

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Daly v Townsville City Council* [2024] QPEC 19

PARTIES: **TERENCE DALY**
(appellant)

v

TOWNSVILLE CITY COUNCIL
(respondent)

FILE NO/S: 1501 of 2020

DIVISION: Planning and Environment

PROCEEDING: Appeal against refusal

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 12 April 2024

DELIVERED AT: Brisbane

HEARING DATE: 24, 25, 26 & 27 July 2023
Further written submissions received on 3 August 2023

JUDGE: Williamson KC DCJ

ORDER: **1. The appeal is dismissed.**

2. The respondent's decision of 23 April 2020 to refuse the appellant's development application (RAL 19/0061) is confirmed.

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal against refusal of a development application seeking approval to subdivide a rural parcel of land into 4 lots – whether the subdivision fragments the land – whether the subdivision would adversely impact the productive capacity of the land – whether approval would create a rural residential subdivision pattern – whether the construction of a new access will have an adverse ecological impact – whether the proposed development complies with adopted planning controls – whether the development application should be approved or refused in the exercise of the discretion.

LEGISLATION: *Planning Act 2016*, ss 45, 51 and 60
Planning & Environment Court Act 2016, ss 43, 45 and 46

CASES: *Abeleda v Brisbane City Council* (2020) 6 QR 441
Altitude Corporation Pty Ltd v Isaac Regional Council [2010] QPEC 127

Brisbane City Council v YQ Property Pty Ltd [2021] QPELR 987

Grosser v Council of the City of Gold Coast (2001) 117 LGERA 153

Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Ltd v Fabcot Pty Ltd & Ors [2022] QPELR 309

Wilhelm v Logan City Council & Ors [2021] QPELR 1321

COUNSEL: Mr A Skoien for the appellant
Mr K Wylie for the respondent

SOLICITORS: McInnes Wilson Lawyers for the appellant
Townsville City Council, Legal Services for the respondent

Introduction

- [1] This is an appeal against Council's decision to refuse an impact assessable development application seeking approval to subdivide a 32 ha rural property at Daly Road, Mutarnee (**the land**). The form of the subdivision changed during the development application process and the life of the appeal. The final form of subdivision proposed comprises 4 lots ranging in size from 2.077 to 25.543 ha. The development application does not seek approval for an associated material change of use.
- [2] Council resists the appeal and maintains the development application should be refused. The refusal case is founded, principally, on two contentions, namely that:
 - (a) the subdivision will fragment the land and diminish its productive rural capacity; and
 - (b) the subdivision if perfected will be akin, in part, to rural residential development.
- [3] The above contentions are relied upon to found non-compliance with adopted planning controls. The primary control is Council's planning scheme in force when the development application was treated as properly made: s 51(5) of the *Planning Act 2016*.
- [4] The appeal is a hearing anew: s 43, *Planning and Environment Court Act 2016*.
- [5] It is for the appellant to establish the appeal should be upheld: s 45(1)(a), *Planning and Environment Court Act 2016*.

The land and surrounding locality

- [6] The land is an irregularly shaped rural lot having an area of 32.03 ha. It is located in Mutarnee, which is about 68 kilometres north-west of Townsville and 450 metres south of the Hinchinbrook Shire Council's local government area.
- [7] The north/north-eastern boundary of the land has frontage to an unformed road reserve, namely Daly Road. The eastern boundary has frontage to Barrett Road, which intersects further to the north with the Bruce Highway. The southern boundary

adjoins a 20 ha rural lot. The western boundary follows the meandering path of Crystal Creek. The creek is a vegetated corridor travelling in a northerly direction towards the Bruce Highway and beyond.

