does not necessarily mean that a given intersection will perform satisfactorily, I am, in the particular circumstances of this case, prepared to put some weight upon the fact that the appellant has come to terms with the co-respondent by election, as the road authority, in relation to works and monetary contributions given that only a preliminary approval is sought and that a concern about this particular intersection was not raised in cross-examination of the traffic engineers for either the appellant or co-respondent by election.<sup>190</sup>

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184 T9-74.

185 T9-74.

186 T9-73.

187 T9-74.

188 T9-74.

189 T9-93 where the State-controlled roads are identified.

190 Mr Williams’ evidence was that, with the proposed network improvements, the State-controlled road network would adequately cater for development traffic. He also referred to the financial

[185] Mr Trevilyan made the point that the impact on local roads and other intersections does not necessarily stop when development generated traffic arrives at the State-controlled road system and that the successful operation of busier intersections does not ensure that there is no undue impact on minor intersections, which have less infrastructure. Whilst these points have some validity, it seems to me that sufficient work has been done for the preliminary approval stage, given that the terms of any preliminary approval should be such that further analysis is required at the development permit stage.

**(c) Scope for the Upgrades**

[186] The scope for constructing the road improvements, to an appropriate design, was a matter of debate.

[187] The road upgrades contemplated by the infrastructure agreement have already been referred to. The appellant also volunteered that it would accept a condition that all road upgrades conditioned to be undertaken by it, be constructed to a Q100 flood immunity standard.

[188] It has already been noted that the infrastructure agreement does not necessarily require the appellant to undertake the upgrading of Beck Drive and that an upgrading of that road to a four lane sub-arterial road will occur at some time in the future in any event. The debate about the scope for that upgrading proceeded on the assumption that it is provided by the appellant in consequence of the development.

[189] Mr Douglas had concept drawings prepared of intersection layouts affecting the SIDRA layouts to demonstrate the feasibility of upgrading Beck Drive without resumption of private property. At trial further drawings were produced.<sup>191</sup> The evidence demonstrated that there are a number of constraints, relating to various “pinch points” along the road reserve associated with the upgrading of Beck Drive to a 4 lane Type B sub-arterial road. The consequence is that, absent the consent of land owners of adjacent land, compromises would be required in relation to the Council’s standard drawing design for a Type B sub-arterial road. This includes that services will need to be built over, or a pathway in the verge compromised.<sup>192</sup> It was submitted, for the respondent, that this compromise approach is inappropriate.

[190] Mr Trevilyan’s objection to the proposal, in this respect, was largely a matter of principle. Whilst, as Mr Douglas pointed out,<sup>193</sup> it is not uncommon for roads and intersections to be provided, including by the Council itself, in forms which represent a variation or compromise of standard design drawings, Mr Trevilyan considered that development of a greenfield site should occur where such compromises are not

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contribution obligation (Ex 33 pg 7 para 21). No point was put to him about this particular intersection on the State-controlled road network.

<sup>191</sup> Ex 68.

<sup>192</sup> T9-5.

<sup>193</sup> T9-72.

necessary.<sup>194</sup> Whilst I appreciate his point, which perhaps serves to further underscore that the subject site is not one which sits at ease with the existing and planned infrastructure, I also take Mr Douglas' point that the road network is not within an entirely greenfield area<sup>195</sup> and there is need for some level of compromise in the road upgradings, including in Beck Drive which will have to be upgraded in any event. The need for some compromise would not cause me to refuse the application if approval was otherwise justified.

[191] Mr Trevilyan identified two potential safety concerns. One relates to the reverse curve where Laudberg Road turns into Sterritt Road. That is discussed later. The other relates to the upgrading of the roundabout at the intersection of Beck Drive and Gouldian Avenue, which, as shown on a preliminary design, was criticised by Mr Trevilyan as creating safety issues because:

- (i) A northbound vehicle would be able to travel through the roundabout without deviation, and
- (ii) Cyclists are not provided for on the through carriageway on the eastern side.

[192] Those criticisms of the preliminary design were not explored in cross-examination of Mr Douglas (who gave evidence prior to Mr Trevilyan). In the course of cross-examination Mr Trevilyan acknowledged that Beck Drive will need to be upgraded to 4 lanes in the future in any event and so a solution would have to be found to achieve that. He acknowledged that, although 'very difficult' in his view, it is, in an engineering sense, possible.<sup>196</sup> That included overcoming the issues with Goudlian Avenue, although it might require some additional land. It is however, something that, in the circumstances, will have to be confronted in any event given the inevitable need to upgrade the road.<sup>197</sup> In the circumstances it does not call for a refusal of this application.

[193] The offer to provide the road upgradings to a Q100 flood immunity standard is discussed later in the context of ground/matters in support of approval.

#### **(d) The Reverse Curve**

[194] The remaining safety issue relates to the reverse curve at the junction of Laudberg Road and Sterritt Road. Currently there are two right angled turns where the roads meet. That is not appropriate in the context of the likely volumes from the proposed development. The proposal is for it to be replaced with a reverse curve. A reverse curve is a section of road consisting of two different curves turning in opposite

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<sup>194</sup> T10-25, 26.

<sup>195</sup> T9-72.

<sup>196</sup> T12-26.

<sup>197</sup> T12-27.

directions. There was debate about whether the development access would still be inappropriate in the circumstances.

- [195] Reverse curves are not an unknown feature of road systems and are specifically dealt with in Austroads, to which the traffic engineers had recourse. They are not however, a desirable design response. Indeed Austroads states “reverse curves should be avoided wherever possible” before going on to acknowledge that “there are situations where designers have no choice but to use them for example, in hilly or mountainous terrain or where physical constraints that influence the alignment are present”.
- [196] Here, the use of a reverse curve is only a necessity if it is assumed that the development must proceed and obtain its access from the local road network along the identified route. On that assumption, it is necessary to address the unsafe interplay between the two roads in question before addition of the significant additional volumes associated with the development. Within the limits of the road reserve, the only identified option is the reverse curve. The first point made by Mr Trevilyan is that this is not so much a case of having to design a road around physical constraints as it is a case of observing that the road reserve corridor does not measure up to one that would be expected to service urban development such as is proposed.
- [197] There was also some debate about the adequacy of what could be achieved if a reverse curve solution were accepted. Mr Douglas did a concept design to indicate what could be achieved, assuming an operating speed environment of 70km/hr and advisory signs at each end of the reverse curve of 60km/hr. Mr Trevilyan took issue with the design. He pointed to that part of Austroads which provides:

“Desirably, reverse curves should not be used unless there is sufficient distance between the curves to introduce full superelevation of the two curves”.

- [198] For an operating speed of 70km per hour the length of superelevation development from normal cross fall to required superelevation rounds up to 55m. Two lots of 55m is required because there are two superelevations. The debate between Mr Trevilyan and Mr Douglas was as to whether the whole of that 110m is to be provided in the straight between the two curves. Mr Trevilyan acknowledged that there was nothing in Austroads, other than the above quote, commencing with the word “desirably” which mandated his approach. He also acknowledged that his concerns could be met if the operating speed could be reduced. He thought that would be problematic, because the natural speed on the straight approach would lead to higher speed. He did not however, seem strong on his view that the proposal was unacceptable from a safety perspective. He described the proposal, if speeds were to be reduced, as falling below a “fuzzing line” of acceptability in what he described as a “grey area”.<sup>198</sup> Mr Douglas took the view that advisory signs of 50 or 55km per hour for the reverse

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<sup>198</sup> T10-31.



curve would not preclude higher speed signs otherwise, there being nothing unusual about such a speed zoning arrangement.

