

# PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Kenfrost (1987) Pty Ltd v CRC & Ors* [2024] QPEC 15

PARTIES: **KENFROST (1987) PTY LTD (ACN 082 384 325)**  
**TRUSTEE UNDER INSTRUMENT 716471770** (appellant)  
**v**  
**CAIRNS REGIONAL COUNCIL** (respondent)  
**and**  
**PILEBRIDGE PTY LTD**  
(first co-respondent)  
**and**  
**MSF SUGAR PTY LTD**  
(second co-respondent)

FILE NO: PEC 16 of 2020

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Cairns

DELIVERED ON: 10 April 2024

DELIVERED AT: Brisbane

HEARING DATE: 3, 4, 7 & 8 November 2022

JUDGE: Morzone KC DCJ

ORDER: 

1. **Appeal dismissed.**
2. **The development application for a preliminary approval for a material change of use (including a variation request) and a development permit for reconfiguring a lot (3 into 65 lots, new roads and balance lot) is refused.**
3. **I will hear the parties as to any other consequential orders.**

CATCHWORDS: **PLANNING AND ENVIRONMENT** – Appeal against refusal of preliminary approval for material change of use of premises

– variation request and reconfiguration of a lot (3 lots into 65 lots, new roads and balance lot).

**Preliminary approval for material change of use of premises** - Compliance with Assessment Benchmarks - Whether the proposed material change of use complies with the assessment benchmarks having regard to the inclusion of the land within the 'Rural Zone' under *CairnsPlan* - Whether the proposed material change of use results in unacceptable impacts on the landscape values of the rural area in which the land is located - Whether the proposed material change of use results in acceptable flood immunity to the land; adverse interference with the function of the drainage catchment; adverse flooding impacts having regard to the likely impacts on other land in the locality; an acceptable response to the natural features and constraints of the land; complex engineering solutions; and significant ongoing maintenance works to be assumed by the local authority - Whether the proposed material change of use results in: any unacceptable loss of agricultural land; and any unacceptable impacts on the capacity of rural land in the locality (other than the land) to be used for agricultural purposes - Whether the degree of any non-compliance with assessment benchmarks, when considered as a whole, is such that the proposed material change of use fails to advance the planning policy for the land, and the strategic intent for the planning scheme area expressed in the Strategic Framework in *CairnsPlan* - Whether, having regard to the matters listed below, there are relevant matters sufficient to warrant approval or refusal of the proposed material change of use; Whether in the exercise of the Court's discretion under s 60(3) of the *Planning Act* 2016, the proposed material change of use should be approved.

**Variation request** - Whether the variation request should be approved having regard to assessment of the proposed material change of use; the consistency of the variation request with the planning scheme, regional plan, state planning policy; common material and future submitter rights.

**Development permit for reconfiguring a lot** - If the proposed material change of use and variation requests are approved, whether the reconfiguration should be approved.

LEGISLATION:

*Planning Act* 2016 (Qld) ss 5(1), 45(5)-(7), 60(3).  
*Planning and Environment Court Act* 2016 (Qld) ss 43.  
*Planning Regulation* (Qld) 2017 s 31.

CASES:

*Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003  
*Abeleda & Anor v Brisbane City Council* (2020) 6 QR 41  
*All-A-Wah Carapark v Noosa Shire Council* [1989] QPLR 155

*Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16  
*Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157  
*Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46  
*Bell v Brisbane City Council* [2018] 230 LGERA 374  
*Bunnings Building Supplies Pty Ltd v Redland Shire Council* [2000] QPELR 193  
*Burmah Fuels (Qld) Pty Ltd v Redland Shire Council* (1995) QPLR 103  
*Casagrande Investments Pty Ltd v Redland City Council* [2011] QPELR 426.  
*Clark v Cook Shire Council* (2007) 152 LGERA 420  
*Clermont Quarries Pty Ltd v Isaac Regional Council* [2021] QPELR 65  
*CPT Manager Ltd v Central Highlands Regional Council* (2010) 174 LGERA 412  
*Cut Price Stores Retailers v Caboolture Shire Council* [1984] QPLR 126  
*Cuthbert v Moreton Bay Regional Council* [2016] QPELR 179  
*Development Watch Inc v Sunshine Coast Regional Council* [2021] QPELR 200  
*Development Watch Inc v Sunshine Coast Regional Council* [2022] QCA 006  
*Elan Capital Corporation Pty Ltd v Brisbane City Council* [1990] QPLR 209  
*Fabcot Pty Ltd v. Cairns Regional Council & Ors* [2021] QPELR 40  
*Fitzgibbons Hotel Pty Ltd v. Logan City Council* [1997] QPELR 208  
*Fox v Brisbane City Council* [2003] QCA 330  
*Friend v Brisbane City Council* [2014] QPELR 24  
*Gracemere Surveys Pty Ltd v Peak Downs Shire Council* (2009) 175 LGERA 126  
*Grosser v Council of Gold Coast* [2001] 117 LGERA 153  
*Harburg Investments v Brisbane City Council* (2000) QPELR 313  
*Indooroopilly Golf Club v. Brisbane City Council* [1982] QPELR 13  
*Intrafield Pty Ltd v Redland Shire Council* (2001) 116 LGERA 350  
*Intrafield v Redland Shire Council* [2001] 116 LGERA 350  
*Isgro v. Gold Coast City Council & Anor* [2003] QPELR 414  
*Jakel Pty Ltd v Brisbane City Council & Anor* [2018] QPEC 21  
*JSFNQ 1 Pty Ltd v Townsville City Council* [2021] QPEC 28  
*Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675  
*KPRA v Brisbane City Council* (2014) QPEC 64  
*Leatch v National Parks and Wildlife Service and Shoalhaven City Council* (1993) 81 LGERA 270  
*Lennium Group Pty Ltd v Brisbane City Council & Ors* [2019] QPELR 835  
*Lipoma Pty Ltd & Anor v Redland City Council & Anor* (2020) QCA 180  
*Lloyd v Robinson* (1962) 107 CLR 142  
*Mackay Shopping Centre Pty Ltd v Mackay Regional Council* (2013) QPELR 661  
*McKay v Brisbane City Council* [2021] QPEC 42  
*Metroplex Management Pty Ltd v Brisbane City Council* [2010] QPELR 270

*Murphy v Moreton Bay Regional Council & Anor* [2020] QPEC 10;  
*Navara Back Right Wheel Pty Ltd v. Logan City Council; Wilhelm v. Logan City Council* [2020] QPELR 899  
*Pike v Tighe* (2018) 262 CLR 648  
*Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485  
*R v Brisbane City Council; ex parte Read & Read* (1986) 2 Qd R 22  
*Roosterland Pty Ltd v Brisbane City Council* (1986) 23 APAD 58  
*Scurr v Brisbane City Council* (1973) 133 CLR 242  
*TMP Holdings Pty Ltd v. Caloundra City Council* [2002] QPELR 1  
*Town Planning v Sunshine Coast Regional Council* [2021] QPEC 36  
*Traspunt No. 14 Pty Ltd v Moreton Bay Regional Council* [2021] QPEC 4  
*Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95  
*United Petroleum Pty Ltd v. Gold Coast City Council & Anor* [2018] QPELR 510  
*Walker v Noosa Shire Council* [1983] 2 Qd.R. 86  
*Watts & Hughes Properties Pty Ltd v Brisbane City Council* (1998) QPLR 273  
*Westfield Management Ltd v Pine Rivers Shire Council* (2004) QPELR 337  
*Wilhelm v Logan City Council & Ors* [2020] QCA 273  
*Williams McEwans v Brisbane City Council* [1981] QPLR 33  
*Wingate Properties Pty Ltd v Brisbane City Council* (2001) QPELR 272  
*Yamauchi v Jondaryan Shire Council & Ors* [1990] QPLR 13.  
*Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QCA 168  
*Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82

COUNSEL: Hughes KC, C with Batty, M for the Appellant  
 Job KC, B; with Stork, T for the Respondent

SOLICITORS: Holding Redlich for the Appellant  
 P&E Law for the Respondent  
 Cullen, S of the Planning Practice for the First Co-Respondent by Election  
 Edgerton, B of MSF Sugar for the Second Co-Respondent by Election

## SUMMARY

- [1] The appellant developer appeals the respondent Council's decision of 4 December 2019 to refuse the development application for land located off Redlynch Intake Road at Redlynch, a suburb of Cairns for:
  - (a) a preliminary approval for a material change of use (including a variation request); and
  - (b) a development permit for reconfiguring a lot (3 into 65 lots, new roads and balance lot).
- [2] The appellant contends that the land, while constrained for agricultural use in the Rural zone, is better suited for orderly and logical urban development due to its proximity to various public and private infrastructure, because concerns related to flooding and agriculture are favourable, and other relevant matters support the proposal, especially given the town planning, economic, and community needs for the proposal, despite expected non-compliance with the planning instruments.
- [3] The Council stands by its decision, asserting that the proposal is inconsistent with the planning instruments because it cuts across clear planning objectives such as limiting urban development to existing designated urban zones, protecting rural land for rural activities, avoiding flood-prone areas for development, and safeguarding landscape character. It also criticises the appellant for not upholding its obligation to dedicate land for public use.
- [4] The first co-respondent-by-election and second co-respondent-by-election, who submitted against the application, also oppose the appeal, and join in the Council's submissions with some supplementation.
- [5] The critical questions for determination in the appeal are whether:
  - (a) there are non-compliances with the assessment benchmarks;
  - (b) the proposed town planning and land use is acceptable;
  - (c) the proposed development would result in unacceptable flooding impacts;
  - (d) approval of the proposed development would result in unacceptable agriculture and soils impacts;
  - (e) approval of the proposed development would result in unacceptable visual amenity impacts;
  - (f) approval is contrary to reasonable public expectations;
  - (g) there is a need for the proposed development;
  - (h) there are relevant matters that either favour approval or refusal of the proposed development.
- [6] I have concluded that the nature and extent of non-compliance with the assessment benchmarks is significant and, when considered with the relevant matters, warrant refusal of the proposed development because the proposed town planning and land use is not acceptable; the proposal will involve complex engineering solutions; it will result in unacceptable flooding, agriculture and soils impacts, visual amenity

impacts and is contrary to reasonable public expectations in the absence of sufficient need, or other relevant matters favouring approval of the proposed development.

- [7] In the exercise of the discretion under s 60(3) of the *Planning Act* 2016, having assessed the proposed material change of use against the assessment benchmarks, having regard to and assessing against the relevant matters above, the public interest, and the purpose of the *Planning Act* 2016, I am bound to conclude that the proposed material change of use should not be approved because of the nature and extent of conflict with the assessment benchmarks, my findings in respect to the relevant matters, the contradiction to the public interest; and failure to advance the purpose of the *Planning Act* 2016.
- [8] It follows that the variation request should also be refused. The result of the assessment of Part A warrants the refusal of the proposed material change of use. The variation request is inconsistent with the *CairnsPlan*, Regional Plan and State Planning Policy 2017 Part E, and would undesirably deny submission rights for later development on the land.
- [9] It further follows that the development permit for reconfiguring a lot is also refused.
- [10] Accordingly, the judgment is that the appeal is dismissed and the development application for preliminary approval for a material change of use (including the variation request) and a development permit for reconfiguring a lot is refused.
- [11] I will receive further submissions about any other consequential orders.

## **PROPOSED DEVELOPMENT**

- [12] The development application applies for a preliminary approval for a material change of use (including a variation request) and a development permit for reconfiguring a lot (3 into 65 lots, new road and balance lot).
- [13] The variation request seeks to vary the effect of *CairnsPlan* to create use rights consistent with the low-density residential zone to the Stage 4 Land. The Stage 4 residential footprint occupies about 6 ha, and an excavated basin in the floodplain is about 18 ha.

## **Location**

- [14] The land is at 357R-371R Redlynch Intake Road and Jenkins Access in the Cairns suburb of Redlynch.
- [15] It is immediately adjacent to the recently approved Redlynch Vistas residential subdivision and development comprising three stages. For Stage 3 the number of lots approved was reduced to 55 by negotiated decision notice, which also conditionally required the transfer of the balance land to be dedicated to the Council for “*Town Planning Purposes – Drainage and Open Space*” prior to or in conjunction with registration of a Plan of Survey for the 50<sup>th</sup> allotment within Stage 3. This transfer land included the “Stage 4” land now subject of this appeal.

- [16] The current proposal also seeks to excavate the 18-hectare eastern area as compensation for the fill required to raise the appeal land above the floodplain. A buffer strip within part of Lot 122 to the south was included pursuant to a minor change application and an Order made on 17 October 2022.
- [17] The land is proximate to Redlynch State College, St Andrews Catholic College, and AFL Cape York House. It is located immediately east, south, and southeast of existing urban land and directly south, east, and west of areas within the urban footprint outlined in the Regional Plan. It is about 1.25 km south of Redlynch Central Shopping Centre, which is a district hub featuring supermarkets such as Coles and Woolworths, alongside a range of food and drink outlets, veterinary, and health and medical services. The land also adjoins Goomboora Park with barbeques, playgrounds, and picnic shelters.

### **Planning Treatment**

- [18] The proposed development is to be assessed against the *CairnsPlan* v1.2, which relevantly treats the land as:
- (a) mainly within the Rural area and, with a small part within the Future Urban area shown in the Strategic framework map, SFM-1 Settlement pattern;
  - (b) largely within the Rural zone, with a small part within the Low-medium density residential zone;
  - (c) subject to the Flood and inundation hazard overlay;
  - (d) subject to the Landscape values overlay, being partly in the Medium landscape values category and partly in the High landscape values category; and
  - (e) otherwise, outside of the designated Urban Area and outside of the Priority Infrastructure Area boundary.
- [19] The land is within the Regional Landscape and Rural Production Area in the Regional Plan, being outside of the Urban Footprint.
- [20] The State Planning Policy 2017 identifies the land as Agricultural Land Class A or B.

### **PRELIMINARY APPROVAL FOR MATERIAL CHANGE OF USE**

- [21] The appeal is to be heard by way of hearing anew<sup>1</sup> and must be decided by the court standing in the shoes of the assessment manager.<sup>2</sup>
- [22] The *Planning Act* 2016 and *Planning and Environment Court Act* 2016 apply to the appeal. As the development application requires impact assessment, the decision of the court pursuant to s 60(3) of the *Planning Act* must be based upon the assessment

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<sup>1</sup> *Planning and Environment Court Act* (Qld) 2016, s 43.