- [199] The final decisions about the speed environment will be made by the Council, as the road authority. The evidence satisfies me that whilst the need to employ a reverse curve solution means that the road network leading to/from the subject site is less than desirable to service the proposed development, a reverse curve would not be an unacceptable solution to the difficulty of traffic generated by the development having to negotiate the junction of those two roads.

**(e) Conclusion on Traffic**

- [200] For the reasons given I have concluded that:

- The development is unlikely to have a detrimental effect on the capacity of the State-controlled road network.
- The development, once completed will, subject to the various road upgrades, be serviced by an external local road network with sufficient capacity.
- It has not been demonstrated that Stage 1 of the proposal, to 1000 lots, could appropriately proceed in advance of the Beck Drive upgrade.
- Any preliminary approval ought be on terms that requires further modelling (and any consequential upgrades) at the development permit stage.
- Sufficient work has been done with respect to the likely impact of the proposal on the performance of intersections to support a preliminary approval on terms that would require further analysis at the development permit stage.
- Whilst achieving the upgrades would not be without difficulty and would require some compromise of design standards, the difficulties do not appear to be insurmountable, nor is the need for some compromise (leaving the reverse curve to one side) unduly disturbing.
- That the development traffic would need to use a route with a reverse curve is less than desirable, but not unacceptable in the circumstances.

- [201] Whilst I take Mr Trevilyan's point to the effect that the need for some compromise in design standards and the use of a road system with a reverse curve is symptomatic that the site is not an ideal greenfield site as one might expect where the road network has been planned with a development in mind, the proposed access route, subject to upgrades, is not inappropriate for the purposes of the grant of a preliminary approval.

**(viii) Flooding**

- [202] The proposal is for the development to have appropriate flood immunity and for the external road upgrades to be to a Q100 standard. The respondent did not rely on flooding issues as a basis for refusal of the application.
- [203] In so far as the impacts of the development are concerned, it was ultimately agreed that suitable on site detention could be provided through detailed design and further refinement of the layout to ensure no adverse downstream flooding impacts occur.<sup>199</sup> The appellant would accept a no worsening condition.
- [204] In so far as the access routes are concerned, Mr Collins considered it desirable for critical access/egress routes to have a Q100 flood immunity and that is what is now proposed. In his view, the required upgrades could be conditioned to ensure that the final design did not result in adverse impact on other properties. In relation to Laudberg Rd, Sterritt Rd and Allambie Lane to its intersection with Beck Drive, upgrading to Q100 will involve the use of box culverts and bridges the particulars of which had been considered by Mr Gould.<sup>200</sup> Modelling of that showed some afflux, with which Mr Clark took issue, but he accepted that there would be a solution. His reservation was as to the practicalities of a solution, once presented, from a civil engineering perspective given considerations such as the width of the road reserve.
- [205] The road reserve in Allambie Lane is very wide and can readily accommodate substantial table drains and bridges.<sup>201</sup> Sterritt and Laudberg roads have a narrower reserve but there is no sufficient reason for undue concerns about them. Mr McAnany was of the opinion that the works in Laudberg Road (which would include bridges and culverts) could not all fit within the road reserve. Mr Gould (the appellant's civil engineer) agreed that there are a limited number of adjoining properties in Laudberg Road that would require their driveways to be reconstructed to the elevation of Laudberg Road.<sup>202</sup> That is not however, necessarily an insurmountable obstacle.
- [206] The part of the upgrades which Mr Gould did have a concern about was Beck Drive which, in his view (which I accept), cannot practically achieve a Q100 standard because of the depth of flood over that road.<sup>203</sup> That problem can however, be overcome by raising a section of Allambie Lane between Beck Drive and Riverway Drive (the latter of which is already at Q100) to achieve a flood free access.<sup>204</sup> Mr Gould's evidence, which I accept, is that that involves a minor lift and is not a significant engineering undertaking.<sup>205</sup> Mr Collins had not modelled the impact of that raising, but it would appear to be unlikely to cause insurmountable problems given the minor nature of the work required.

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<sup>199</sup> Ex 14 pg 4 para 9.

<sup>200</sup> T8-32 to 34.

<sup>201</sup> Ex 38 p 48.

<sup>202</sup> T8-34.

<sup>203</sup> T8-39.

<sup>204</sup> T4-5, 6.

<sup>205</sup> T8-10.

[207] I do not consider that there are any flooding issues in relation to the development or the upgrading of the external roads which warrant a refusal of the application for a preliminary approval.

**(ix) Stormwater Quality**

[208] The respondent does not rely on stormwater quality as a reason for refusal. It is common ground that there is adequate space for water quality measures to meet relevant standards and objectives. In those circumstances it is unnecessary for me to descend further into the detail of the evidence. The site is affected by severe erosion. This is discussed later as it was a matter which the appellant sought to turn to its advantage by an offer to undertake works to stabilise and rehabilitate the affected areas.

**(x) Uncertainty**

[209] It was submitted, for the respondent, that a level of uncertainty surrounds the proposal. Insofar as that affects the assessment of the issues relating to the material change of use it has been dealt with in the discussion of the various issues. There was also reference to a level of uncertainty arising in relation to the text of the proposed variations and in relation to their application in the context of the changed plans. As I have observed, there would be a need to revisit the variations in the event that the Court were to deliver reasons indicating an intention to approve the application.

**Grounds/Matters in Favour of Approval**

[210] In opening the appellant's case Mr Gore QC said that this is a "grounds case".<sup>206</sup> In the written submissions delivered at the conclusion of the case it was conceded that, if the Nerinda point was put to one side, conflict with the TPS 2003 necessarily follows, at least as regards the Rural Planning Area Code and the Urban Growth Boundaries Code. I have already dealt with the nature and extent of the conflict.

[211] The appellant's case with respect to grounds to justify approval and/or matters to take into account in favour of approval narrowed and/or was given new focus in the course of submissions. The written submissions, on behalf of the appellant set out 18 grounds. In the course of oral submissions however, the Court was informed that some of those were not pressed. The rest were ranked, in order, as of primary, secondary or marginal importance. The appellant did not seek to categorise the grounds by reference to whether they fell within the second or third limbs of the Weightman approach, but that is unnecessary. The importance of the ground depends of what it is rather than where it falls in the Weightman approach.<sup>207</sup>

[212] The primary grounds are as follows (adopting the paragraph numbering from the appellant's submissions):

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<sup>206</sup> T1-18.

<sup>207</sup> *Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 Qd R 303 at 323.