<sup>2</sup> *Jakel Pty Ltd v Brisbane City Council & Anor* [2018] QPEC 21 at [93].

required by ss 45(5), (6) and (7) and done in a way that advances the purpose of the Act.<sup>3</sup> Accordingly, the court:

- (a) must carry out the assessment of the development application:
  - (i) against the applicable assessment benchmarks in a categorising instrument in effect at the time the development application was properly made;<sup>4</sup> and
  - (ii) having regard to any matters prescribed by regulation to the extent the assessment manager considers those matters relevant to the development;<sup>5</sup> and
- (b) may carry out the assessment of the development application against, or having regard to, any other relevant matter (other than personal circumstances, financial or otherwise);<sup>6</sup> and
- (c) may give the weight the court considers appropriate to any amendments to the planning scheme (none are relevant here);<sup>7</sup> and
- (d) decide to approve all or part of the application; or to approve all or part of the application but impose development conditions on the approval; or to refuse the application;<sup>8</sup> and
- (e) when undertaking this task the court must perform its function in a way that advances the purpose of the Act.<sup>9</sup>

[23] Matters prescribed by regulation, to which regard must be had, include:

- (a) the Regional Plan;
- (b) the State Planning Policy (SPP), to the extent it is not identified in the planning scheme as being appropriately integrated in the planning scheme. The SPP is not identified as being integrated;
- (c) any development approval for the premises or adjacent premises; and
- (d) the common material.

[24] Williamson KC DCJ in *Ashvan Investments Unit Trust v. Brisbane City Council & Ors*,<sup>10</sup> well explained the regime under the *Planning Act* and found that non-compliance with an assessment benchmark no longer assumes primacy in the

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<sup>3</sup> *Planning Act 2016* (Qld), s 5(1).

<sup>4</sup> *Planning Act 2016* (Qld), ss 45(5)(a) & 45(6) & *Planning Regulation 2017*, s 31.

<sup>5</sup> *Planning Act 2016* (Qld), ss 45(5)(a) & 45(6) & *Planning Regulation 2017*, s 31.

<sup>6</sup> *Planning Act 2016* (Qld), s 45(5)(b).

<sup>7</sup> *Planning Act 2016* (Qld), s 45(7).

<sup>8</sup> *Planning Act 2016* (Qld), s 60(3).

<sup>9</sup> *Planning Act 2016* (Qld), s 5(1).

<sup>10</sup> *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16. See also *Murphy v Moreton Bay Regional Council & Anor* [2020] QPEC 10; *Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46 at [19] and [22].



exercise of the planning discretion.<sup>11</sup> The pertinent reasons have been well traversed in subsequent cases and do not need repetition here. Subject to recognition that the *Planning Act* has not changed the characterisation of a planning scheme as the embodiment of the community interest, the Court of Appeal endorsed the more flexible approach in *Ashvan*.<sup>12</sup>

- [25] In *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexs Funds Management Limited v Fabcot Pty Ltd & Ors*,<sup>13</sup> Brown J (with Philippides and Mullins JJA agreeing) said:

“[180] ...*The process adopted by a decision-maker may now be one which involves balancing a number of factors to which consideration was permitted under s 45(5) of the Planning Act in making a decision under s 60(3) of the Planning Act where the factors in favour of approval have to be balanced with the factors in favour of refusal of the application. The weight that is given to each factor is a matter for the decision-maker.*”

- [26] The following principles can be distilled from the seminal Court of Appeal decision of *Abeleda v Brisbane City Council*:<sup>14</sup>

- (a) Section 60 of the *Act* eliminates the two-part assessment process that involved finding non-compliance and then considering whether there was sufficient grounds to justify an approval, despite the non-compliance.<sup>15</sup>
- (b) The change to the assessment and decision-making framework under the *Act* by eliminating the two-stage test has not altered the fundamental nature of a planning scheme as a reflection of the public interest in the appropriate development of land: *Bell, K & K, and Redland City Council v King of Gifts (Qld) Pty Ltd* [2020] QCA 41.<sup>16</sup>
- (c) The absolute terms which McMurdo JA expressed in [67] and [70] of *Bell* that it is in the public interest that the planning scheme is applied, unless the contrary is demonstrated, are no longer applicable to the exercise of the discretion by the decision-maker under s 60(3) of the *Act*, as the outcome of the development application is not necessarily determined by the degree of compliance against the assessment benchmarks and the decision-maker is permitted to have regard to other relevant matters, in addition to the mandatory assessment against the assessment benchmarks in the planning scheme. In most instances, where a planning scheme is not affected by changed circumstances of the type referred to in *Bell* at [68], the decision-maker would give significant weight to the public interest expressed in the

<sup>11</sup> *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 at [51], [53], [54], [57], [58], [60], [67]-[69].

<sup>12</sup> *Abeleda & Anor v Brisbane City Council* (2020) 6 QR 41 at [40], [42], [53]; Cf. *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexs Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95 at [180].

<sup>13</sup> *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexs Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95 at [180].

<sup>14</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003.

<sup>15</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003 at [36].

<sup>16</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003 at [37].

planning scheme in undertaking the decision-making under s 60(3) of the Act.<sup>17</sup>

- (d) The risk, identified by Sofronoff P (with whom Fraser JA and Flanagan J agreed) in the last sentence of paragraph [48] of *K & K* - that “the decision-maker will be doing no more than performing a general weighing of factors in order to determine whether, in the decision-maker’s own view, it would or it would not be better to permit a development on the site to go ahead” - should not be treated as anticipating the process of decision-making under s 60(3) of the Act.<sup>18</sup>
- (e) The decision-maker under s 60(3) of the Act is still required to carry out the impact assessment against the planning scheme benchmarks and can take into account any other relevant matter under s 45(5)(b). The starting point must generally be that compliance with the planning scheme is accorded the weight that is appropriate in the particular circumstances by virtue of it being the reflection of the public interest (and the extent of any non-compliance is also weighted according to the circumstances), in order to be considered and balanced by the decision-maker with any other relevant factors.<sup>19</sup>
- (f) In view of the departure from the two-part test, it is no longer appropriate to refer in terms of one aspect of the public interest “overriding” another aspect of the public interest before a development application that is non-compliant with the assessment benchmarks can be approved. The decision-maker may have regard to a number of factors to which consideration is permitted under s 45(5) of the Act in making the decision under s 60(3) of the Act where the factors in favour of approval (or approval subject to development conditions) have to be balanced with the factors in favour of refusal of the application. The weight given to each of the factors is a matter for the decision-maker in the circumstances, particularly having regard to the purpose of the decision in the context of the Act and the obligation imposed on the decision-maker under s 5(1) of the Act to undertake the decision-making in a way that advances the purpose of the Act.<sup>20</sup>
- (g) The following statement of Sofronoff P in *K & K* at [67] does not apply to the decision-making under s 60(3) of the Act:

*“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.”*<sup>21</sup>

- (h) The court agreed with the observations of Williamson QC DCJ referred to at [51] of *Ashvan* to the legislature’s intention in enacting s 60(3) of the Act to

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<sup>17</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003 at [40].

<sup>18</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003 at [41] - [42].

<sup>19</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003 at [42].

<sup>20</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003 at [43].

<sup>21</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003 at [45].

dispense with the two part test under s 326(1)(b) of the SPA and observed that

*“means that non-compliance with assessment benchmarks, which include planning schemes, no longer has assumed primacy in the exercise of the planning discretion” and “the discretion conferred by s 60(3) of the [Act] admits of more flexibility for an assessment manager (or this Court on appeal) to approve an application in the face of non-compliance with a planning document in contrast to its statutory predecessor”.*<sup>22</sup>

- (i) And, subject to recognition that the Act has not changed the characterisation of a planning scheme as the embodiment of the community interest, the court also agreed with the observations of Williamson QC DCJ at [53]-[54] of *Ashvan* on the role of non-compliance with a planning scheme in the exercise of the planning discretion under s 60(3) of the Act.<sup>23</sup>
- (j) In view of the discretion that is conferred under s 60(3) of the Act, which is not fettered other than by reference to the purpose of the Act and the constraints under s 45 imposed on an impact assessment, the observations by Williamson QC DCJ at [60] of *Ashvan* are apposite:

*“The manner in which the balance between rigidity and flexibility is struck in any given case does not lend itself to a general statement of principle, or precise formulation. The planning discretion, and the inherent balancing exercise, is invariably complicated, and multi-faceted. It is a discretion that is to be exercised based on the assessment carried out under s 45 of the [Act]. It will turn on the facts and circumstances of each case, including the nature and extent of the non-compliances, if any, identified with an assessment benchmark.”*<sup>24</sup>

- [27] The more flexible assessment regime promotes synthesis in the impact assessment whereby the decision-maker, in advancing the Act’s purpose, “must” carry out the assessment against the planning scheme benchmarks as the embodiment of the community/public interest “having regard to” the matters prescribed by regulation, and it “may” also carry out the assessment against, or having regard to, any “other relevant matter”. Notably, the Court of Appeal in *Abeleda*<sup>25</sup> adhered to the principle, as unchanged by the *Planning Act*, that the planning scheme remains the embodiment of the public interest albeit with less structure than McMurdo JA expressed in [67] and [70] of *Bell v Brisbane City Council*.<sup>26</sup>
- [28] In this way the assessment proceeds upon the premise that it is in the public interest that the benchmarks in the planning instrument be applied in each relevant respect, but in doing so the decision-maker may cumulatively consider any “other relevant

<sup>22</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003at [53].

<sup>23</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003at [54].

<sup>24</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003at [56].

<sup>25</sup> *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003 at [40]-[43].

<sup>26</sup> *Abeleda & Anor v Brisbane City Council* (2020) 6 QR 41 at [53]; *Wilhelm v Logan City Council & Ors* [2020] QCA 273 at [77]; Cf. *Bell v Brisbane City Council* [2018] 230 LGERA 374.

matter”, which may or may not promote the community/public interest embodied in the instrument or demonstrate otherwise.

- [29] Importantly, non-compliance with a planning document should be “plainly identified”.<sup>27</sup> The more important the benchmark, the more likely that non-compliance with it will be determinative<sup>28</sup> subject to the nature and weight of any other relevant matter.
- [30] The principles applicable to the construction of planning documents were restated by the Court of Appeal in *Zappala Family Co Pty Ltd v Brisbane City Council*.<sup>29</sup> The Court noted that the same principles which apply to statutory construction apply to the construction of planning documents,<sup>30</sup> but that this still allows for the expressed view that such documents need to be read in a way which is practical, read as a whole and as intending to achieve a balance between outcomes.<sup>31</sup> The discussion by this Court of relevant principles in *Westfield Management Ltd v Pine Rivers Shire Council*<sup>32</sup> has commonly been referred to by this Court, and was referred to with apparent approval in *Zappala*<sup>33</sup>.
- [31] In the context of this case, the following principles of construing planning instruments are relevant: they should be construed broadly, rather than pedantically or narrowly, and with a sensible, practical approach; they should be construed as a whole; and they should be construed in a way that best achieves their apparent purpose and objects. Further, where planning provisions are worded in vague and flexible terms, where there are no clear or definitive criteria by which the Court can determine whether there is conflict between a proposal and the planning scheme, the Court has great width in the decision-making process.<sup>34</sup>
- [32] By virtue of s 5(1) of the Act, the court is obliged to fulfill its function to assess and decide the application in a way that advances the purposes, which includes applying the precautionary principle. Section 5(2)(ii) makes it clear that “advancing the purpose of this Act” includes following ethical decision-making processes that, *inter alia*, “apply the precautionary principle, namely that the lack of full scientific certainty is not a reason for delaying taking a measure to prevent degradation of the environment if there are threats of serious or irreversible environmental damage”. The precautionary principle calls for an assessment of the nature and extent of the consequential risks posed by the various options and the ways and means those risks can be addressed or managed.<sup>35</sup> However, it does not call for a nervous approach or one which is intolerant of any risk under the circumstances.<sup>36</sup>

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<sup>27</sup> *Burmah Fuels (Qld) Pty Ltd v Redland Shire Council* (1995) QPLR 103 at 106; *Fitzgibbons Hotel Pty Ltd v Logan City Council* [1997] QPELR 208 at 212; *Harburg Investments v Brisbane City Council* (2000) QPELR 313 at 328.

<sup>28</sup> *Traspunt No. 14 Pty Ltd v Moreton Bay Regional Council* [2021] QPEC 4 at [26]; *I.B. Town Planning v Sunshine Coast Regional Council* [2021] QPEC 36 at [71]; see also *JSFNQ 1 Pty Ltd v Townsville City Council* [2021] QPEC 28 at [67].

<sup>29</sup> *Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82.

<sup>30</sup> *Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82 at [52].

<sup>31</sup> *Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82 at [56].

<sup>32</sup> *Westfield Management Ltd v Pine Rivers Shire Council* (2004) QPELR 337.

<sup>33</sup> *Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82 at [56].

<sup>34</sup> *Gracemere Surveys Pty Ltd v Peak Downs Shire Council* (2009) 175 LGERA 126 at [30]; *CPT Manager Ltd v Central Highlands Regional Council* (2010) 174 LGERA 412 at [25]-[27].