- (a) the site is unsuitable for agriculture, and has low suitability for grazing;
- (b) given the sodic soils issue, it is unlikely that the cost of remediation could be borne by a grazing operation, whereas the appellant is prepared to fund such measures as part of the proposed development, with consequential benefits in the public interest, as the soils are currently carried down stream with detrimental effects;
- (c) there is a town planning, community and economic need for the proposed development,
- (g) approval of the proposed development would provide an opportunity for a place of refuge to be developed, particularly in respect of flood inundation, for residents of the proposed development and also those residents of the Upper Ross Corridor;
- (h) the proposed development is protected, unlike other land in the Council's local government area, from flood, storm tide inundation and the effects of a dam break scenario;
- (p) approval of the proposed development will result in the restoration and protection of waterway corridors on the land;
- (q) approval of the proposed development would result in the dedication of land of significant ecological value of significant size;

[213] The secondary grounds are as follows:

- (d) the proposed development would contribute to housing affordability;
- (f) approval of the proposed development would enhance residential choice and diversity;

[214] The marginal grounds are as follows:

- (e) approval of the proposed development would contribute to "self-containment" in the Upper Ross catchment;
- (i) approval of the proposed development would allow residents to "age in place";
- (j) approval of the proposed development will generate significant employment;
- (l) the proposed development provides an opportunity to masterplan a significant development thereby ensuring the orderly and efficient delivery of infrastructure, services and facilities;
- (o) approval of the proposed development will adopt a number of sustainability measures;

[215] The appellant's case with respect to the development's promotion of the public interest was ultimately reduced to the following summary:

“The proposal will convert the land from its presently low or non-existent potential for rural uses into land that is well suited for and will be well utilized for residential and ancillary purposes, for the benefit of much large number of community members than currently benefits from the land's zoning and potential uses, in association with other benefits that would probably or certainly not be enjoyed if the status quo where maintained:

- (a) the remediation of a significant and worsening soil erosion and dispersion problem;
- (b) the provision of an opportunity for a place or refuge for other members of the community in time of flood inundation;
- (c) the restoration and protection of waterway corridors on the land;
- (d) the dedication for public purposes of land of significant ecological value and of significant size;
- (e) the provision of residential choice and diversity in a competitive market for many decades.”

[216] The above raises a number of issues for consideration.

**(i) Need**

[217] Whilst only a preliminary approval is currently sought for the material change of use, it is nevertheless appropriate to consider whether a need has been established to support an approval of the application in order to facilitate, (subject to further approvals) the provision of the development it proposes within a reasonable planning horizon. It is not in dispute that Townsville will require further development, including further residential development. The central question is whether a need has been established to support an approval for such development to occur on the subject site, contrary to the planning documents, rather than in the locations provided for pursuant to those documents.<sup>208</sup>

[218] It has already been observed that the current planning documents proceed on the basis that there is already sufficient land set aside for greenfield development. In particular CP 2014 asserts that the plan allocated sufficient land for housing, business and community uses, sufficient to meet Townsville's need for at least 25 years<sup>209</sup> and,

<sup>208</sup> See *Gold Coast City Council v K&K (GC) Pty Ltd* (2019) 239 LGERA 409 at 47-48.

<sup>209</sup> s 3.3.1(1).

more specifically, that the planning scheme designates sufficient land supply for future greenfield development well beyond the requirements of the next few decades.<sup>210</sup> Consistently with that, both CP 2014 and NQRP adopt a planning strategy of directing development to the areas already set aside. The proposal is in obvious conflict with that strategy.

- [219] The evidence of the need experts did not establish that there has been any serious or substantial erosion in the factual basis underlying the planning strategy such as to call for an approval to facilitate (subject to further approvals) a large additional master planned development on the subject site. The evidence revealed that population growth has slowed in Townsville in recent years, such that the projections upon which the CP 2014 was based have proved to be “more aspirational about the growth” than had been planned for in the planning scheme.<sup>211</sup> Similarly, there has been a reduction in the rate of sales of vacant land. The supplementary need JER contained population projections on a ‘low’, ‘medium’ and ‘high’ growth basis, which took account of official projections prepared for 2018. In his trial report Mr Duane reported that since 2018, ABS resident population projections would indicate that Townsville’s population growth has slowed and that even the low series projections for 2021 might not be reached. Whilst the experts agreed that north Queensland economies can fluctuate rapidly in terms of major projects and consequently population and dwelling growth,<sup>212</sup> there is nothing to suggest a change in circumstances which would trigger the need to provide for the development of more land, beyond that provided for in the planning scheme, for residential development.
- [220] There is a very substantial land bank for the future supply of residential lots. In the supplementary need JER the experts agreed that there would be about 35,000 dwellings available within the market and potentially up to 40,000-45,000 taking into account other broadhectare land.<sup>213</sup> Having regard to the population projections (ie the ones that may not be met for 2021), it was agreed that Townsville has a current residential land supply of in excess of the planning schemes 25 years on the basis of the medium projection of population growth.<sup>214</sup> Mr Duane reported that “at a broad level, therefore, the Townsville market has a level of supply in keeping with most major metropolitan areas based on medium series projection, but is at the lower end for a high population base scenario.”
- [221] Not only does the planning scheme provide for the supply of future residential development, it expressly acknowledges the need to keep its strategy under review. Whilst stating that the scheme sets out the Council’s intention for future development over the next 25 years, it also says that it will be reviewed periodically, in accordance with the Act, to ensure that it “responds appropriately to the changes of the

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<sup>210</sup> s 3.2.5.

<sup>211</sup> T6-16.

<sup>212</sup> Ex 24 pg 23.

<sup>213</sup> Ex 24 para 45.

<sup>214</sup> Ex 24 para 47.

community at a local, regional and State level”.<sup>215</sup> More specifically it states that the Council will monitor the supply of new land for residential development to ensure at least 10 years land supply is available and to prevent land supply placing any pressure on housing affordability.<sup>216</sup>

[222] Mr Duane argued that there may be a need to provide further land because, by the time the Council reviews the planning scheme, the supply of land might have fallen significantly below 20 years of supply. He pointed to the significant lead times for major new released areas in order to opine that to allow the stock of available land to decline until it is potentially replenished on a 10 year review is not appropriate, from an economic point of view to ensure a healthy and functional residential market in Townsville. He said that within the next 10 year period, as supply is used up, there will be a need to appropriately plan for further supply to make sure that there is a 25 year horizon going forward.<sup>217</sup> That is not a proposition which has significant application in this instance.

[223] The review of the planning scheme is due in 2024, much sooner than 10 years from now and as Mr Duane acknowledged,<sup>218</sup> there is no reason to fear that, by 2024, there will be significantly less than 20 years supply. I also accept the evidence of Mr Coghlin in paragraph 57 of the supplementary need JER as follows:

“57. GC notes that Townsville has a current residential land supply of 25 years under a medium demand scenario. Therefore:

- a. There is sufficient residential supply throughout Council’s 25 year planning horizon.
- b. The existing land supply will extend well beyond the typical life of the planning scheme, therefore giving Council ample time to designate additional land for residential development well ahead of need, if required.
- c. Supply is broadly-based. It currently includes 33 residential estates with more than 29,000 available lots (Table 4). In addition, there are proposals for a further 11 residential estates containing more than 5,000 lots (Table 5).
- d. In GC’s opinion, the current land supply is so substantial that it is highly unlikely to compromise a healthy functioning market for the foreseeable future.”

[224] There being no convincing case with respect to the need for a greater quantum of land to be set aside now for a new master planned residential development, the appellant’s

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<sup>215</sup> s 1.1.

<sup>216</sup> s 3.3.2.2.

<sup>217</sup> T6-22.

<sup>218</sup> T6-24.

case, with respect to need, focused more on qualitative matters, in the sense of what the proposal would add, for the community benefit, over and above simply more land for development.

[225] Paragraph (f) of the appellant's secondary grounds relates to the enhancement of choice and diversity. It was argued that the proposal would increase choice in the residential market in circumstances where there is a concentration of ownership of the future supply of residential land and where much of the future growth is expected to occur in one development, namely Elliot Springs, which is located 15kms south-west of the CBD and is planned to cater for over 10,000 lots and over 26,000 people by completion around 2057.

[226] Mr Duane put forward a hypothetical scenario in which, depending upon the demand for residential lots and the number supplied by Elliot Springs (assumed at up to 300 lots per year) over the next decade, the supply in other estates might be consumed relatively quickly, such that, by 2031, 50% of the then future available land supply would be in the one estate (Elliot Springs), something that he did not regard as healthy. Given lead times for large estates he considered that longer term planning (for additional land such as the subject site) should occur now. He would regard having an additional large estate, such as that proposed, better and more than two better still.<sup>219</sup> In my view, Mr Coghlin persuasively answered Mr Duane's concerns in the following paragraphs of the supplementary JER:

68. GC disagrees with GND's conclusions for the following reasons:

- a) The forecast Elliot Springs rate of development is speculation based on an estimated completion date almost 50 years away, and an assumed constant rate of lot releases. Lot development is more likely to be based on overall demand and levels of competition at any given time, both of which are likely to fluctuate. The actual lot production each year is likely to be determined mainly by level of demand.
- b) In any event, there is an estimated 34,223 lots currently available (Table 8). Assuming absorption of 1,400 lots a year, there is some 24 years of existing supply. It is therefore clear that Council will have ample opportunity at a more appropriate future time to address any required changes to residential land supply in the long term.

71. GC notes that excluding Elliot Springs (Eastern Rural), in 2018 there was an estimated 23,653 lots available (Table 8). Even under the assumptions used by GND of absorption of around 1,100 lots a year outside of Elliot Springs (medium series forecast), as at 2018 there

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<sup>219</sup> T6-29.



was around 21 years of supply outside of Elliot Springs, which is well beyond the typical life of a planning scheme.

73. GC concludes that in view of the number and variety of residential land developments and developers outside of Elliot Springs, and the number of proposed residential estates outside of Elliot Springs, residential supply in the Townsville region does not risk being too concentrated in a single development.

- [227] Of relevance to the point made by Mr Coghlin in paragraph 68(b) is the fact that the next review of the planning scheme is now just a few years away. That is of significance because Mr Duane’s concern was about what might occur after 2031 in relation to choice if no further supply is made available as a result of any review of the Council.<sup>220</sup> He clarified that his preference for planning to start ‘now’, is to be understood as within the next few years, such that a review in 2024 that resulted in immediate action would be within that realm.<sup>221</sup>
- [228] In so far as the point made by Mr Coghlin in paragraph 73 is concerned, the evidence shows<sup>222</sup> that the current future supply of lots comes from a range of growth districts<sup>223</sup> and is composed of a number of estates, offering a range of lot sizes, brought to the market by a range of developers at a range of price points.
- [229] For the above reasons, I am not persuaded that there is a need to approve the subject application in order to provide, at this point in time, for the future development of an additional master planned community on the basis of enhancing choice and diversity.
- [230] It was also contended that the development is needed to make a meaningful contribution to housing affordability in Townsville which is the subject of paragraph (d) of the appellant’s secondary grounds. It was pointed out, for the appellant, that Townsville is rated as “seriously unaffordable” by international standards. As Mr Coghlin pointed out however, most Australian cities are rated as “severely unaffordable” and Townsville remains one of the most affordable cities within Australia, being third only to Gladstone and Rockhampton as the most affordable among 24 surveyed Australian cities. Indeed the evidence is of house prices in Townsville having been in decline since 2011. More specifically, the Upper Ross Corridor has become more affordable.<sup>224</sup> That does not mean that housing affordability is not a matter to be concerned about, but it puts the issue in perspective.
- [231] As Mr Coghlin pointed out, there is no sufficient basis to conclude that any affordability difficulty in relation to land in Townsville is the result of a lack of supply, since there is an existing abundant residential land supply. The addition of yet

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<sup>220</sup> T6-28, 29.

<sup>221</sup> T6-26.

<sup>222</sup> Ex 24 table 4.

<sup>223</sup> Ex 24 table 8.

<sup>224</sup> Ex 24 paras 81, 82.

further supply is unlikely to have a significant impact on affordability.<sup>225</sup> There is no realistic likelihood of a shortage of available lots within any reasonable planning horizon such as to provoke the need for more supply in the hope of improving affordability.

- [232] Mr Duane saw some potential benefit, in terms of affordability, in the provision of competition and choice at a future point in time when supply is more reliant on Elliot Springs. That harks back to his concern about the potential concentration of supply on Elliot Springs, with which I have already dealt and rejected on the basis of Mr Coghlin's evidence to the effect that future supply is broad based and the Council will have ample opportunity, at an appropriate future time, to address any required changes to residential land supply, in the long term, such that there is no need for concern about the healthy function of the market for the foreseeable future.
- [233] Whilst that is sufficient to dispose of the issue it might also be observed that the extent to which (if at all) the proposed development may provide price competition in the future, so as to improve affordability, is unknown. Whilst choice may often provoke competition, the extent of that competition and its potential effect on the price of lots and so on affordability may obviously be affected by several factors. It might be affected by the development costs of the lots in respect of a proposal which, as has been observed, is proposing to assume significant obligations including, but not limited to, with respect to the provision of infrastructure and the remediation of erosion. It will obviously depend on market circumstances at the time and decisions about how lots within the development, which Mr Vassallo enthused provided the opportunity to set a new standard,<sup>226</sup> are positioned in that market.
- [234] For the reasons given I do not consider that it has been demonstrated that there is any significant need to approve the subject development application in order to address housing affordability issues in Townsville.
- [235] It was submitted that there is a need for the proposed development in circumstances where the proposal is appropriately located in that it is "near" the urban growth boundary pursuant to CP 2014 and would be accessible from various institutions and facilities in the broader area. Even if that were accurate it would not, in my view, add much to the need case. It relates more to the suitability of the site in the event that development were permitted outside the areas planned for pursuant to the planning documents. In any event the proposal would not represent a logical extension of the urban growth boundary. In that regard I accept the evidence of Mr Perkins to which I have already referred about the separation of the site from existing urban development. Further, the argument seems to be one of justifying an extension of urban sprawl, against which the planning documents set their face. Further, Mr Coghlin pointed out that the site is more distant from community infrastructure than

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<sup>225</sup> Ex 24 para 83.

<sup>226</sup> Ex 62 para 19.

most other new and approved residential estates,<sup>227</sup> although it is better placed than Elliot Springs.<sup>228</sup> The development relies on providing facilities in order to achieve an appropriate degree of self sufficiency. Indeed, the appellant seeks to make a virtue of the proposal to provide facilities in an area which it otherwise submits is lacking infrastructure.<sup>229</sup>

- [236] It was contended that “more importantly”<sup>230</sup> the proposal would, over time, not only provide its own facilities, but would provide facilities that would assist in ensuring that the Upper Ross Corridor is better provided for and more self-sufficient. That is relevant to paragraph (e) of the appellant’s marginal grounds. There are a number of things to note about that proposition.
- [237] Firstly, there are some retail and other facilities, including education facilities in the broader area,<sup>231</sup> the site’s proximity to which the appellant otherwise relies on to assert the suitability of its location.
- [238] Secondly, in the first need JER, the experts agreed that, absent approval of the full residential development, there is no need for the other uses.<sup>232</sup>
- [239] Thirdly, the evidence about need for non-residential facilities is that found in the second supplementary JER, which speaks of how much residential development must occur within the development itself in order to justify the provision of those facilities. The focus on the non-residential uses needing to be justified by development on the subject site (rather than in the Upper Ross Corridor more generally) is understandable given that, as Mr Duane agreed, the site is tantamount to one sitting at the end of a very large cul-de-sac, such that the trade area for any retail facilities on the subject site would be largely confined to the site itself.<sup>233</sup>
- [240] Fourthly, the evidence demonstrates that it will take a long time for residential development on the subject site to justify substantial retail and education facilities.<sup>234</sup> In the meantime the development would, far from assisting to make the broader area more self-sufficient, simply be adding lots at a location remote from facilities. As Mr Perkins said in the planning JER “early residents will be left in an isolated, under-serviced and car-dependent fringe location, contrary to the goal of all contemporary urban planning in Australia”.<sup>235</sup>

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<sup>227</sup> Ex 23 pg 63.