<sup>35</sup> Cf. *Cuthbert v Moreton Bay Regional Council* [2016] QPELR 179 at [129]; *Yamauchi v Jondaryan Shire Council & Ors* [1990] QPLR 13 at 460 quoting *Leatch v National Parks and Wildlife Service*

- [33] The Court is not the planning authority and should exercise appropriate restraint, as the Court of Appeal affirmed in *Australian Capital Holdings Pty Ltd v Mackay City Council*<sup>37</sup> and added these observations of Keane JA (as he then was) in *Clark v Cook Shire Council*<sup>38</sup> that:

*“The terms of a planning scheme inevitably reflect the striking of an overall balance, in the public interest, between the many interests potentially affected by the planning scheme. It is important not to minimise the force of this consideration. In the striking of the overall balance in a planning scheme, there will be “winners and losers” so far as individual interests are concerned.”*

- [34] The appellant readily acknowledges that by the very nature of the application for preliminary approval, including a variation request, there will be a raft of non-compliances with the benchmarks. In *Metroplex Management Pty Ltd v Brisbane City Council*,<sup>39</sup> this Court confirmed that: “The gravity of conflict between an application for approval of a material change of use and the existing planning scheme cannot be put at naught simply because the applicant applies to vary the effect of the planning scheme so as to obviate the conflict....”.<sup>40</sup>
- [35] Section 61 applies to assessing and deciding variation requests. Relevantly, when assessing the variation request, the Court must consider:
- (a) the result of the assessment of that part of the development application that is not the variation request; and
  - (b) the consistency of the variations sought with the rest of the local planning instrument that is sought to be varied; and
  - (c) the effect the variations would have on submission rights for later development applications, particularly considering the amount and detail of information included in, attached to, or given with the application and available to submitters.”
- [36] Although the power to decide a request to vary the effect of a planning scheme includes a power to approve all or some of the variations sought or different variations from those sought,<sup>41</sup> none are suggested here.
- [37] The application for the development permit for reconfiguring a lot (3 into 65 lots, new roads and a balance lot) is subject to code assessment. However, the reconfiguration could not take effect until after variation. It seems to me that the

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and *Shoalhaven City Council* (1993) 81 LGERA 270 at 282; *Clermont Quarries Pty Ltd v Isaac Regional Council* [2021] QPELR 65 at [12].

<sup>36</sup> *Clermont Quarries Pty Ltd v Isaac Regional Council* [2021] QPELR 65 at [12].

<sup>37</sup> *Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157

<sup>38</sup> *Clark v Cook Shire Council* (2007) 152 LGERA 420 at 431

<sup>39</sup> *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QPELR 270 at [9].

<sup>40</sup> *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QPELR 270 at [11].

<sup>41</sup> *Planning Act* 2016 (Qld), s 61(3)(a).

reconfiguration component will rise or fall with the assessment of the application for the preliminary approval for a material change of use.

- [38] The parties have consolidated a list of issues for consideration in the appeal, including particularly identified assessment benchmarks subject of contention. That does not list all of the assessment benchmarks in respect of which the appellant alleges compliance, as listed in the appellant's response of 20 April 2020 to paragraph 1 of the Council's request for further and better particulars dated 6 February 2020, about which the Council makes no admission about the underlying factual contentions or compliance. With respect to all assessment benchmarks, the Council's position is as set out in the letter to Holding Redlich accompanying these issues, dated 4 August 2020, and Part A of the Decision Notice dated 4 December 2019.

## ASSESSMENT BENCHMARKS

**Does the proposed material change of use comply with the relevant assessment benchmarks having regard to the inclusion of the land within the 'Rural Zone' under *CairnsPlan*?**

- [39] This question involves the assessment against the land use provisions across the relevant planning instruments, particularly:
- (a) *Far North Queensland Regional Plan 2009-2031* - Part D – Regional Land Use Pattern – Intent – Regional landscape and rural production area; Part E – Regional Policies, Section 2.6 Rural Subdivision, Land Use policy 2.6.1, and Section 4 Urban Development – Land Use Policy 4.1.1.
  - (b) *CairnsPlan 2016 Version 1.2 – Strategic Framework – 3.3 Settlement Theme* - Strategic Outcomes 3.3.1(1)(e) & (i), 3.3.1(2) & 8, Specific Outcomes 3.3.5.1(1) (Element – Residential Areas and activities) & 3.3.6.1(1), (2), (3) & (5) (Element – Rural Areas); *Rural Zone Code* - Purposes 6.2.19.2(1)(a), (b) & (c), Local Government Purpose 6.2.19.2(2)(a), Overall Outcomes 6.2.19.2(3)(a), (c), (d) & (e), and Table 6.2.19.3.a, Performance Outcomes PO3, PO4(a),(b) & (c), PO6 & PO7; *Infrastructure Works Code* - Purpose 9.4.6.2(2)(a), (c) & (d) as to stormwater; *Local Government Infrastructure Plan* - 4.3 – Priority Infrastructure Area

### ***Regional Plan***

- [40] The Regional Plan sets a regional land use pattern based on a preferred pattern of development<sup>42</sup> including allocation of land to the Urban footprint, for urban development,<sup>43</sup> and the Regional Landscape and Rural Production area.<sup>44</sup>
- [41] An express land use policy is that urban development is contained within the urban footprint.<sup>45</sup> This is consistent with the objective that urban development is to be

<sup>42</sup> *Regional Plan*, Part D, p.15.

<sup>43</sup> *Regional Plan*, Part D, p.15; 4.1.1, p.74.

<sup>44</sup> *Regional Plan*, 2.6, 2.6.1, p.56.

<sup>45</sup> *Regional Plan*, 4.1.1, p.74.

consolidated and compact and to conserve regional landscape and rural production land.<sup>46</sup> The Regional Plan explains what it means by providing a compact urban form. Infrastructure provision is not the sole driver of compact urban form.<sup>47</sup> A compact form stems from seeking to avoid low density development on the urban fringe and, rather, provide a compact urban form with mixed use and high quality living environments.<sup>48</sup> This is to avoid urban sprawl “into rural areas”, to avoid loss of agricultural land and scenic amenity.<sup>49</sup> Relevantly, even land included within the urban footprint may be unsuitable for urban development because of values or constraints, including scenic amenity, open space and flooding.<sup>50</sup>

- [42] Growth is to occur through “infill” and “redevelopment” but also, for the majority of new growth, within growth areas, including the Mount Peter Master Planned Area.<sup>51</sup> The Regional Plan defines “in-fill development” as “new development that occurs within established urban areas where the site or area is either vacant or has previously been used for another urban purpose...”.<sup>52</sup>

### ***CairnsPlan***

- [43] *CairnsPlan* advances the *Regional Plan*.<sup>53</sup> It sets out the intention for future development of the local government area over 20 years subject to periodical review to respond to changes in the community,<sup>54</sup> taking into account State and regional policies through detailed local responses and context.<sup>55</sup>
- [44] The Strategic Framework sets the policy direction for *CairnsPlan*, and forms the basis for ensuring appropriate development occurs for the life of the scheme.<sup>56</sup> For that purpose, the strategic framework is structured with an overarching strategic intent, four themes for the policy intent (namely, settlement pattern, natural areas and features, economy and infrastructure), strategic outcomes for development for each theme and elements that refine and further describe the strategic outcomes, specific outcomes and land use strategies.<sup>57</sup> The policy direction is also reflected in overlay, local plan, zone and development codes.<sup>58</sup>
- [45] The strategic intent represents the vision for the Cairns region in 2031, including by s 3.2 that:

*“The region’s settlement on the coast and community awareness of natural hazards and climate changes influence land use planning and decision making. Growth has occurred in an efficient manner and urban development is consolidated within the identified urban area. The expected population growth for the region is*

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<sup>46</sup> *Regional Plan*, Objective, p.74.

<sup>47</sup> *Regional Plan*, pp.12 & 21.

<sup>48</sup> *Regional Plan*, p.73.

<sup>49</sup> *Regional Plan*, pp.21 & 73.

<sup>50</sup> *Regional Plan*, p.32 (under Urban footprint heading).

<sup>51</sup> *Regional Plan*, Facilitating growth in Mount Peter, pp.13 & 22.

<sup>52</sup> *Regional Plan*, p.176.

<sup>53</sup> *CairnsPlan*, 2.2.

<sup>54</sup> *CairnsPlan*, 1.1(2) and (4). Cf. *Planning Act 2016*, s.25.

<sup>55</sup> *CairnsPlan*, 1.1(3).

<sup>56</sup> *CairnsPlan*, 3.1(1).

<sup>57</sup> *CairnsPlan*, 3.1(3).

<sup>58</sup> *CairnsPlan*, 3.1(5).

*accommodated through the redevelopment of existing urban areas and the expansion into the future urban area of the Southern Growth Corridor. Rural land has been protected and is used for rural purposes.”*

[46] The settlement pattern is shown in the Strategic Framework maps, which do not include the land in an urban area. The Strategic Outcomes 3.3.1(1)(e), (i) & (m) provide for regional growth and evolution in a way that “*consolidates existing urban areas*”; “*retains rural land for agricultural uses*” and “*maintains and enhances the scenic amenity*” of the region. Strategic Outcome 3.3.1(2) provides for confinement of urban development: “*Urban development in the region occurs within the urban area. Expansion beyond this boundary is not facilitated as it does not support the efficient and orderly delivery of urban infrastructure and a compact urban form*”. Consistently, Strategic Outcome 3.3.1(8)(a) requires that development contributes to a “*compact urban form*” through “*infill development in existing urban areas*”. Unlike the proposal here, “*Infill development*” is defined in *CairnsPlan* as “*development of a vacant or underdeveloped site within a predominantly developed urban area*”. Specific Outcome 3.3.5.1(1) provides that: “*The region’s urban residential growth is accommodated through in-fill and redevelopment of existing urban areas, development of emerging community areas and the development of the future urban area within the Southern growth corridor.*”

[47] As to the rural areas element, the Specific Outcome in s.3.3.6.1 relevantly provides that:

- “(1) Rural areas are used for agricultural purposes.*
- (2) Land uses that have the potential to conflict with agricultural uses are not established.*
- (3) Rural areas contain a range of rural activities of varying scale depending on land suitability and access to infrastructure.*
- (4) Rural areas that provide an inter-urban break or have scenic landscape value are retained in their form for that purpose.*
- (5) Residential uses within rural areas are of a scale and density that is consistent with the level of infrastructure provided and the rural character of the area. ...”*

[48] By s 6.1(1), zones organise the planning area in a way that facilitates the location of preferred or acceptable land uses. Accordingly, the purpose of the Rural zone code pursuant to 6.2.19.2(1)(a), (b) and (c) is to provide for rural uses and compatible non-rural uses and protect Agricultural Land Class A and B land, as here. The Rural Zone code purpose s 6.2.19.2(1)(b) provides for rural uses with limitations on non-rural uses to those compatible with agriculture, environmental features and landscape character and do not compromise the long-term use of land for rural purposes. This intent is also reflected in the local government purpose of the Rural zone code, overall outcomes and performance outcomes.<sup>59</sup> Local Government

<sup>59</sup> *CairnsPlan*, 6.2.19.2(2)(a) and (b); (3)(a), (c) to (e), PO3, PO4, PO6 & PO7.



Purposes 6.2.19.2(2)(a) recognises the primacy of rural production and farming practices in rural areas. Overall Outcomes 6.2.19.2(3) relevantly:

- (3) *The purpose of the code will be achieved through the following overall outcomes:*
- (a) *areas for use for primary production are conserved and fragmentation is avoided;*
  - (b) *...*
  - (c) *rural lots are consolidated to reduce fragmentation to maintain the predominant form of rural use in the area;*
  - (d) *development reflects and responds to the natural features and constraints of the land;*
  - (e) *development other than a rural use is directly associated with the rural character of the zone; ...”*

[49] Performance Outcome PO3 in Table 6.2.19.3.a requires that development be consistent with the purpose and overall outcomes for the Rural zone. PO4(a), (b) & (c) promote uses and development that promote, serve, and are compatible with, rural activities, character and landscapes. PO6 provides for development that responds to the site and surrounding characteristics, features and constraints, and PO7 seeks to protect rural activities from the intrusion of incompatible uses.

[50] The Purpose 9.4.6.2(2)(a), (c) & (d) of the Infrastructure Works Code provide for overall outcomes for the safe and efficient standards for stormwater drainage, and management of stormwater quality and flow and maintenance of existing infrastructure. The priority infrastructure area identifies the area prioritised for the provision of trunk infrastructure to service the existing and assumed future urban development up to 2028.<sup>60</sup>

[51] It seems to me that the proposal contradicts the planning intent advanced by the Regional Plan and the *CairnsPlan* for urban development not to occur outside the designated area; to accommodate population growth by way of “infill” and “redevelopment” of “existing” urban areas, in identified emerging community areas, and the Southern growth corridor; and to preserve rural land and the scenic landscape value of rural land. The proposal is neither infill development as defined, nor re-development in an existing urban area, nor development in an emerging community area or within an urban area in the Southern growth corridor. It is mainly within the Rural area (with a small part within the Future Urban area elsewhere). Contrary to Strategic Outcomes s.3.3.1(2) and (8) of the strategic framework, the proposal does not confine urban development within the existing urban areas with infill development but seeks urban expansion beyond that boundary. And similarly, it contradicts the Land use Policy 4.1.1 of the Regional Plan for the containment of urban development within the Urban footprint.

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<sup>60</sup> *CairnsPlan*, 4.3 & maps.

- [52] Further, the proposed use in the regional landscape and rural production area does not seek to protect areas of rural production or with other non-urban values, such as open space and drainage purposes, as is required by the Regional Plan.<sup>61</sup> Instead the proposal seeks to develop rural land and will impact the scenic landscape value of rural land (as discussed below).
- [53] The planning intent is consistent with the planning of trunk infrastructure in an “*efficient and orderly manner*”<sup>62</sup> in reliance upon planning assumptions about population and employment growth and demand of infrastructure driven by the type, scale, location, and timing of development.<sup>63</sup> Since the proposal is an illogical development in a planning sense, it is untimely, and inefficient in terms of the planned manner of delivering infrastructure.
- [54] In those circumstances, the proposal is illogical and in conflict with the Regional Plan and *CairnsPlan*.
- [55] This is consistent with the town planning evidence of Mr Schomburgk, who, whilst accepting that the proposal was on its face orderly vis-à-vis the approval of stages 1 to 3, does not accept that the proposal is logical because:
- (a) expansion is illogical in a town planning policy sense because of the clear, and sound, intent of the planning instruments;
  - (b) that intent has continued despite amendments to *CairnsPlan*;
  - (c) it would be orderly and logical for the subject land to be transferred, consistent with the Transfer Requirement. It would provide a public space for the enjoyment of residents of stages 1 to 3 and the broader community for connectivity with the adjoining open space corridor along Freshwater Creek;
  - (d) there is direct conflict between the Transfer Requirement and the proposal to develop an area to be used for public purposes, contrary to reasonable community expectations since 2011.
- [56] I prefer the evidence of Mr Schomburgk over Mr Perkins’ evidence to the effect that the development was both orderly and logical vis-à-vis the Regional Plan and *CairnsPlan*.
- [57] For these reasons, I conclude that the proposal fundamentally conflicts with the relevant benchmarks in *CairnsPlan*, which advances the Regional Plan, having regard to the inclusion of the land within the Rural Zone. Of course, this is not surprising, since the appellant applies for a preliminary approval that effectively seeks to vary the planning scheme by its nature.