<sup>228</sup> T7-12.

<sup>229</sup> Appellant’s submissions para 242.

<sup>230</sup> Appellant’s submissions para 242.

<sup>231</sup> Ex 23 para 103.

<sup>232</sup> Ex 23 pg 11 para 12.

<sup>233</sup> T6-33.

<sup>234</sup> being the only non-residential facilities about which there was any specific evidence about need/timing.

<sup>235</sup> Ex 34 para 98.

[241] Insofar as the last point is concerned, the need experts agreed, in the second supplementary JER as follows:

**“Retail Facilities**

15. A convenience centre anchored by a 500sq.m convenience store with five to six speciality shops requires around 3,000 – 3,500 persons. This would be supportable around year ten of the development.
16. A full-line supermarket based centre of around 6,000 sq.m with a range of other uses usually requires around 8,000 – 9,000 persons. This would be supportable around year 23 of the development.
17. Over time as the population increases the centre could be developed to a larger size and up to 10,000 – 12,000 sq.m of uses most likely as a guide by around year 30.

**Education Facilities**

18. A childcare centre is typically provided at one place for every three children aged 0 – 5 years of age. Consequently, assuming children 0 – 5 years of age up 10%-12.5% of the population around 300 children would be required for the first childcare centre. This would be required by year 8-10. After that time frame, childcare centres could be provided every six to seven years.
19. Primary schools typically target around 400 – 500 students supporting children aged 5 – 11 years. Assuming 10%-12.5% of the population is aged 5 – 11 years and increasing over time, the first primary school is likely to be demanded by year 15.
20. It is understood that the typical threshold for a new high school in an urban area is a population of around 1,200 students aged 11-17. Assuming students aged 11 – 17 are 10%-12% of the development’s population, a high school would be expected by around year 26 – 30.”

[242] It should be noted that, if anything, those predictions in terms of the years at which those facilities would be supportable are optimistic, since they are based on an occupancy rate of 3 residents per dwelling, which is an average for single lot dwellings and is decreasing over time.<sup>236</sup>

[243] Accepting that evidence, those who would come to live in the first lots developed would have to wait a decade before even a convenience centre was supportable. Even Mr Duane acknowledged that it would be undesirable if nothing was provided for 10 years.<sup>237</sup> A full line supermarket would not be supportable for almost a quarter of a century. Currently, the nearest full line supermarket is as Mr Coghlian opined (and I

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<sup>236</sup> T6-36, T7-5.

<sup>237</sup> T6-42.

agree), undesirably remote.<sup>238</sup> The typical threshold for a primary school is unlikely to be reached before 15 years, with the threshold for a high school being more than a quarter of a century away, if it ever materialises.

- [244] The reservation about whether the typical threshold for a secondary school will ever be met is because the experts put that around 26-30 years which is when they assume that 3300 to 4000 lots will have been developed, sold and occupied. Whilst the initial proposal was for the development to achieve up to 5100 lots, the evidence suggests that will no longer be achievable. There is uncertainty around what lesser number could ultimately be provided.
- [245] There is a decrease in likely lot yield as a consequence of changes to the proposal, which have already been noted, particularly so as to address the ecological issues. This has resulted in a decrease in the developable area and the need to set some of that aside for things such as for example, buffers and storm water treatment areas now proposed to be within those areas. As has already been noted in the context of agriculture experts, there is also the possibility of greater buffers being required at the development permit stage.
- [246] There has been a loss of around a third of the developable area from 711 ha to 445 ha - a loss of some 265 ha. If the yield of 5100 lots from the 711 ha were accepted and then reduced in proportion to the reduced developable area, the yield would be around 3200 lots. That is however, a crude exercise. Mr Perkins carried out a more detailed analysis of the latest plan to estimate that there would be approximately 250 ha of land for residential lots. That however, did not allow for the 50 m ecological buffer or the 40 m agricultural buffer. Both parties, in submissions, adopted an additional reduction to 200 ha to take account of that. That is a net area (excluding roads). Assuming it is mostly used for 600m<sup>2</sup> lots (but some 450m<sup>2</sup> as well) produces a yield of 3444 lots, which is towards the bottom end of the threshold for a secondary school. It also suggests that the development will be nearing completion before there is justification for a secondary school. Of course, even those predictions may turn out to be optimistic if less land can be given over for lots because the agriculture buffer needs to be wider or the infrastructure (eg stormwater treatment devices) within the developable area larger.
- [247] Fifthly, whilst it would be logical to suggest that a large master planned community should include a range of uses so as to achieve an appropriate degree of self-sufficiency, there has been no specific evidence about the need for the many other urban uses contemplated by the application or when, if they are needed, they might be realised.
- [248] For the reasons discussed, I am not satisfied that there is a significant need for the development application to be approved so as to provide facilities which would be used by those in the broader area. The non-residential facilities, particularly the retail

and educational facilities of which there was some evidence, would primarily serve the residents of the development itself and be reliant on a sufficient population such that the facilities will be a long time coming with the consequence that, in the meantime, the development would do more to locate people in a location remote from facilities than it would to benefit the wider area.

[249] It was contended that there is a need for the proposed development in circumstances where, unlike the subject site, much of the future land supply set aside for development in Townsville is significantly flood affected. That is relevant to paragraph (h) of the appellant's primary grounds which is dealt with later and does not significantly assist the appellant.

[250] For the reasons given I do not consider that there is any significant need to support approval of the subject development application. I do not consider that the appellant has made out paragraph (c) of its primary grounds.

**(ii) The Benefits of the Site and Development from a Flooding Perspective**

[251] The development:

- (i) would be substantially flood free and, indeed, have immunity to the extent that it would be suitable for the provision of a refuge for use in times of flood.<sup>239</sup> It would also not be subject to cyclonic storm tide and can be engineered to achieve immunity from dam failure.
- (ii) could be carried out in a way that does not adversely impact on others, from a flooding perspective.
- (iii) can (subject to a qualification discussed below) be conditioned to require the proposed external road upgradings to be of a Q100 standard, so as to provide flood free access, at least to that standard.

[252] From the above the appellant advances two of its primary grounds/matters in favour approval, namely ground (g) which relates to the benefit to be obtained from having a flood refuge on the site and ground (h) which relates to the sites' suitability, from a flooding perspective, relative to other land in Townsville.