**Does the proposed material change of use result in unacceptable impacts on the landscape values of the rural area in which the land is located?**

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<sup>61</sup> Ex.14, *Regional Plan*, p.31, Intent.

<sup>62</sup> *CairnsPlan*, s.4.1(2)(d).

<sup>63</sup> *CairnsPlan*, ss.4.1(2)(a), (3) and 4.2(1) and (2).

**The extent to which approval of the proposed material change of use would impact on the current and likely future character, identity and amenity of the locality.**

- [58] These questions involve the assessment against the landscape values and character provisions of *CairnsPlan 2016 Version 1.2 – Strategic Framework – 3.3 Settlement Theme*, Strategic Outcome 3.3.1(1)(m), Specific Outcome 3.3.6.1(4) (Element – Rural Areas), and *Strategic Framework – 3.4 Natural Areas and Features Theme* - Specific Outcome 3.4.4.1(2) (Element – Landscapes); *Landscape Values Overlay Code* - Purpose 8.2.10.3, Overall Outcomes 8.2.10.3(2)(f)(ii) &(iii), and (g)(i), (ii) & (iv), and s 8.2.10.4 criteria for assessment; *Rural Zone Code* - Local Government Purpose 6.2.19.2(2)(c) and Overall Outcome 6.2.19.2(3)(d).
- [59] Strategic Outcome 3.3.1(1)(m) for the settlement theme in the Strategic Framework provides for the region to grow and evolve in a way that maintains and enhances the scenic amenity tropical character and identity of the region. Rural areas provide inter-urban or landscape values.<sup>64</sup> Specific outcome 3.3.6.1(14) seeks to retain rural areas that have scenic landscape value, for that purpose. For landscapes, Specific Outcome 3.4.4.1(1) provides that “*development protects, maintains, and enhances the region’s landscape values*” and s 3.4.4.1(2) seeks to protect rural breaks from visual intrusion. One local government purpose of the Rural Zone Code is to “*provide protection to areas of environmental and scenic significance*”,<sup>65</sup> which is achieved through overall outcomes, including 6.2.19.2(3)(d) that “*development reflects and responds to the natural features and constraints of the land*”.<sup>66</sup> Landscape values are shown on the Landscape Values Overlay Maps. It is trite that Cairns region is renowned for its outstanding scenery, including canefields, and the rural landscape is characterised by distinctive patterns of canefields and other rural production areas, and “*this rural character is an important part of the region’s scenic landscape values*”.<sup>67</sup> In recognition of the region’s scenic beauty comprised of elements, including rural landscape, close to urban areas, population growth pressures present a challenge to maintain those landscape values, the Landscape Values Overlay Code provides in 8.2.10.3(2)(f)(ii) &(iii), and (g)(i), (ii) & (iv) for the protection, maintenance and enhancement of landscape values, by preserving the natural landscape character of watercourses and the rural character of canefields and lowlands.
- [60] The land is mapped as partly within the medium landscape value area and partly within the high landscape value area. The proposal falls within the medium landscape value area, in contrast to stages 1 to 3 of Redlynch Vista, which are not subject to the landscape values overlay. The demarcation follows the boundary between the Low-medium density residential zone and the Rural zone.
- [61] I do not accept Dr McGowan’s town planning opinion that the proposal complies with performance outcomes for development within the medium landscape value area in table 8.2.10.4.a. The land is visually appealing in its undeveloped state as open space or canefields or open space adjacent to cane fields and vegetation. It is part of a contiguous area of rural landscape comprising the vegetated slopes of

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<sup>64</sup> *CairnsPlan*, 3.3.6.1(4), 3.4.4.1(2).

<sup>65</sup> *CairnsPlan*, 6.2.19.2(2)(c).

<sup>66</sup> *CairnsPlan*, 6.2.19.2(3)(d).

<sup>67</sup> *CairnsPlan*, 8.2.10.2.

Redlynch Valley and expanses of rural landscape that rate very highly and reasonably highly, respectively. There is insufficient effective screening of the development of the walking and cycle trails, and the housing rooftops would be 4m higher than the 10m height top of the eastern buffer; it is not of a scale, design, and height that is compatible with the lowland open space and rural landscape values of the locality and landscape values and views will likely be impacted by extensive earthworks. Further, the south-easterly visual amenity of existing residents located in the adjacent stages 1 and 3 will also be impacted in circumstances where stage 4 was not approved for development but dedicated to the Council for open space. Further, contrary to Dr McGowan's opinion, since the application proposes extensive filling of up to 3 metres and retaining walls in the low-lying area, it also falls foul of s 6.2.19.2(3)(d), as well as s 8.2.10.3(2)(f) and (g). On these matters, I prefer the town planning evidence of Mr Schomburgk.

- [62] In my assessment, the proposal will result in unacceptable impacts on the landscape values, visual amenity or character. It seeks to establish 65 houses in contrast to maintaining the open space, it falls foul of the *CairnsPlan* outcome 3.3.1(1)(m), Specific outcome 3.3.6.1(4), Specific outcome 3.4.4.1(2), Rural Zone Code - Local Government Purpose 6.2.19.2(2)(c) and Overall Outcome 6.2.19.2(3)(d), and Landscape Values Overlay Code 8.2.10.3(2)(f) and (g). The proposal will not maintain and enhance the scenic amenity, instead, it will reduce the rural area and degrade scenic and landscape value, and it will present as a visual intrusion into open space.

**Does the proposed material change of use result in:**

- (a) acceptable flood immunity to the land?**
- (b) adverse interference with the function of the drainage catchment?**
- (c) adverse flooding impacts having regard to the likely impacts on other land in the locality; particularly Lot 4 on SP262382; Lot 122 on SP262381 and Lot 501 on SP262383?**
- (d) an acceptable response to the natural features and constraints of the land?**
- (e) complex engineering solutions? and**
- (f) significant ongoing maintenance works to be assumed by the respondent?**

**The extent to which the approval of the proposed material change of use would impact on other land in the locality.**

**The likelihood that approval of the proposed material change of use would result in actionable nuisance with regard to Lot 501 on SP262383**

**The extent to which approval of the proposed material change of use, and associated engineering works and detention facility, would cause an ongoing maintenance, liability, and financial burden on the Respondent.**

- [63] These questions involve the assessment against the flooding and drainage provisions, in particular:

- (a) *State Planning Policy 2017* - Part E - Natural hazards, risk and resilience and Assessment Benchmarks (3), (5) & (7)
- (b) *CairnsPlan 2016 Version 1.2* - Strategic Framework – 3.3 Settlement Theme - Strategic Outcomes 3.3.1(6) & (7), Specific Outcome 3.3.9.1(6) (Element – Built form, design and city image); Strategic Framework – 3.4 Natural Areas and Features Theme - Strategic Outcomes 3.4.1(6), Specific Outcomes 3.4.6.1(1) (Element – Natural Hazards), 3.4.6.1(3) (Element – Natural Hazards), and 3.4.6.1(5) (Element – Natural Hazards); Flooding and Inundation Hazards Overlay Code - Purpose 8.2.7.2(1), Overall Outcome 8.2.7.2(2)(e), and Table 8.2.7.3.a – Performance Outcomes PO7 & PO8; Natural Areas Overlay Code - Purpose 8.2.11.2(1)(b); Excavation and Filling Code - Purposes 9.4.4.2(1), (2)(c) & (e), Table 9.4.4.3.a Performance Outcomes PO1(d) & PO4.

### ***State Planning Policy***

- [64] Assessment Benchmark (3) for Natural hazards, risk and resilience of the Policy, requires development to avoid natural hazard areas, or if that is not feasible to minimise risks to a safe level. Assessment Benchmark (5) requires development to avoid worsening natural hazards or increasing potential damage on or off the site. Assessment Benchmark (7) seeks to maintain or enhance land and vegetation that mitigate natural hazard risks.

### ***CairnsPlan***

- [65] Strategic Outcome 3.3.1(6) and (7) in the Strategic Framework – Settlement Theme provide that natural hazards and the impact of climate change influence the location, scale and intensity of development, and that development is to be located to ensure that any potential adverse or detrimental impacts are, in order of priority, avoided, mitigated or managed. Section 3.3.9.1(6) provides the specific outcome that development does not rely on complex engineering solutions to overcome site constraints.
- [66] Strategic Outcomes 3.4.1(6) requires that Development considers the impacts of natural hazards and is located and designed to avoid putting people, property and the environment at risk, and ss 3.4.6.1(1), (3) and (5) provide consistent Specific Outcomes to avoid areas vulnerable to hazards and avoid risks or impacts to people and property from natural hazards, and account for the impacts of climate change. The Flooding and Inundation Hazards Overlay Code Purpose 8.2.7.2(1) aims to ensure that development is safe for individuals, minimises property and environmental damage, does not disrupt drainage catchments, avoids complicated engineering responses, and lessens the community's impacts from flooding in relation to infrastructure, environmental integrity, and economic productivity while improving community resilience against climate change effects. Overall Outcome 8.2.7.2(2)(e) relevantly advances the purpose of the code by providing that development does not directly or cumulatively cause or increase adverse impacts of flood or storm tide inundation on other properties or require complex engineering solutions to mitigate adverse impacts. In Table 8.2.7.3.a, Performance Outcomes PO7 & PO8 address the matters this way:

<p><i>PO7</i>  <i>Development does not directly or cumulatively cause or increase adverse impacts from flood or storm tide inundation on:</i></p> <ul style="list-style-type: none"> <li><i>(a) properties or land;</i></li> <li><i>(b) ecological functions of waterways or other drainage paths, including water quality or their hydraulic capacity;</i></li> <li><i>(c) natural coastal processes.</i></li> </ul>	<p><i>AO7.1</i>  <i>Development ensures there is no adverse change to the profile of flood or storm tide hazard events or its behaviour over land that is upstream, downstream or adjacent to the development site.</i></p>
	<p><i>AO7.2</i>  <i>Works do not involve any physical alteration (including vegetation clearing) to:</i></p> <ul style="list-style-type: none"> <li><i>(a) a watercourse;</i></li> <li><i>(b) drainage path;</i></li> <li><i>(c) the coastline;</i></li> <li><i>(d) tidal waters and land; or</i></li> <li><i>(e) wetlands.</i></li> </ul>
	<p><i>AO7.3</i>  <i>Development:</i></p> <ul style="list-style-type: none"> <li><i>(a) avoid any reductions of on-site flood storage capacity and storm tide inundation, and contain within the subject site any changes to depth/duration/velocity of flood or storm tide hazards up to and including the 1% AEP Event; or</i></li> <li><i>(b) do not change the flood or storm tide characteristics at the Defined Inundation Event outside the site in ways that result in:</i> <ul style="list-style-type: none"> <li><i>(i) loss of flood storage capacity;</i></li> <li><i>(ii) loss of/changes to flow paths;</i></li> <li><i>(iii) acceleration or retardation of flows;</i></li> <li><i>(iv) any reduction in warning times elsewhere;</i></li> </ul> </li> </ul> <p><i>or</i></p> <p><i>AO7.4</i>  <i>The development is supported by a Inundation Hazard management plan that outlines the manner in which impacts of any changes to the flood or storm tide behaviour are mitigated to maintain the safety of people and property and the ecological function of the coast and tidal waters, flood plains, waterways and wetlands.</i></p>
<p><i>PO8</i>  <i>Development provides an efficient</i></p>	<p><i>AO8.1</i>  <i>No acceptable outcomes are provided.</i></p>

<p><i>drainage network which:</i></p> <p><i>(a) provides capacity for stormwater discharge;</i></p> <p><i>(b) minimises flooding from major rainfall events;</i></p> <p><i>(c) does not result in loss of floodplain storage;</i></p> <p><i>(d) does not result in adverse impacts upstream or downstream;</i></p> <p><i>(e) does not result in an unacceptable increase in peak flood levels and flows.</i></p>	
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- [67] Purpose 8.2.11.2(1)(b) of the Natural Areas Overlay Code seeks to protect natural areas of the region by minimising adverse direct and indirect impacts of development on natural areas.
- [68] The purpose of the Excavation and Filling Code is to ensure that excavation and filling occurs in a manner that does not adversely impact upon character and amenity, environmental values, flooding and drainage and land stability.<sup>68</sup> Relevantly here, this is achieved according to 9.4.4.2(2)(c) & (e) through the overall outcome that flooding and drainage problems do not result as a consequence of the works and works do not involve complex engineering solutions. This is reinforced by the criteria in Table 9.4.4.3.a. Relevantly, Performance Outcome PO1(d) provides that Excavation or filling does not rely on complex engineering solutions, and PO4 provides that Excavation or filling does not adversely impact on other premises as a result of storm water drainage flows or flooding.
- [69] It seems to me that the proposed excavation or filling of about 6 ha of the development, including roads, does rely on complex engineering solutions, and will adversely impact on other premises because of stormwater drainage flows or flooding. An engineered basin is necessary to mitigate the negative flooding consequences arising from the substantial fill for the proposal. It will need rock armouring along its eastern slope and intolerably costly and burdensome ongoing maintenance and vigilant post-flooding clean-up of sediment and debris; lest the proposal adversely impact surrounding properties with storm water drainage flows or flooding.
- [70] I prefer the evidence of Mr Collins, Mr Matthew and Mr Schomburgk.
- [71] Mr Collins contrasted the earthworks and stormwater drainage works required for Stages 1 to 3, and within the transfer area as minimal, comprising a detention basin of 0.14 hectares that required excavation of less than 20,000m<sup>3</sup>. These works for Stages 1 to 3 are markedly smaller, occupying less than half of the western batter for the now proposed basin. The proposal requires 18.2 hectares of excavation, and the engineered basin, which is about 300,000m<sup>3</sup>, requires over 200,000m<sup>3</sup> of excavation averaging 1 to 1.1m but below the level of the floodplain. The relative staged areas can also be functionally contrasted. The function of the Stages 1 to 3 works was to manage local site runoff only to avoid worsening, without anything being required for flood management for stages 1 to 3. In contrast, the function of

<sup>68</sup> CairnsPlan, 9.4.4.2(1).

the proposed engineered basin is necessary to offset the loss of flood-flow conveyance caused by filling up to 3 metres to create the proposed lots. There is no identifiable community benefit from the required earthworks in the basin.

- [72] Whilst, the hydraulic engineering experts, Dr Johnson and Mr Collins, agree that the engineered basin will be subject to deposited sediment and trapped debris during flood events, they differ in quantity and causation.
  
- [73] Dr. Johnson posits that deposition of debris and sediment would occur regardless of the engineered basin. It seems to me that Dr Johnson's opinion as to the cause and expected quantities of sediment and debris capture is flawed. His assessment is premised on sedimentation happening only when water accumulates in the northern section of the constructed basin post-flooding. This overlooks several factors: (a) Sedimentation is also likely to happen during flooding; (b) The water column's velocities are not constant and are reduced at greater depths, which enhances the probability of sedimentation in those areas; (c) In 2018, the farmer Mr. Tognolini, saw about 100mm of silt deposited over about 4,000m<sup>2</sup> in the lower areas, along with seed pods and small debris; (d) Floodwaters may sweep up heavy sediment loads from uncropped fields, both sediment and cane remnants could be carried into the constructed basin, and the tilled field and horse paddock upstream of the land are potential sources of sediment; (e) evidence of considerable amounts of trapped sediment and debris at bridges and causeways, as well as on upstream during the 2018 flood event. Dr Johnson relied on his modelling to say that velocities over the top of the batter are not sufficient to cause such scouring.
  
- [74] However, according to author Mr Collins of the modelling, the velocities that result from the modelling do not fully account for the moments the batter over-tops, and at that point in time, water will run down the batter much faster than the velocities Dr Johnson relies on. Further, the model is not capable of predicting the "micro effects" of that overtopping. Mr. Collins presents compelling evidence to the contrary, which I prefer, drawing on his impressive expertise, having evaluated the 2018 flood in Redlynch Valley and having devised the model used for flood studies concerning the planned project. He explains that the design of the engineered basin, which deepens towards the downstream (northern) end with excavation below the natural ground level, effectively serves as a "trap" or "sump" for sediment and debris that would have previously passed downstream. He explained that the resultant basin will catch debris and sediment differently because the engineered basin gets deeper at the downstream end due to excavation below the natural ground level. This creates a "sump" or "trap" for sediment and debris that would have previously moved downstream. He identifies that it is possible for there to be multiple flood events in any year, particularly when the effects of climate change are brought to account (not having been accounted for thus far), leading to the need for clean up to occur more than once a year. Further, I accept his evidence that the basin must be maintained to perform its function for flood-path conveyance. The appellant provided insufficient evidence of expected maintenance costs for the engineered basin (including the batter and buffers). There are also 3.6ha of batters that will require maintenance. The agronomists expressed joint concern about maintenance of the batter adjoining Freshwater Creek, describing it as "*problematic*" and, suggested that part may need to be transferred to the Council to ensure operation of the basin. Mr Collins and Dr Matthew identified a need for rock armouring to that batter to avoid it scouring and potentially breaking through when



Freshwater Creek overtops it (which overtopping is likely to happen at least once a year).

- [75] The scope of works to the basin is required to offset adverse flooding impacts due to the extensive filling for the proposal, and will require rock armouring to the eastern batter (and ongoing maintenance of that batter) as well as significant ongoing removal of sediment and flood debris in perpetuity, which if not carried out adequately will result in adverse flood impacts on properties. There is no community benefit from the earthworks required of the engineered basin. If farming is unviable, the basin does not provide a realistic development opportunity. It will be a mere flood conveyance. Untimely or inadequate maintenance will likely increase flood levels and depths and cause resultant damage to surrounding properties.
  
- [76] Mr Schomburgk observed that the proposal “... *relies on extensive and complex earthworks solutions over a very large area ... - solutions that arise solely from the need to provide additional fill for 6 ha (including roads) of the proposed new 65 lots,*” which is supported by the expert hydraulic engineering evidence of Mr Collins.
  
- [77] Mr Collins opined that the proposal required “*complex and large engineering excavation works*” to create the basin to offset flooding impacts caused by, and to provide, the extensive filling required for the proposed 65 lots. I do not accept Dr Johnson’s contrary opinion, and prefer Mr Collins’ evidence, which recognises the basin’s significant size and depth, the required extensive excavation below the floodplain and that it is not the best practice particularly because it requires ongoing maintenance in perpetuity, to facilitate stormwater flows and flooding, the basin’s functionality depends on the use of pipes or culverts for water flow and will need ongoing maintenance according to a perpetual management plan, the basin will need special measures if not used for farming, one side of the basin will need rock protection given its proximity to the creek and expected to flood once every year, and it remains uncertain of water possibly seeping in when the creek is higher than the base of the basin. Accordingly, I accept Mr Collins’s opinion:

*“In my opinion, the proposal involves overdevelopment of the Freshwater Creek floodplain, that then required complex and large engineering excavation works to create a sump / basin in the floodplain, to offset the extensive filling works proposed into the floodplain to manage flooding impacts. These works once complete, require the removal of deposited sediment and flood debris in perpetuity after multiple 290 flood events to maintain the required flood conveyance and flood storage capacity. The sump would silt and progressively fill up over time without on-going intervention with multiple flood events each wet season resulting in the potential for adverse flooding impacts on properties beyond the subject site.*

*The cost of such on-going post flood clean-up and maintenance of the proposed basin area will be prohibitive, and place an unreasonable burden on Council and would also be a burden if under private 295 ownership.”*

- [78] Contrary to Assessment Benchmarks (3), (5) and (7) of the State Planning Policy July 2017 – Part E – Natural hazards, risk and resilience: the proposal does not avoid the natural hazard area with extensive excavation and filling proposed in relation to the floodplain of Freshwater Creek; the proposal intolerably relies on on-going post-flood clean-up and maintenance in perpetuity to mitigate adverse flooding impacts to other properties, due to sediment build-up in the proposed basin; the natural floodplain landforms will not be maintained or enhanced by the proposed development, with the significant filling proposed, major excavation works, and earthworks across most of the site; and therefore, there will be no enhancement of the natural drainage pattern by the proposed development. On the contrary, it significantly modifies (rather than maintains) the flood plain of Freshwater Creek by major excavation works and significant filling.
- [79] Contrary to Infrastructure Works Code 9.4.6.2 (2), the proposed detention basin is inefficient because this proposal requires the large 17.5 hectare basin due to the extensive site filling and the need to source that in the floodplain, and but for that need, a smaller basin would ordinarily service site runoff without worsening flooding or stormwater quality.
- [80] As to Strategic Framework – 3.3 Settlement Theme: contrary to Outcome 3.3.1(6), the proposal does not sufficiently head natural hazards and the impact of climate change to influence the location, scale and intensity of development, in order to avoid, mitigate or manage any potential adverse or detrimental impacts. Instead, the proposal employs large compensatory excavation into the floodplain to offset the considerable floodplain filling proposed. Climate change is likely to result in more severe flooding in the future, adding to the on-going maintenance burden. Contrary to Outcome 3.3.1 (7), the management of potential adverse flood impacts requires on-going removal of deposited sediment and flood debris in the proposed basin in perpetuity with attendant costs. Contrary to Outcome 3.3.9.1 (6), the proposal relies on complex engineering to overcome site flooding constraints to the residential area, resulting in an engineered design that will require expensive on-going maintenance in the floodplain. The proposed large basin is large, will require extensive on-going maintenance, and may require under-drainage to meet the agronomists 180 requirements for farming of the land. Untimely or inadequate maintenance will result in adverse flooding impacts, including increased flooding frequency, flood levels and depths on other properties downstream in the creek valley and potentially beyond adjacent properties.
- [81] Contrary to Strategic Outcome 3.4.1(6), the development is not designed and located to avoid putting people, property and the environment at risk, when the potential adverse impacts when untimely or inadequate on-going maintenance is taken into account.
- [82] As to the Strategic Framework – 3.4 Natural Areas and Features Theme, contrary to 3.4.6(1); the development does not avoid the floodplain area that is vulnerable to natural flooding hazard and does not avoid putting property at risk from flooding if adequate maintenance and post-flood clean-up of the basin is not carried out. Contrary to 3.4.6 (3), the development will likely directly or cumulatively increase adverse impacts of flooding on other properties, if maintenance is not carried out in a timely and adequate way so that the proposed basin accumulates sediment and debris. Contrary to 3.4.6(5), the flood modelling does not take proper account of

climate change in terms of increased flows. Additional freeboard to lot and house levels could be required to address this, and a larger basin may be needed to offset flooding impacts due to increased flood flows due to climate change.

- [83] In terms of the Flood and inundation hazards overlay code, contrary to Purpose 8.7.2.2, without timely and adequate ongoing post-flood clean-up and maintenance in perpetuity, the proposal will likely adversely impact other properties. It will interfere with the natural drainage function of the catchment, and relies on a complex engineering solutions to attempt to manage internal impacts. If unreliably maintained, adverse water quality may result from ponded water and waterlogging of the basin. Contrary to Overall Outcome 8.2.7.2(2)(e), unreliable post-flood clean-up and maintenance in perpetuity has the potential to increase adverse impacts of flooding on other properties.
  
- [84] The proposal does not meet the Performance Outcome PO7 in Table 8.2.7.3.a, because with untimely and unreliable ongoing maintenance and post-flood clean-up in perpetuity, there will likely be an increase in adverse flooding impacts on other 210 properties beyond the site. If unmaintained, there is potential for adverse water quality impacts due to ponded water and waterlogging of the basin. Performance Outcome PO8 is also unmet because the proposal provides an inefficient drainage outcome through the oversizing of the basin to meet site flood management of creek flooding. Unreliable ongoing maintenance and post-flood clean-up in perpetuity will tend to loss of floodplain storage and the potential for adverse flooding impacts on other properties beyond the site.
  
- [85] As for the Natural Areas Overlay Code, contrary to Purpose 8.2.11.2(1)(b), the proposal does not minimise adverse impacts of the development on natural areas. The development highly modifies the floodplain of Freshwater Creek, with the potential for adverse flooding impacts on the riparian corridor of Freshwater Creek.
  
- [86] As for the Excavation and Filling Code: contrary to Purpose 9.4.4.2(1), the nature and extent of the proposed filling and the excavation of the 17.5 hectare basin in the floodplain will likely adversely impact on flooding and drainage. Contrary to Purpose 9.4.4.2(2)(c), flooding and drainage problems may arise with demanding excessive maintenance requirements, and inadequate maintenance. Contrary to Purpose 9.4.4.2(e); the proposal needs an over-sized basin to compensate for the extensive floodplain filling proposed, which requires a complex engineering solution reliant on excessive ongoing maintenance in perpetuity.
  
- [87] Performance Outcome PO1(d) in Table 9.4.4.3.a is not met because the proposal relies on complex engineering solutions. The size of the basin needed for stormwater detention purposes is proportionally small compared to the proposed basin. Performance Outcome PO4 is also unmet because, without timely and adequate on-going post-flood clean-up and maintenance in perpetuity, the proposal may adversely impact other properties.
  
- [88] Further, as against the current Planning Scheme Infrastructure Works Code – Version 3.1 – Section 9.3.5: contrary to PO4 and PO(9)(a), the stormwater management design proposed for the proposal may worsen flooding on downstream or upstream properties, with reliance on excessive ongoing post-flood clean-up and maintenance in perpetuity to mitigate adverse flooding impacts due to sediment build-up in the proposed basin. Contrary to PO(9)(d), with siltation and flood

debris deposition within the proposed basin, the protection of the environmental values of Freshwater Creek will require ongoing maintenance and post-flood clean-up of the basin in perpetuity. Adverse water quality impacts could occur due to ponding and waterlogging of the basin because on inadequate maintenance. Contrary to PO(9)(e), the maintenance requirements are excessive and access for maintenance is inadequate, and access requires ongoing maintenance and repair after flood events.

- [89] Even absent the risk of untimely, unreliable and inadequate maintenance, the proposal for the detention basin is contrary to the strategic framework, because: it does not respect natural hazards and climate change to influence the location, scale and intensity of the proposal contrary to s.3.3.1(6); it does not ensure the proposal is located, designed and operated to ensure potential adverse or detrimental impacts are avoided, mitigated or managed contrary to s. 3.3.1(7); it does not account for the impacts of climate changes contrary to s.3.4.6.1(5); and it relies on complex engineering solutions to overcome the significant loss of flood-path conveyance, contrary to s.3.3.9.1(6). For the same reasons, the proposal conflicts with the Flooding and inundation hazards overlay code, Purpose 8.2.7.2(1); Overall outcome (2)(e) and Performance outcome PO7(a) and PO8; and the Filling and excavation code, Purpose 9.4.4.2(1), Overall outcomes (2)(c) and (e) and Performance outcomes PO1(d) and PO4.
- [90] It seems to me that the proposed excavation or filling of about 6 ha of the development, including roads, does rely on complex engineering solutions, and will adversely impact on other premises because of stormwater drainage flows or flooding. An engineered basin is necessary to mitigate the negative flooding consequences arising from the substantial fill for the proposal. It will need rock armouring along its eastern slope and intolerably costly and burdensome ongoing maintenance and vigilant post-flooding clean-up of sediment and debris; lest the proposal adversely impact surrounding properties with storm water drainage flows or flooding.
- [91] For these reasons, I conclude that in conflict with the benchmarks, the proposal does not ensure acceptable flood immunity to the land, falling short of providing the necessary protections against potential water-related hazards. Furthermore, it does not avoid adverse interference with the function of the drainage catchment, potentially disrupting the existing water management systems. Concerning the impact on surrounding lands, such as Lot 4 on SP262382, Lot 122 on SP262381, and Lot 501 on SP262383, the material change of use does not sufficiently mitigate the risk of adverse flooding impacts, which could lead to detrimental effects on these localities. The design of the material change of use does not provide an acceptable response to the natural features and constraints of the land, failing to harmonise with the inherent environmental conditions. It also necessitates complex engineering solutions that may not be justified by the benefits gained, suggesting an overcomplicated approach to the project's challenges. Finally, the material change of use leads to significant ongoing maintenance works that would have to be assumed by the Council, imposing a considerable burden of care and expense for the foreseeable future.