[253] Ground (h) however, is not a matter upon which I am prepared to place a lot of weight. Even accepting that the site performs well relative to others, it does not follow that land which has the benefit of approvals for urban development or which the planning documents contemplate as being suitable for future development cannot appropriately be developed for such purposes, with the result that the proposed development is needed in order to, in effect, take their place in providing for such development to occur. The evidence does not go so far as to establish that the planning strategy, as to the provision for future development of this kind, is, in any substantial way, unsound

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<sup>239</sup> with the majority of lots being above the PMF – Ex 14 pg 3.

on the basis of insurmountable flooding constraints affecting land planned to provide for future development of this kind. It may be noted that the Council has not made amendments of relevance, in this regard, following the 2019 flood. I accept that the relative suitability of the site, from a flooding perspective, is a factor that would weigh in favour of concluding that the subject site is an appropriate one on which to permit development of this kind in the event that a location beyond those contemplated by the planning documents was considered appropriate, but it is not something which weighs heavily in favour of concluding that a location at odds with the planning strategy in the planning documents is appropriate in the circumstances.

- [254] Ground (g) is worthy of some weight. It was a point of agreement, in the 3<sup>rd</sup> stormwater JER that, subject to increased flood immunity on access roads and suitable detailed design, the development would potentially provide significant benefits to existing flood affected development east and north-east of the subject site, as a regional evacuation centre for the suburbs of Kelso, Rasmussen and Condon. As has been noted, it is proposed to have upgrades conditioned on any approval of the subject application. Accordingly there is the potential for a benefit of the kind referred to.
- [255] There are at least two things to observe about this potential benefit. First, there is some level of uncertainty about the proposed on-site emergency centre. Mr Collins, in his appeal report, set out development requirements for adequate emergency flood management on the site.<sup>240</sup> They included an ambulance/fire station (and functional helipad for helicopter evacuations). This contemplates a commitment from State agencies. Further, they included a medical centre and a town centre management structure with a full time on-site manager to act as an emergency flood manager. In that regard however, there is no fixed timing for the development of the town centre and the evidence of the need experts suggests that it will be quite some time before other than modest retail facilities will be provided.
- [256] Secondly, the disaster management plan for the Townsville City Council identifies major evacuation routes. The Ring Road and Riverway Drive are already identified as major evacuation routes, in times of flood, in this area.<sup>241</sup> That is not to say that, leaving to one side the uncertainty issues, the upgrading of the level of immunity of roads linking Riverway Drive to the subject site (accepting, as I do, Mr Gould's evidence to the effect that upgrading the immunity of Beck Drive is not practicable), would be of no benefit. It would increase the extent of the road network that has a Q100 immunity and would provide an option (if and when an evacuation centre is built) to take refuge on the subject site in a facility not otherwise provided in the area, rather than use Riverway Drive to access Ring Road to the north (which lies in an area of the floodplain where flooding - although not necessarily the road - is generally worse) and from there to an unspecified destination. In assessing the extent of that benefit however, it is relevant to bear in mind that we are not dealing with an area that is currently bereft of an evacuation route.

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<sup>240</sup> Ex 36 pg 46.

<sup>241</sup> T4-11.

[257] Whilst I accept that ground (g) provides some support to the application I have ultimately come to the conclusion that it is not a matter, which considered by itself or in combination with other matters in favour of approval, justifies approval of the development application.

**(iii) Sodic Soil/Erosion**

[258] The site contains evidence of severe erosion associated with very sodic and highly dispersive soils, that are widespread, but particularly concentrated in the north-east and south-east sections of the property. Whilst similar landscapes and soils occur throughout the coastal plain,<sup>242</sup> the extent of erosion on the subject site is particularly great.<sup>243</sup> Mr Thompson ranked it as 5 on a scale of 1 to 5.<sup>244</sup> The proposed master plan shows that most forms of development are included in eroded areas.<sup>245</sup>

[259] The extent of the erosion would not prevent the development being realised but, as Mr Sutherland and Mr Thompson agreed, erosion controls beyond those normally employed in subdivisions would be required.<sup>246</sup> Indeed as Mr Thompson pointed out,<sup>247</sup> extensive rehabilitation and remediation works would be required to permanently stabilise the affected areas. Mr Sutherland and Mr Thompson gave some evidence of what that is likely to entail.

[260] Mr Sutherland's approach, as set out in his appeal report, involved updated soil testing, mulching, the application of lime or gypsum and seedbed fertiliser, oversowing a Rhodes Grass based seed mix and placing cane mulch. I accept Mr Thompson's evidence however, to the effect that this underestimates the extent of works required to achieve rehabilitation and does not address the requirements for severe gullies.<sup>248</sup> As he attested (words in brackets added):<sup>249</sup>

Do you believe it [Mr Sutherland's proposed solution] to be feasible?--  
--No I don't.

Why not?---The level of sodic – okay, there are extensive areas of these tough clay subsoils that are exposed at the land surface. Simply dumping a bit of fertiliser and amendment on it, and throwing some grass seeds on it, won't really alter the fact that these are very, very difficult clay soils to deal with. They already have a shape, which is related to the nature of the sodic soils, that makes it very difficult to get 5 relatively uniform conditions across the area. You can't get away with this, unless you do some degree of physical earthworks. Now, I'm not talking about physical earthworks that are part of, you know,

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<sup>242</sup> T12-8.

<sup>243</sup> T12-8.

<sup>244</sup> T12-8.

<sup>245</sup> Ex 26 pg 2.

<sup>246</sup> Ex 40 pg 6.

<sup>247</sup> Ex 26 pg 2.

<sup>248</sup> T12-15.

<sup>249</sup> T10-70, 71.



a wetland environment, or part of a sedimentation [indistinct] I'm talking about physical earthworks, to get the topsoil and immediate subsoil of relatively uniform character, so whatever you plant in 10 there, whenever you plant it, will come up in a relatively uniform rate. So that's my concern with that. Now, that is solely to do with the areas outside of the immediate eroding stream bed. Inside the eroding stream bed, that's an even more serious issue.

- [261] It has already been noted that Mr Thompson envisaged works in the waterways including armouring and reshaping. The conclusion is that the issue, whilst not rendering the site incapable of development as proposed, would require extensive and expensive works, which, as Mr Thompson point out, ought be done at the outset.<sup>250</sup> Mr Sutherland appeared to be somewhat flummoxed when questioned about the timing and duration of the process.<sup>251</sup> I prefer Mr Thompson's view as to when it should occur. Mr Thompson's evidence was that the cost of rehabilitation would run into "many millions of dollars", and that he would not be surprised if it ran to in the order of tens of millions of dollars.
- [262] The appellant sought to turn this constraint into an advantage, in terms of obtaining an approval. It pointed to the site's relatively low value for grazing, its high level of erosion, the fact that the erosion has been on-going and will, without intervention, continue and the evidence as to the likely high cost of rehabilitation to suggest that rehabilitation is unlikely to occur if the site remains in its rural state and that there is a significant benefit to be obtained, in the form of rehabilitation, if the development proceeds. That is reflected in its primary ground (b).
- [263] It was contended, for the respondent, that the appellant ought be given no credit for its willingness to take on the burden of rehabilitation in circumstances where the evidence shows that the problem has materially worsened as a result of land management during the appellant's ownership of the site. The evidence does not however, establish that the poor land management practices over that time were the fault of the appellant (as opposed to a lessee, for example) or that it knew of the problem and knowingly did nothing about it or what, if any, opportunity it had to address that matter with the person or entity in occupation of the site. I am not prepared to make a speculative finding about those matters and so, in the circumstances, I have not discarded or discounted the potential benefit to be gained from rehabilitation.
- [264] I accept that the rehabilitation would be a benefit. In that regard however, there are two things to note. First, whilst the appellant's ground asserts that the soils are "currently carried down stream with detrimental effects." The evidence did not establish the quantum of runoff or the extent of downstream detrimental effect to date or the likely extent of effect if the erosion problem on the subject site is not arrested.