**Does the proposed material change of use, result in:**

- (a) any unacceptable loss of agricultural land; and**

**(b) any unacceptable impacts on the capacity of rural land in the locality (other than the land) to be used for agricultural purposes.**

- [92] This question involves the assessment against the agriculture provisions in *CairnsPlan 2016 Version 1.2*, in particular, Specific Outcome 3.5.4.1(2) (Element – Agriculture), whilst acknowledging compliance with the assessment benchmarks listed in the Appellant’s response of 20 April 2020.
- [93] In furtherance of the *CairnsPlan* provisions relating to the preservation of rural land, already canvassed above, Specific Outcome 3.5.4.1(2) for the Element – Agriculture, provides for the availability and viability of rural land for ongoing agricultural use is not compromised by inappropriate or incompatible development.
- [94] The land is Agricultural Land Class A and B.
- [95] While the transfer area is currently subject to the condition of being transferred to the Council for open space and drainage purposes, it remains viable for sugar cane production, as it was previously used by Mr Tognolini, and the transfer area will continue to be available for such agricultural use with a suitable planted buffer, at the Council's discretion. It will still be in the Rural zone and the open space and drainage designation is consistent with the purpose of the Rural zone code of “providing protection to areas of scenic significance”.<sup>69</sup> Mr Schomburgk testified that the Council has permitted its other land for cane cropping. Absent the proposal, it seems to me that about 25ha of land, with a platted buffer, would be available and viable rural land for ongoing agricultural use. In any event, the transfer land will not be forever alienated by the conditioned transfer.
- [96] In contrast, the proposal will variously compromise both the availability and the viability this rural land for ongoing agricultural use.
- [97] About 10 hectares of rural land will be practically lost for ongoing agricultural use comprising: 6 hectares will be alienated by the fill and development of the 65 residential allotments; the necessary batters occupying 3.6 ha (as well as the area of the eastern buffer of 4ha) will be lost to cropping; and the area of Lot 122 north of Jenkins Access will be too close and too small and to be farmed as a result of the proposal according to Dr Matthew and Mr Tognolini, which evidence I accept.
- [98] As to the balance of the land, I am not satisfied that the proposal’s resulting engineered basin would be available or viable for cane cropping. The agronomists agree that the basin would have reduced profitability because of management issues. It would need to be an “opportunity crop” as part of a wider production enterprise like Mr Tognolini’s. The agronomists also agreed that inundation for more than 48 hours would be a limitation for cane farming if such inundation occurred annually. Dr Johnson’s report showed that the engineered basin will be drained within 68 hours for a 39% AEP event; 74 hours for a 10% AEP event; and 80 hours for a 1% AEP event. Dr Matthews considered it would be a further 24 hours until saturated soil will have drained. Water logging of cane becomes a more serious problem after three or four days. The hydraulic engineers agreed the engineered basin would flood at least annually. Maintenance is required for the basin to drain amidst uncertainty about the necessary maintenance. I am also uncertain about how the

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<sup>69</sup> *CairnsPlan*, 6.2.19.2(2)(c).

creek levels are and how frequently there will be inflows or ingress of water through the batters in circumstances where the level of the creek is above the basin's base or whether water levels in the creek will allow water ingress through the culvert arrangement. There is no reliable evidence about those factors. Mr Thompson testified that the extended duration of flood recession, increased wetness, and waterlogging make cane farming an impractical long-term proposition, and added in that he did not "*know too many farmers that willingly farm...in a flooded basin*". Mr Tognolini testified that "*Subject to the completion of appropriate earthworks*" it was his "*present intention*" to continue farming on that land, but he was vague as to the details of the engineered basin, which leaves me with intolerable uncertainty as to his basis and confidence of ongoing cane cropping of the basin, and its feasibility.

- [99] In my view, the proposal will likely result in a significant and unacceptable loss of agricultural land (in circumstances where it could still be made available to farming after transfer to the Council) and thereby diminish the available area that is currently designated and utilised for farming purposes. This loss extends to affecting the overall capacity of rural land in the locality to be used for agricultural activities, beyond just the land in question, thereby undermining the agricultural potential and productivity of the surrounding areas.

**Is the degree of any non-compliance with assessment benchmarks, when considered as a whole, such that the proposed material change of use fails to advance the planning policy for the land, and the strategic intent for the planning scheme area expressed in the Strategic Framework in *CairnsPlan*?**

- [100] It must follow from my discussion above as to the nature and degree of non-compliance with the assessment benchmarks considered as a whole, that the answer to this question is 'yes'. The proposal fails to advance the planning policy for the land, and it also falls short of fulfilling the strategic intent for the planning scheme area as expressed in the Strategic Framework in *CairnsPlan*.

## RELEVANT MATTERS

- [101] The expression "another relevant matter" or "relevant matter" is not defined in the *Planning Act* except by way of example and the express exclusion of "a person's personal circumstances, financial or otherwise."<sup>70</sup> A "relevant matter" ought carry its ordinary meaning to capture a matter that has a bearing upon, or is connected with the assessment of the application other than a person's personal circumstances, financial or otherwise. An "other relevant matter" may include all relevant matters of positive and negative attributes of the proposed development, including any particular community benefits or detriments that might weigh in favour of or against an approval even where a proposal is or is not consistent with the community expectations.<sup>71</sup> And, the nature and extent of "other relevant matters" may overlap and blend with each other. The legislature provides three examples for the purposes of s 45(5)(b) being:

- (a) a planning need;

<sup>70</sup> *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 at [80].

<sup>71</sup> Cf. *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexs Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95 at [180]. Contrast, *Bell*, at [73] & [74].

- (b) the current relevance of the assessment benchmarks in the light of changed circumstances;
- (c) whether assessment benchmarks or other prescribed matters were based on material errors.

[102] It seems to me that the use of the phrases “carried out against” and “having regard to” in s 45 of the Act are purposeful. The term “carried out against” connotes a compliance check analysis of the development against some recognised plan, report, study, standard, guideline, or other discernible measure, whereas “having regard to” connotes regard being had to matters of fact and circumstance.

[103] It is also well settled, and relevant here, that regard may be had to the fact of Council’s decision and persistence in this appeal as representing the views of the responsible planning authority as to the merits of the proposal.<sup>72</sup> Rather than being inconsistent with or overtaken by the events, as contended by the appellant, it seems to me that the Council’s position is entirely consistent with the currency of the planning benchmarks and its previous decisions regarding the staged Redlynch Vistas development.

**The extent to which the inclusion of the land within the 'Rural zone' under the planning scheme, and the exclusion of the land from the urban footprint in the Regional Plan, have been overtaken by events.**

[104] The appellant contends that the currency of the assessment benchmarks ought to be considered in light of the following changed circumstances:

- (a) The current population of the ‘Redlynch Valley projection area’ shown on the Local Government Infrastructure Plan’s Priority Infrastructure map already exceeds: the projections from ‘Table SC3.2.1.a - Existing and projected population’ in Schedule 3 of *CairnsPlan* for the year 2026; and the projections for the year 2036 from the corresponding table of the current planning scheme.
- (b) In respect of its population projections for the ‘Redlynch Valley projection area’, the Local Government Infrastructure Plan that applied during the currency of *CairnsPlan* has become irrelevant in light of updated population projections in the Local Government Infrastructure Plan for the current planning scheme.
- (c) Accounting for the current population of the ‘Redlynch Valley projection area’ and the estimated capacity of undeveloped urban land within it, to achieve the ‘Ultimate development (capacity)’ population under the Local Government Infrastructure Plan for the current planning scheme it will be necessary for some growth to be accommodated on land that is currently not zoned for urban purposes.

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<sup>72</sup> Cf. *Lipoma Pty Ltd & Anor v Redland City Council & Anor* (2020) QCA 180 at [41]; see also *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 257; *R v Brisbane City Council; ex parte Read & Read* (1986) 2 Qd R 22 at 28; *Wingate Properties Pty Ltd v Brisbane City Council* (2001) QPELR 272 at [22]; *Mackay Shopping Centre Pty Ltd v Mackay Regional Council* (2013) QPELR 661 at [44]; *Friend v Brisbane City Council* [2014] QPELR 24 at [103]-[104]; *KPRA v Brisbane City Council* (2014) QPEC 64 at [100]-[104].

- (d) The land represents a logical and orderly option for extending the urban area of the ‘Redlynch Valley projection area’ and would contribute to an efficient, compact urban form.
- (e) The Regional Plan, which excludes the land from the ‘urban footprint’, was published in February 2009 and has not since been updated. The Regional Plan states, at page 139, that the Regional Plan “should be reviewed formally at least every 10 years”. For its excluding the land from the urban footprint, the Regional Plan has become irrelevant because:
  - (i) the Council has approved a staged urban residential development of the parent land since the Regional Plan first commenced;
  - (ii) the Council amended the zoning of part of the parent land since the Regional Plan first commenced;
  - (iii) the land is no longer characterised by one or more of the Regional Landscape and Rural Production Area values listed at pages 31 and 32 of the Regional Plan;
  - (iv) the actual population of the Redlynch Valley projection area under the Local Government Infrastructure Plan when compared to the population projections for the Redlynch Valley projection area from the year 2016 and onwards (shown in Table SC3.2.1.a – Existing and projected population of Schedule 3 of *CairnsPlan*) indicates that more urban-zoned land is required in the Redlynch area to accommodate likely future demand.

[105] As to the matters of population and projections in sub-paragraphs (a), (b), (c) and (d)(iv) above; these fall in the paradigm of need, which is discussed below. Suffice it to say, at this juncture, that when so considered, I am not satisfied that there is sufficient planning, community and economic need, enlivened by the population growth or projections.

[106] As discussed in relation to the benchmark provisions, I do not accept the sub-paragraph (d) proposition that the proposal is a logical and orderly option for extending the urban area of the ‘Redlynch Valley projection area’ or that it would contribute to an efficient, compact urban form. On the contrary, I have found that it is untimely and inefficient in terms of infrastructure and unsuitable for urban development. While it is true that existing, approved, and planned urban development is in the locality generally, the proposal does not contribute to a compact urban form; it is not in-fill or redevelopment of existing urban areas; it is outside the bounds of an urban area, but it is not the development of an emerging community area or the development of a future urban area within the Southern growth corridor; and is outside the priority infrastructure area.

[107] I also reject the argument in sub-paragraph (e), that the Regional Plan is outdated and irrelevant for excluding the land from the urban footprint. The Council-approved staged residential development and associated rezoning does not include the land subject of this appeal; it was relegated by condition 28 of the Stage 3 approval to be “*transferred to Council for freehold for Town Planning Purposes – Drainage and Open Space*”. Further to my discussion above, I do not accept that the land has no regional landscape, rural production, or other non-urban values. It



remains capable of cane production; it will continue to be a low-lying water catchment and drainage area and will provide outdoor recreation and open space.

[108] The appellant further contends that the treatment of the land as ‘rural land’ has been overtaken by events and is not soundly based for the following reasons:

- (a) The parent land’s zoning under *CairnsPlan* reflects an approved structure plan in a development approval granted in the 2015 Judgment so far as it divides the parent land into urban land and non-urban land on the basis of a “Line of Q 100/general line of retaining wall”. The proper basis of that distinction between the urban and non-urban zoning of the parent land has been overtaken by events, namely, the flood studies submitted by the appellant to the Council in support of the development application the subject of this appeal, which demonstrates that the land is suitable for urban development eastward of the ‘Line of Q 100/general line of retaining wall’ shown on the structure plan included in the 2015 Judgment.
- (b) The land on which the appellant proposes compensatory earthworks (which is a common engineering solution) is land already set aside for drainage purposes, with condition 28 of approved Stage 3 of the land’s development requiring that it be “transferred to Council for freehold for Town Planning Purposes – Drainage and Open Space”. When the Appellant enacts that Stage 3 approval, the land will no longer be available for rural uses unless the proposed development is approved.
- (c) The proposed development will now abut urban residential development currently under construction, not undeveloped rural land.
- (d) The proposed development is on land adjoining and directly opposite established community facilities and is near other essential facilities and services and ‘suburban’ residential development characteristic of an urban area.

[109] I am unable to accept the appellant’s contention that these matters warrant a finding that the planning treatment of the land as ‘rural land’ has been overtaken by events.

[110] I do not accept the proposition in subparagraph (a) that the achievement of flood immunity for the proposal further eastward of existing approved urban development renders the land suitable for urban development; as if to overtake the event of the existing rural zoning designation. In any event, I have already made adverse findings about the need for complex engineering solutions to achieve flood immunity works with potential consequential flooding impacts, and finding that the land will continue to be available and suitable for rural production. That is, even if the land made suitable for urban development eastward of the ‘Line of Q 100/general line of retaining wall’ shown on the structure plan included in the 2015 Judgment – that outcome will cause unacceptable consequential impacts.

[111] Contrary to the proposition in subparagraph (b), I have found that the fill and compensatory works will involve a complex engineering solution, regardless of whether it is considered common or not, and I have also found that fulfilment of condition 28 of approved Stage 3 to transfer land to Council for Drainage and Open Space renders it unavailable or unsuitable for rural production. Consequently, the appellant’s argument fails.

- [112] I accept that the proposal would abut the approved residential under development currently and not undeveloped rural land, as asserted in subparagraph (c), but that is not, in my view, indicia that the current state of the land in the rural zoning has been overtaken by events. The proximity of rural land to urban development does not overtake its designated as a rural zone. Instead, it simply necessitates the implementation of suitable buffers to support the sustained viability of rural agricultural production.
- [113] Similarly, the very close proximity of rural land to an urban area with suburban residential characteristics, community facilities and other essential facilities and services, do not overtake its rural zone designation. Again, the scheme requires suitable buffers to separate the uses for continued rural agricultural production.
- [114] Therefore, I'm bound to conclude that the planning treatment of the land as 'rural land' has not been overtaken by events, and its continued designation is not unsoundly based.

**The extent to which current approvals of premises in the locality, including premises adjoining the land, support the refusal of the proposed material change of use. In particular, the extent to which refusal is supported by inconsistency between the proposed material change of use and;**

- (a) condition 28 of the Amended Negotiated Decision Notice dated 1 August 2019 applicable to the land, which requires the dedication of Lot 902 to Council; and**
  - (b) the preliminary approval, which provides for the area the subject of the development application to be within the Open Space Planning Area.**
- [115] Section 31(1)(f) of the *Planning Regulation* 2017 provides that impact assessment must be carried out with regard to development approval for the use of premises or adjacent premises.
- [116] In April 2011, a consent judgment granted preliminary approval for a property development, excluding a specific lot (Lot 122). This preliminary approval is valid until April 2025. The approval established a Structure Plan and Precinct Plan, categorising parts of the land for residential use and others for non-residential purposes, with an area designated as Open Space Planning Area, which included the subject land. The Structure Plan outlined a boundary, referred to as the "line of Q100/general line of retaining wall," which separated the residential areas from the open space areas. It provided that land below the Q100 flood level would be part of a Drainage Reserve and designated as Open Space Planning Area, to be eventually dedicated to the Council after necessary infrastructure work was completed. The approval also set assessment criteria for future applications in this area to be consistent with those for Open Space Planning Areas.
- [117] In April 2015, the appellant applied to reconfigure a lot, aiming to approve Stages 1 to 4 for the Redlynch Vistas residential development 181 lots. Later that year, on August 31, it applied for a development permit for Stages 3 and 4. By November 5, 2015, a development permit was granted for Stages 1 and 2.
- [118] In May 2016, the appellant amended the application, removing Stage 4. A month later, on 28 June 2016: a development permit was granted for reconfiguring Stage 3.

It included a condition that required the transfer of the balance land (which includes the “stage 4” area) to the Council for “*Town Planning Purposes – Drainage and Open Space*” in conjunction with the registration of the 50<sup>th</sup> allotment in the approved development.

- [119] In July 2016, the appellant sought a negotiated decision notice for Stage 3, proposing a revised lot and road layout that decreased the number of lots from 80 to 55.
- [120] On 11 December 2017 *CairnsPlan* 2016 came into effect, and in April 2018, the appellant lodged a new development application for Stage 4 and sought a negotiated decision notice for Stage 3, including keeping the part of the balance allotment in private ownership, subject to a drainage easement, rather than to transfer it to Council pursuant to the condition.
- [121] By August 2019, amended negotiated decision notices were issued for Stages 1, 2, and 3, reflecting the reduced number of lots for Stage 3 to 55, as the appellant had requested. However, the condition for land transfer remained. Condition 28 requires the transfer to occur before or in conjunction with the registration of a Plan of Survey for the 50<sup>th</sup> allotment in Stage 3.
- [122] Finally, on December 4, 2019, a decision notice was issued that refused the development application for Stage 4; this is now the focus of this appeal.
- [123] Whilst the appellant acknowledges the inconsistency between the proposal and previous approvals, it relies upon *Walker v Noosa Shire Council*<sup>73</sup> to argue that the need for further approvals (or in this case a change to the earlier approval for stage 3) is not a reason for refusal. In that case, the court of appeal held that, in the absence of clear futility or incurable illegality, approvals should have been granted on the condition that all necessary approvals must be obtained before construction and subject to any additional conditions imposed by the council.
- [124] It seems to me that this is a different case, where the dedication requirement in 2011 was entrenched by the Stage 3 approval condition 28, which was the community price the appellant paid and acted upon for that approval, as the High Court so characterised in *Pike v Tighe*.<sup>74</sup> Here, the appellant has acted upon the Stage 3 approval and registered 43 of the total 55 lots approved, just short of the 50<sup>th</sup> lot trigger for the transfer under Condition 28 of that approval. In an earlier case of in *Lloyd v Robinson*,<sup>75</sup> when considering a condition requiring the dedication of land for open space purposes, but in circumstances where the developer had not yet taken a substantial benefit – the quid pro quo – and appealed against the condition, the High Court remarked:

*“If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a quid pro quo is received,*

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<sup>73</sup> *Walker v Noosa Shire Council* [1983] 2 Qd.R 86.

<sup>74</sup> *Pike v Tighe* (2018) 262 CLR 648 at [40].

<sup>75</sup> *Lloyd v Robinson* (1962) 107 CLR 142 at 154, per the Court (Kitto, Menzies and Owen JJ).

*namely the restored right to subdivide the first. It may be that the quid pro quo is inadequate, and that the landowner, though under no legal compulsion to give up the second area of land if he chooses to forego the idea of subdividing the first, is nevertheless under some real compulsion, in a practical sense, to submit to the loss of it because of the importance to him of obtaining the approval.”*

- [125] This reasoning supports the planning approach of Mr Schomburgk, which I prefer over Mr Perkins’ somewhat piecemeal approach to treat a consequential amendment the Stage 3 transfer requirement as merely procedural.<sup>76</sup>
- [126] It seems to me that the appellant's proposal to now develop 65 housing lots on land previously accepted as designated for open space and drainage, in the absence of any changed circumstances,<sup>77</sup> starkly contradicts the Stage 3 approval, reasonable community expectations and the public interest. These matters favour an exercise of discretion to refuse.

**The extent to which the proposed material change of use represents orderly and logical expansion and consolidation of the existing or approved urban area having regard to the exclusion of the land from the Priority Infrastructure Area under the Local Government Infrastructure Plan.**

**The extent to which weight should be given to the current planning scheme; and, if so, the extent to which the proposed material change of use complies with PO4, PO9(a), (d) and (e) of the Infrastructure Works Code in the current planning scheme.**

- [127] The appellant asserts that the proposal represents orderly and logical development over a parcel of land that is effectively surrounded by land with existing or approved urban development and nearby to an array of infrastructure and services.
- [128] I have accepted Mr Schomburgk’s evidence and found that the proposal is not a logical inclusion into an urban area.
- [129] It is not true that the land is Part of the western portion of the subject site, land west of the tramway, is currently under construction for stages 1 to 3 of an approved residential sub-division.
- [130] More broadly, the land is located within the northern part of the suburb of Redlynch. Importantly, the town planners agree that the land is located immediately east, south, and south-east of existing urban land.<sup>78</sup> Indeed, urban land in proximity to the subject site is agreed to include not just suburban residential development but a wide range of community services and infrastructure.<sup>79</sup>
- [131] The land is located approximately 1.25km south of Redlynch Central Shopping Centre, a designated District Centre (which includes 2 full-line supermarkets, Coles

<sup>76</sup> Cf. *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485 at 504 per Stephen J. Contrast *Fox v Brisbane City Council* [2003] QCA 330 at [12] per de Jersey CJ.

<sup>77</sup> *Contrast Casagrande Investments Pty Ltd v Redland City Council* [2011] QPELR 426 at [8] to [14].

<sup>78</sup> Exhibit 6, Town Planning JER, p.11, [25].

<sup>79</sup> Exhibit 6, Town Planning JER, p.11, [26].

and Woolworths), food and drink outlets, veterinary services and health and medical services.<sup>80</sup>

- [132] The land also adjoins Goomboora Park, a facility that contains several amenities and improvements including BBQs, picnic shelters, playgrounds and a walking track.<sup>81</sup> Notably, the town planners also agree that the land is in close proximity to several educational establishments, including Redlynch State College, St Andrews Catholic College and AFL Cape York House.<sup>82</sup> In reality it could not be closer to, and facilitate active transport (walking and cycling) to those schools.

**The extent to which there is any planning need for the proposed material change of use.**

**The extent to which approval of the proposed material change of use provides housing diversity and choice for the area.**

- [133] The appellant submits that there is strong a town planning, community and economic need for the proposed development in reliance upon the expert evidence of Mr Perkins and Mr Duane. This is disputed by the other parties, or in my view, supported by the evidence of Mr Schomburgk and Mr Norling which I prefer.
- [134] The seminal principles that inform and guide an assessment of need are conveniently summarised by Judge Wilson SC (as he then was) in *Isgro v Gold Coast City Council*,<sup>83</sup> and have been refined in subsequent cases,<sup>84</sup> as follows:
- (a) need is a relative concept to be given greater or lesser weight depending on all of the circumstances to be taken into account;<sup>85</sup>
  - (b) need in planning does not mean pressing need, critical need, widespread desire or connote a pressing urgency, but relates to the well-being of the community;<sup>86</sup>
  - (c) for community need, a range of qualitative factors are involved such as convenience, accessibility, choice, range, depth, competition, price, service, shopper amenity, etc;<sup>87</sup> A use is needed if its provision, taking all things into account, will improve the physical well-being of the community,<sup>88</sup> or will on

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<sup>80</sup> Exhibit 6, Town Planning JER, p.11, [26]. See also Zone Map at p.50.

<sup>81</sup> Exhibit 6, Town Planning JER, p.11, [27].

<sup>82</sup> Exhibit 6, Town Planning JER, p.11, [28].

<sup>83</sup> *Isgro v Gold Coast City Council & Anor* [2003] QPELR 414 at [20]-[30].

<sup>84</sup> For example: *Abeleda & Anor v Brisbane City Council & Anor* [2021] QPELR 1003 at [51]; *Navara Back Right Wheel Pty Ltd v Logan City Council*; *Wilhelm v Logan City Council* [2020] QPELR 899 at [297] & [330]; *Fabcot Pty Ltd v Cairns Regional Council & Ors* [2021] QPELR 40 at [29] and undisturbed on appeal in *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors*; *Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95 at [22], [157] and [159]; *McKay v Brisbane City Council* [2021] QPEC 42 at [237]; and *United Petroleum Pty Ltd v Gold Coast City Council & Anor* [2018] QPELR 510.

<sup>85</sup> *Intrafield v Redland Shire Council* [2001] 116 LGERA 350 at [20].

<sup>86</sup> *Watts & Hughes Properties Pty Ltd v Brisbane City Council* (1998) QPLR 273 at 275.

<sup>87</sup> *Fabcot Pty Ltd v Cairns Regional Council & Ors* [2021] QPELR 40 at [29].

<sup>88</sup> *Cut Price Stores Retailers v Caboolture Shire Council* [1984] QPLR 126 at [131].

balance improve the services and facilities available in the locality;<sup>89</sup> or will improve the ease, comfort, convenience and efficient lifestyle of the community;<sup>90</sup>

- (d) a need cannot be a contrived one, but based on the assumption that there is a latent unsatisfied demand which is either not being met at all or is not being adequately met;<sup>91</sup> A need does not have to be particularly strong to be a ‘demonstrable need’, but rather real or substantive (rather than trivial, immaterial, minor, or insignificant) need which is capable of being shown or logically proved.<sup>92</sup>
- (e) the question of need is decided from the perspective of the community and not that of an applicant, commercial competitor or those who make adverse submissions;<sup>93</sup>
- (f) the impact of a proposed development on existing like businesses is a matter which is to be taken into account adversely to the proposed new facility unless, for example, the extent of competition will cause an overall adverse effect on the extent and adequacy of facilities available to the community;<sup>94</sup>
- (g) the provision of competition and choice can be a matter which indicates a need.<sup>95</sup>
- (h) a fundamental element of economic need is that the development, if approved, would be financially viable,<sup>96</sup> as distinct from privately profitable. Economic need involves a typically more quantitative assessment as to whether the extent of demand for the proposal is sufficient to support it at a sustainable level.<sup>97</sup>
- (i) Planning Need refers to an assessment of the extent to which the proposed development can be accommodated by existing planning provisions. This necessarily involves an assessment of the existence of competitive approvals and the availability of suitably zoned and/or designated lands to accommodate the proposed development.<sup>98</sup>

[135] The appellant points to the projected 20 year growth in the Cairns local government area, including the suburbs around the appeal land, and that the relative need for diversity and choice offered by the proposal being in an attractive location close to public and private facilities, will likely to be supported by strong buyer and tenant interest. It propounds five reasons to support a favourable finding of a strong

<sup>89</sup> *Roosterland Pty Ltd v Brisbane City Council* (1986) 23 APAD 58 at [60].

<sup>90</sup> *Fitzgibbons Hotel Pty Ltd v Logan City Council* [1997] QPELR 208 at 213; *Bunnings Building Supplies Pty Ltd v Redland Shire Council* [2000] QPELR 193 at 198C.

<sup>91</sup> *Indooroopilly Golf Club v Brisbane City Council* [1982] QPELR 13 at 32-35.

<sup>92</sup> *United Petroleum Pty Ltd v Gold Coast City Council & Anor* [2018] QPELR 510.

<sup>93</sup> Cf. *Fitzgibbons Hotel Pty Ltd v Logan City Council* [1997] QPELR 208 at [213]; *TMP Holdings Pty Ltd v. Caloundra City Council* [2002] QPELR 1 at [9]; *Isgro v. Gold Coast City Council & Anor* [2003] QPELR 414.

<sup>94</sup> *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675, at 687.

<sup>95</sup> *Intrafield v Redland Shire Council* [2001] 116 LGERA 350.

<sup>96</sup> *All-A-Wah Carapark v Noosa Shire Council* [1989] QPLR 155, 158.

<sup>97</sup> *Fabcot Pty Ltd v Cairns Regional Council & Ors* [2021] QPELR 40 at [29].

<sup>98</sup> *Fabcot Pty Ltd v Cairns Regional Council & Ors* [2021] QPELR 40 at [29].

community, economic and planning need for the proposed development, in summary:

- (a) There is a need for diversity and choice of household products, such as is proposed by this development, due to the projected 20-year population growth of the Cairns local government area, including the suburbs around the proposal.
- (b) The proposal is well located to infrastructure in circumstances where the efficient use of infrastructure is important to ensure a sustainable economic return.
- (c) Broad hectare land within the planning infrastructure area of the Redlynch Valley projection area is limited, so there is market capacity to accommodate additional lots as proposed.
- (d) In light of the reduced population growth within the Cairns local government area as compared with the Far North Queensland Regional Plan, it is important to provide additional residential development, in an area popular with young families to ensure housing diversity and choice in the Cairns market.
- (e) The proposal will add to diversity of choice within the entire Cairns market. More particularly, the proposed development will continue to provide detached dwellings for young families which is consistent with the housing type within Redlynch Valley.