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<sup>250</sup> T12-10.

<sup>251</sup> T10-57, 58, 59.

In the course of oral submissions Mr Gore QC accepted that the extent to which the erosion creates an environmental problem is, on the evidence, unknown.<sup>252</sup>

[265] Secondly, whilst it is reasonable to conclude that a rural use of this land is unlikely to produce sufficient funds to carry out rehabilitation works costing tens of millions of dollars as envisaged by Mr Thompson, that does not mean that the erosion problem will necessarily continue, unabated, if the subject proposal does not proceed. Mr Thompson's evidence, which I accept, was to the effect that, for a fraction of the cost of rehabilitation, steps could be taken by way of responsible and appropriate land management practices in the context of a rural use to stabilize (but not rehabilitate) the site, so as to address the risk of further erosion. In this regard he spoke of measures that would include decisions about stock, fencing off areas from access by stock and utilising treatments of some areas of the kind recommended by Mr Sutherland.<sup>253</sup>

[266] Mr Thompson put the likely cost of stabilizing the site, in the context of a rural use, at something in the order of \$500,000. He acknowledged that the expenditure would not bring much of a return to a grazier,<sup>254</sup> but would not discount the prospect of that investment being made. Reference was made to the encouragement owners of degraded sites get in terms of government grants and regulatory provisions, to address such issues.<sup>255</sup> I have previously noted the evidence of the ecologists as to the increasing awareness of sustainable farming and grazing practices. I am not prepared to discount, even on the balance of probabilities, the prospect of the land being stabilised in the future by the application of more responsible land management in the context of a rural use.

[267] The evidence falls short of persuading me to find that the site would be consigned to unarrested erosion into the future in the absence of approval of the subject development. I am similarly not prepared to find that the site should be regarded as unsuitable for retention for rural purposes, because of the need to address the erosion issue. Notwithstanding those observations however, I accept that the rehabilitation of the site, from an erosion perspective, would be a beneficial outcome of the proposed development. Ultimately however, I do not consider that it is a benefit which, considered individually or in combination with other factors, justifies approval of the application.

#### **(iv) Other Grounds/Factors in Favour**

[268] Paragraph (a) of the primary grounds is that the site is unsuitable for agriculture and has low suitability for grazing. The site is neither good quality agricultural land nor strategic cropping land<sup>256</sup> and is low-potential grazing country.<sup>257</sup> The site can however be, and has been, used for grazing. It should also be recalled that, the natural

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<sup>252</sup> T14-32.

<sup>253</sup> T12-10, 11, 14.

<sup>254</sup> T12-16.

<sup>255</sup> T12-9, 10.

<sup>256</sup> Ex 26 pg 2.

<sup>257</sup> T12-5.

economic resources element under CP 2014 contains a specific outcome which seeks to avoid fragmentation of rural land even when there is a lack of viability. The site does not lack utility in its zoning under the planning documents. Further, the purpose of the application of the rural zone (or rural planning scheme) is not limited to the protection of rural productivity. It includes, for example, matters of character and landscape value. That is reflected in the provisions of both TPS 2003 and CP 2014 discussed earlier. The zoning/area designation also serves to constrain the expansion of urban development. The allocation of the land to the rural planning area pursuant to TPS 2003 is consistent with its location outside the urban growth boundary. The zoning of the land under CP 2014 is consistent with its strategy of containment of urban growth. These strategies serve a number of purposes. For example, CP 2014 links the avoidance of urban development beyond existing boundaries to avoiding increasing pressure on environmentally important values.

- [269] Paragraph (p) and (q) of the primary grounds relate to the restoration and protection of the waterway corridors on the land and the proposed dedication of land. The stabilisation and rehabilitation of the eroded areas have been discussed separately. These aspects must be seen in the context of the ecological impact of the development as a whole, which would, as has been observed, introduce new or increased environmental threats. For the reasons previously given I do not consider that it has been demonstrated that the proposal represents any significant overall advantage for the environment. Indeed I have found that it would be preferable to retain it as a rural holding.
- [270] Paragraph (l) of the marginal grounds speaks of the advantage of master planning in ensuring an orderly and efficient delivery of infrastructure, services and facilities. Master planning does have that advantage, particularly in relation to the delivery of infrastructure, services and facilities within the development. In this case the site is not currently serviced by infrastructure. Issues in relation to the orderly and efficient delivery of infrastructure to the site have been considered earlier in these reasons.
- [271] Paragraph (i) of the marginal grounds relates to the intention to provide for facilities to allow residents to “age in place”. That would be an appropriate aspect of a new master planned community, but does not add much in terms of justifying approval of such a community on the subject site.
- [272] Paragraph (j) of the marginal grounds relates to the generation of employment. It may be accepted that a substantial new master planned development as proposed would generate employment, but the planning documents make provision for employment generating development to occur elsewhere. The ground adds little if anything.
- [273] Paragraph (o) of the marginal grounds relates to sustainability measures. Other than for the sites proximity to gas, electricity and water infrastructure, the things relied on were the potential to establish a co-generation or tri-generation gas fired power centre on the site and the development using its own water centre and recycling to achieve greater water efficiency. Assuming (favourably to the appellant) that there is a real

prospect of these things being realised, they represent positive aspects of the proposal that might not be achieved in other developments. It is something to which I have had regard and which warrants some, but not great, weight.

- [274] Paragraph (r) asserts an absence of unacceptable amenity impacts. I have had regard to my findings on amenity, to the extent they are favourable to the appellant, but that does not alter my conclusion.

**(v) Appellant's Summary**

- [275] The summary of the appellant's grounds/matters in favour of approval commences with an introductory paragraph before five sub-paragraphs which refer to benefits which it is said would flow from the proposal but would probably or certainly not be enjoyed otherwise. Those five matters have already been discussed in these reasons. The introductory paragraph:

- (i) refers to the lands relative unsuitability for rural uses compared with its suitability for the proposed purposes
- (ii) asserts that the proposed purposes would be for the benefit of a much larger number of community members than currently benefit from the lands zoning and potential uses

- [276] The alleged unsuitability of the land for rural purposes has been discussed and rejected. The appellant's proposal is based on only a minority of the site being suitable for development and then only after works to deal with the erosion issue. Part of the subject land may be physically suitable for development, but its suitability from a planning perspective is the subject of consideration of the various issues otherwise dealt with in these reasons.

- [277] As to the number of community members to benefit from the use of the land, it should not be thought that the benefit to the community, of the lands' retention for rural use is limited to the small number of people who might occupy the land. I have already dealt with the utility of the site in its zone. To the extent that the land, under its rural use, contributes to the broader planning strategy for the city, its benefit to the community is much broader.

**Conclusion on Material Change of Use Component**

- [278] For the reasons given, the proposed material change of use finds itself starkly at odds with the planning documents, particular by reason of its urban (non-rural) nature. That is true of each of the planning documents. The Council's current planning scheme which, in my view, is deserving of considerable weight is against the expansion of urban development into rural zoned land. There is no need, of any significance, to justify approval of the subject development application. The current planning scheme, and the planning strategy apparent from its provisions, was based on the assumption that the document set aside sufficient land for housing, businesses and community uses to meet Townsville's needs for at least 25 years. The evidence in this case shows

that nothing has occurred which undermines that assumption in any way that would call for this site to be approved for development as proposed. That planning scheme also expressed an intention to monitor the supply of new land for residential development. The next planning scheme review is due in but a few years time. There is ample opportunity for the Council to respond to any possible future shortage that may appear on the horizon. There is no sufficient basis otherwise to find that there is a need to support approval of the application.

- [279] The stark departure from the planning strategy with respect to land use coupled with the absence of any significant need are ultimately the matters of most significance in the context of this particular case and which point to refusal of the application for a preliminary approval for a material change of use. There are grounds/matters in favour of approval some of which I have accepted as having some substance. None however, considered individually or collectively, alter the conclusion that the proposed material change of use should be rejected. More specifically, there is nothing which I regard as passing the conflict/grounds test in relation to the conflicts I have found with TPS 2003 in relation to the nature of the use, even if they were assumed to be the only conflicts. I also would conclude that the application should be refused even if those provisions were a matter simply for consideration in the assessment under s 3.5.5 prior to a discretionary decision (as was submitted for the appellant). I have previously indicated the weight I place on the later planning documents. There are also other matters of conflict/matters raised against the proposal which I have discussed earlier and which serve to reinforce my conclusion.
- [280] This is a case where rural land was purchased on the speculative basis that it would be “next in line” to be permitted to be developed, even though the provisions of the planning scheme gave no basis for such an expectation. Subsequent attempts to persuade the respondent to draw its new planning scheme in a way which favoured those aspirations failed, as did attempts to persuade the respondent to support the subject development application. The relevant planning documents have been consistent in their treatment of the subject land as part of the relevant broader planning strategy. The proposal flies in the face of that strategy and I have not been persuaded that, in the circumstances, the proposed MCU for the site ought be approved.

### **Approval in Part**

- [281] In the event that I was not minded to approve the development in whole (as I am not) I was asked to consider approving it in part and, in particular, to approve Stage 1, subject to conditions which, amongst other things, would require the dedication of open space areas. Relatively little argument was directed to it and it is difficult to see the rationale for such an approval.
- [282] Development of Stage 1 alone may reduce the extent of the introduced ecological threat but it would still offend the planning strategy as to the location of uses without contributing much in the way of the long term housing stock or facilities which formed important components of the appellant’s ultimately unsuccessful case on need

and on the benefits of its master planned proposal. Without the balance of the development it would be, as Mr Perkins said, “an isolated community that had no hope of any significant level of self-containment”,<sup>258</sup> located contrary to the planning documents whilst having an even weaker case with respect to need. I am not minded to grant an approval in part.

### **The Variation Component**

[283] The debate in the case was overwhelmingly focused on the material change of use component. The variations attracted relatively little consideration.

[284] I have earlier outlined the general nature of the variations sought. In the appellant’s written submissions it was said that, in addition to variations otherwise identified, it was proposed to override the Urban Growth Boundaries Code. I have also noted that there would be a need for revision of the variations in the event that the Court delivered reasons indicating that the development application would be approved. It is therefore not possible to deal with the variations in a comprehensive way.

[285] It has already been observed that the assessment of the proposed variations should have regard to their consistency with other aspects of the planning scheme.<sup>259</sup> Further the decision on the variations must not compromise the achievement of the desired environmental outcomes for the planning scheme area. It was submitted, on behalf of the respondent, that the variations sought by the appellant would result in (or would have resulted in) inconsistency between those provisions and the DEO’s. Had I decided to approve the MCU component of the application then I would have had to have been satisfied that a decision to approve that component would not have compromised the achievement of the DEO’s. To the extent that the variations do no more than is appropriate to provide a framework for future applications for approvals to implement the MCU, I would then have been minded to allow them notwithstanding a level of conflict in so far as land use is concerned.

[286] I have previously noted that one of the proposed codes calls up codes from CP 2014 as at a certain date. They are, in that way, to be made applicable for the future of what would be a large project with a lengthy development period. That brings the obvious risk of applying codes that are, in the future, out of date or no longer appropriate. I would have been loath to approve of such a variation. Mr Gore QC accepted that common experience shows that codes and standards change over time.<sup>260</sup> He initially foreshadowed<sup>261</sup> a change to the application, so that the codes from time to time would apply, but did not proceed with that.<sup>262</sup> Ultimately he submitted that a condition nevertheless might be imposed by the Court which required assessment against the new provisions (from time to time) even though that is not what his client requests. He acknowledged that the failure to explore that in the course of the case made it

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<sup>258</sup> T11-79.

<sup>259</sup> s 3.5.5A(d).

<sup>260</sup> T14-19.

<sup>261</sup> T13-46.

<sup>262</sup> T14-16.

difficult for him to press the submission.<sup>263</sup> Had I been otherwise minded to approve the MCU, I would have sought further assistance from Counsel in relation to this aspect.

[287] One of the matters to have regard to in assessing the variations is the effect of the variations on any right of a submitter for following applications, with particular regard to the amount and detail of the supporting material for the current application available to any submitters. It was contended, on behalf of the respondent, that having regard to length of time that has expired since public notification of the application, the extent to which the proposal has evolved since that time, the information not available to submitters and indeed still not available, the estimated time for the delivery of the development, and the level of uncertainty as to the final form of the development, the removal of submitters rights for subsequent approvals is not justified.

[288] It is, of course, neither surprising nor unusual for there to be a degree of uncertainty about the final form of development at the time a preliminary approval is given for a master planned development such as is proposed here. That does not mean that changes to levels of assessment, for the purposes of future applications, are necessarily inappropriate, assuming that the scheme, as varied, would provide for an appropriate assessment of future applications. That proviso means that a decision about the levels of assessment ought not be made until there is clarity about the issue with the codes referred to above and the changes otherwise to the requested variations.

[289] Whilst I appreciate that the application has been on foot for a long time, the general nature of the proposal has remained the same, with changes largely made in an attempt to mitigate concerns. The range of potential uses and the way the master planning process is proposed to work have not changed. Had I been satisfied that the MCU ought be given a preliminary approval then I would have been prepared to entertain changes of levels of assessment appropriate to reflect the fact that the suitability of the site for the proposed master planned community had been determined sufficiently to grant that approval.

[290] The range of uses for which a change to the level of assessment has been requested is broad, but that is not unexpected in relation to a substantial master planned community proposed in an otherwise rural area and which would need to achieve a level of self-sufficiency by the provision, within the development, of a range of uses. The need experts agreed that if there is a need for the residential development then there will be a need for other components of the master plan.<sup>264</sup>

[291] The extent to which the respondent takes issue with the proposed changes to the levels of assessment for that range of uses is unclear. It would seem unlikely, for example, that there would be opposition, should the MCU component be granted, to the variation requested so that a detached house in a residential precinct is self assessable,

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<sup>263</sup> T14-21.

<sup>264</sup> Ex 23 pg 11 para 12.

rather than impact assessable. Had I approved the MCU component I would, before finally determining the variations, have sought further assistance from Counsel for the respondent in relation to the extent to which the proposed changes to the levels of assessment were opposed and the reasons for opposition to the specific variations sought. It is unnecessary for me to trouble Counsel further in relation to the variations however, because, having determined to refuse the material change of use component, I am required by s 3.5.14A(2) to refuse the variation component as well.

### **Conclusion**

[292] For the reasons given, the appeal is dismissed.