[136] The Court of Appeal<sup>99</sup> considered the relevant authorities including *Intrafield Pty Ltd v Redland Shire Council*<sup>100</sup> to the effect that the assessment of need being a relative concept to be given a greater or lesser weight depending on all of the circumstances which the planning authority was to take into account. Relevantly here, in *Intrafield* the court confirmed that the mere addition of choice does not equate to a demonstration of need:

*“Of course convenience for the motorist is a major element in establishing planning need, but in my opinion in this case the evidence does not go further than to show that the proposal would be an attractive and additional choice for some of those motorists. That falls short of showing that the needs of motorists are not at present adequately catered for ...*

*... The fact that a number of these commuters would be likely to purchase their petrol supplies and convenience goods at the proposed service station instead of at outlets currently patronised by them no doubt indicates a degree of convenience offered by the proposed outlet in comparison with the existing outlets. This does not, however, in my opinion, of itself demonstrate that there is a demand for the provision of a new facility in the vicinity of the proposed service station. Given an addition to existing choices a number of consumers are likely to avail themselves of it as a matter of human experience. While this indicates a consumer preference, to*

<sup>99</sup> *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QCA 168 at [30].

<sup>100</sup> *Intrafield Pty Ltd v Redland Shire Council* (2001) 116 LGERA 350 at [20].

*an extent which is, however, debatable, it does not demonstrate inadequacy in the existing arrangements and therefore falls short of showing a planning need for the development. ...”*<sup>101</sup>

[137] Whilst the proposal’s location is attractive and convenient to public and private facilities, in my view, the proposal does not offer much by way of diversity and choice. The blocks have variable sizes and aspects when compared to earlier developed stages, but I agree with Mr Norling’s description to the effect that the proposal “simply adds more of the same” detached dwellings generic to the area.

[138] I am unable to accede to the appellant’s argument that there is an economic need for the proposed development because demand for this proposal would be sufficient to support it at a sustainable level.

[139] The court cautioned in *Williams McEwans v Brisbane City Council*<sup>102</sup> that:

*“It should not, in my opinion, be thought that a rezoning can be justified by merely contriving a need which is, essentially, nothing more than an exercise in entrepreneurial skill, the effect of which is to give the applicant some commercial advantage. Nor will land be re-zoned in favour of the entrepreneur who seeks to create the need by the use of his land in the manner he desires. The basic assumption must be that there is in, existence at the time of the application a latent unsatisfied demand on the part of the persons affected by the planning scheme which is not being met at all nor being, adequately met by the scheme in its present form.”*

[140] Here, there is no such unsatisfied demand. The population projections in the Regional Plan are consistent with the 2006 population projections prepared by the Queensland Government Statisticians Office. Comparatively, the region’s population has been tracking slightly above the low series projections in the Regional Plan. In the Cairns Region (including Port Douglas), the actual population growth rate is close to the medium population projections to 2016, but has fallen well short of that medium projections since 2016, and is trending downwards. And I accept Mr Norling’s evidence that growth within Redlynch Valley accounts for just eight percent of city-wide growth. Further afield, Mr Norling identified planned residential opportunities in Edmonton, Bentley Park, Trinity Beach, Smithfield, other opportunities in Clifton Beach and Kewarra and the greatest opportunity being in Mount Peter, despite Mr Duane’s concern about the pace of development and infrastructure in Mount Peter.

[141] It seems to me that there is no unsatisfied demand which is not being met or adequately met by the planning scheme in its current form.

[142] I do not accept Mr Duane’s evidence of a shortfall in available land to meet the development potential identified in the Local Government Infrastructure Plan v.2.1. In my view; the Local Government Infrastructure Plan is not an appropriate measure

<sup>101</sup> *Intrafield Pty Ltd v Redland Shire Council* (2001) 116 LGERA 350 at [7] to [8].

<sup>102</sup> *Williams McEwans v Brisbane City Council* [1981] QPLR 33 at 35.



for that purpose.<sup>103</sup> The purpose of the Local Government Infrastructure Plan is for infrastructure planning based upon land use planning and provides plans and standards for trunk infrastructure for priority infrastructure areas based on assumptions such as population, future development and planning densities, which are gleaned from the Regional Plan and the planning scheme's strategic framework and zoning and development provisions.<sup>104</sup>

- [143] In any event, both the planning scheme and the Regional Plan contain deliberate strategies for accommodating population growth in Cairns. The respondent council has adjusted down the assumed population for the Redlynch Valley priority infrastructure area over the last three years since 11 November 2019. The Local Government Infrastructure Plan population assumptions to 2031 for the Redlynch Valley PIA have been reduced since v2.1 and retained the lower assumptions through v3.0 and s3.1 of about 1,000 people to 2036, compared to the v1.2 assumption to 2031. Mr Duane revised his estimate to 1,565 people and Mr Norling settled 1,681 people as a reasonable estimate of capacity of appropriately zoned land available. This is consistent with the respondent's analysis of capacity using the recent ABS population estimates.
- [144] It seems to me that there is sufficient suitably zoned land available for residential growth and stock currently available, indeed, there is 8 to 9 years more capacity before the v1.2 assumed population is reached. On the more recent population assumptions (which reflect more recent trends), there is more than enough capacity to cater for at least 14 years of population growth within the Redlynch PIA (adopting the excess capacity for 900 people to 2036).
- [145] Even if, as Mr Duane suggests, there is a need to re-work the relevant planning of population growth, that is a matter for the local government.<sup>105</sup>
- [146] Accordingly, the *CairnsPlan* well meets the demand for population growth within the Redlynch priority infrastructure area, and explicitly anticipates that the supply of broad hectare land at Redlynch will be exhausted by 2031,<sup>106</sup> subject to periodical reviews to respond to any changes before its 20-year horizon to 2036.<sup>107</sup>
- [147] In the result, the evidence falls a long way short of demonstrating planning or economic need to warrant approval in the context of the level of non-compliance with the benchmarks.

**The extent to which conditions could be imposed to satisfactorily resolve any non-compliance with the relevant assessment benchmarks.**

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<sup>103</sup> Cf. *Development Watch Inc v Sunshine Coast Regional Council* [2021] QPELR 200 at [133], appealed on other grounds in *Development Watch Inc v Sunshine Coast Regional Council* [2022] QCA 006.

<sup>104</sup> *Planning Act* (Qld) 2016, Schedule 2, Definition, LGIP; see also Minister's Guidelines and Rules, Part 6, Item 28. See also *Lennium Group Pty Ltd v Brisbane City Council & Ors* [2019] QPELR 835 at [84] and Ex.12, Scheme extracts, p.28, s.4.1(2)(a).

<sup>105</sup> *Grosser v Council of Gold Coast* [2001] 117 LGERA 153 at [38], affirming *Elan Capital Corporation Pty Ltd v Brisbane City Council* [1990] QPLR 209 at 211 per Quirk DCJ.

<sup>106</sup> Ex.14, *Regional Plan*, p.22.

<sup>107</sup> Ex.12, *CairnsPlan* s.2.1(4), p.3.

- [148] I am unable to identify any reasonable and relevant conditions that could be imposed to satisfactorily resolve any non-compliance with the relevant assessment benchmarks.

**The extent to which approval of the proposed material change of use is in accordance with sound town planning practice.**

- [149] The assessment against the benchmarks, and having regard to and against relevant matters, demonstrate the extent to which approval of the proposed change of use is not in accordance with sound town planning practice.

**The extent to which the proposed material change of use aligns with community expectations for the land.**

- [150] I do not accept the appellant's assertion that a properly informed and reasonable member of the community would expect that Redlynch Vistas may well include the proposed stage 4 having regard to its immediate adjacency to the existing stages, its compromise for agricultural use, and its location immediately south of stage 3 and west of the cane tram line.
- [151] Reasonable community expectations can be gleaned from the *CairnsPlan* provisions, decisions about land use in the locality and the existing development approved, under construction or constructed.
- [152] The appellant's proposition is inconsistent with my assessment against the *CairnsPlan* provisions, and consideration of the approvals and ensuing development.
- [153] The application for this proposal was made on 26 April 2018 and 19 adverse submissions resulted from public notification in June/July 2018.
- [154] By that time, *CairnsPlan* 2016 commenced on 11 December 2017. The 2011 preliminary approval remained in effect to provide for the area to be within the Open Space Planning Area. The original development application for reconfiguring a lot into 181 lots in 4 stages had resulted in approvals – the development permit was granted on 5 November 2015 for reconfiguring Stages 1 and 2 and, on 18 June 2016 (after the appellant withdrew Stage 4 on 17 May 2016) the development permit was granted for reconfiguring Stage 3, which included then condition “29”, which required the transfer of a balance allotment to the Council for “Town Planning Purposes – Drainage and Open Space” in conjunction with the registration of the 50th allotment in the approved development.
- [155] After representations were made to the Council (including a request to keep the part of the balance allotment to the east of the cane line in private ownership, subject to a drainage easement, rather than to transfer it to Council, which was rejected), and amended negotiated decision notice issued for Stages 1, 2 and 3 on 1 August 2019. For Stage 3, the lots were reduced to 55 (as requested) but the re-numbered condition “28”, still required the transfer of the balance allotment prior to or in conjunction with the registration of a Plan of Survey for the 50<sup>th</sup> allotment within Stage 3. On 4 December 2019, the application the subject of this appeal was refused.

- [156] The appellant also points to the Council's decisions, for stages 1, 2 and 3 especially, of the residential development of Redlynch Vistas, departing from the town planning designations in the zoning map and the Strategic Framework map and Regional Plan, to assert that the planning scheme in this locality does not represent an embodiment of the public interest. There is some analogy between the land the subject of this appeal and the land the subject of Stage 3 of the Redlynch Vistas residential subdivision and development approved by the Council, including the Rural Zone; outside the Urban Designation in the Strategic Framework and priority infrastructure area but in the medium landscape value designation in the Landscape Overlay Plan. However, the Stage 3 approval was undertaken on its own merits assessment under a previous planning regime, and on grounds that included circumstances materially different to here, and which sought to relegate the balance allotment, including the land the subject of this appeal (then formerly Stage 4) to be dedicated to the Council. Stage 3 was approved on the basis that it was the final stage of viable development, including the dedication of the land now sought to be developed.
- [157] Lots in Stages 1 to 3 have been selling since February 2021. In the meantime, the population growth in Redlynch Valley has increased by about 140 people per year. It seems to me that reasonable community expectations are that the approval of Stage 3, with 43 out of 55 lots completed, will culminate in the land transfer in accordance with condition 28 at or before the registration of a Plan of Survey for the 50th allotment within Stage 3. That transfer area, which includes the appeal land, will be dedicated for open space and drainage, adjoin the established pedestrian and cycle pathway and form part of a broader landscape of open space. The requirement to transfer that land has existed since 2011.
- [158] I conclude that the community expectations are such that the Redlynch Vistas would not include the proposed stage 4.

**The extent to which the proposed material change of use is in the public interest.**

**The extent to which the proposed material change of use advances the purposes of the Planning Act 2016.**

- [159] The appellant also points to the Council's decisions, for stages 1, 2 and later 3 especially, of the residential development of Redlynch Vistas, as a departure from the town planning designations in the zoning map and the Strategic Framework map and Regional Plan, to assert that the planning scheme in this locality does not represent an embodiment of the public interest.
- [160] In contrast, the Council (which the other parties join) distinguishes this appeal from the merits or otherwise of the approvals for stages 1, 2 and 3, which were applied for, and approved, under a previous planning regime, and on grounds that include circumstances materially different to here. I agree. And further, it seems to me that Stage 3 was approved on the basis that it was to be the final stage, and that the appellant would dedicate the land it now seeks to develop. Further, the deprivation of the community of land of all or part of the transfer land subject to condition 28 is contrary to the public interest.

## CONCLUSION

- [161] In the exercise of the discretion under s 60(3) of the *Planning Act* 2016, having assessed of the proposed material change of use against the assessment benchmarks, having regard to and assessing against the relevant matters above, the public interest, and the purpose of the *Planning Act* 2016, I'm bound to conclude that the proposed material change of use should not be approved because of the nature and extent of conflict with the assessment benchmarks, my findings in respect to the relevant matters, the contradiction to the public interest; and failure to advance the purpose of the *Planning Act* 2016.

## VARIATION REQUEST

- [162] The appellant makes a variation request to vary the effect of *CairnsPlan* to create use rights consistent with the Low Density Residential Zone on those parts of the parent land intended to be proposed lots 137-201 (inclusive), by reference to the plan.
- [163] In *Metroplex Management Pty Ltd v Brisbane City Council*,<sup>108</sup> this Court affirmed that the gravity of conflict between an application for approval of a material change of use and the existing planning scheme cannot be put at nought simply because the applicant applies to vary the effect of the planning scheme so as to obviate the conflict.<sup>109</sup>
- [164] Pursuant to s 61 of the *Planning Act* when assessing the variation request, the Court must consider:
- (a) the result of the assessment of that part of the development application that is not the variation request, above; and
  - (b) the consistency of the variations sought with the rest of the local planning instrument sought to be varied; and
  - (c) the effect the variations would have on submission rights for later development applications, particularly considering the amount and detail of information included in, attached to, or given with the application and available to submitters.
- [165] The appellant does not seek approval of some of the variations sought or different variations from those sought.<sup>110</sup>
- [166] It follows from the assessment and conclusions above that the variation request should also be refused. The result of the assessment of Part A warrants the refusal of the proposed material change of use. The variation request is inconsistent with *CairnsPlan*, Regional Plan and State Planning Policy 2017 Part E, and would undesirably deny submission rights for later development on the land.

## DEVELOPMENT PERMIT FOR RECONFIGURING A LOT

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<sup>108</sup> *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QPELR 270 at [9].

<sup>109</sup> *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QPELR 270 at [11].

<sup>110</sup> *Planning Act* (Qld) 2016, s 61(3)(a).

- [167] It also follows from the conclusions regarding proposed material change of use and variation request, that the development permit for reconfiguring a lot is also refused.

## **ORDERS**

- [168] Therefore, I will make the following orders:

- (a) Appeal dismissed.
- (b) The development application for a preliminary approval for a material change of use (including a variation request) and a development permit for reconfiguring a lot (3 into 65 lots, new roads and balance lot) is refused.
- (c) I will hear from the parties about any other consequential orders.



**Judge DP Morzone KC**