- [8] The land is improved with two dwelling houses and associated ancillary structures. The improvements are located in the northern part of the land.
- [9] A water licence is attached to the land. The licence enables water to be lawfully taken from Crystal Creek for the purpose of irrigating a maximum area of 12 ha. The irrigation is to be for agricultural purposes.
- [10] Three covenants are registered on the title for the land. They collectively constrain its use.
- [11] Covenants A and C apply to a 50 metre wide buffer area following the edge of Crystal Creek. For this area, the covenants provide:
 - “...no building or ancillary structures, other than existing lawful buildings or structures, and pipes, pumpworks or ancillary structures necessary or desirable to give effect to the Covenantor’s rights under a water licence attached to Lot 1 on SP 262860 or water allocation issued in substitution for such a licence and used to supply water to that lot, are permitted within...[the covenant area].”
- [12] Covenant B applies to an area in the south-eastern corner of the land. The covenant creates a building envelope. The Covenantor’s obligations in relation to this part of the land are:
 - “...From the Date of the Covenant, the Covenantor must not construct a dwelling or secondary dwelling outside of the Covenant Area, without the prior written consent of the Covenantee.”
- [13] The Covenantee for Covenants A, B and C is Townsville City Council.
- [14] Mapping indicates the land has recognised biodiversity values. The values include remnant vegetation that, in plan view, presents as a crescent shape across the width of the land between Barrett Road and Crystal Creek. This vegetation follows a significant change in topography, which separates the land into a northern and southern portion. Mr Skoien described this feature as a vegetated escarpment. I accept this is an accurate description. It is made good having regard to visual aids before the Court.
- [15] The local road network to the north and north-east of the land is, as Mr Skoien correctly submitted, convoluted. It was pointed out that there is no existing road in a road reserve providing access to the land, Crystal Creek and properties to the west of Crystal Creek. The only access to Daly Road is via a track through an area of public land. This land is a reserve held by Council as trustee for park purposes.
- [16] Looking more broadly, three distinct parts of the local area can be identified. They are delineated by existing, natural, and man-made features.
- [17] The first area is defined on its eastern edge by the vegetated corridor for Crystal Creek. Land in this area is large in size, and, as aerial imagery confirms, is used for horticultural activities. The area is unmistakably rural, characterised by large lots.

- [18] The second area is defined by two features, namely Crystal Creek to the west, and Daly Road/Barrett Road to the north and north-east. Land located in this second area comprises large rural lots. Aerial photography, along with the evidence of agricultural experts, suggests this area has not been used productively for rural purposes for some time. The land is included in this part of the local area and has not been used for horticultural purposes for more than two decades.
- [19] The third identifiable part of the local area sleeves Barrett Road at its northern end, near the intersection with the Bruce Highway. It is fairly described as a hamlet. The land uses within the hamlet include a school, park, modest shop and postal service. Land to the east of Barrett Road is defined to the north by the Bruce Highway and comprises a cluster of parcels appreciably smaller than those to the west of Barrett Road and Crystal Creek. Land in this part of the local area ranges in size but is predominantly 1 to 5 ha. Some, but not all of this land appears to be used for rural activities. The rural activities that can be identified appear modest relative to those located west of Crystal Creek.
- [20] There was disagreement between the town planning witnesses as to the existing land use character of the hamlet, particularly to the east of Barrett Road. Mr Perkins, who was called by Council, characterised the area as '*rural residential*'. Ms Rayment, who was called by the appellant, characterised the area as '*a cluster of smaller rural land holdings centred around the Mutarnee township*'. In my view, both descriptions have application because the character of the area is mixed. It is a mix of non-residential, rural and rural residential uses. The non-residential uses are located to the west of Barrett Road and are identified in paragraph [19]. The area east of Barrett Road comprises a balanced mix of land uses falling into one of two categories: (1) land uses that are primarily rural with an associated dwelling subordinate to the rural use; and (2) land uses that are primarily residential in character with no, or small scale, rural activities subordinate to the primary use. Given the character of this area is mixed, I was persuaded, overall, that it is fairly described as '*semi-rural*'.
- [21] The area east of Barrett Road demonstrates why it is, as a matter of town planning principle, undesirable to permit the fragmentation of rural land through subdivision. The historical subdivision of the land east of Barrett Road has: (1) created a subdivision pattern that increases the number of houses close to agricultural activities, giving rise to the potential for reverse amenity impacts; and (2) created lots that are, by reason of their size and shape, suitable and attractive for a rural residential lifestyle, having no particular connection to horticultural activities.
- [22] That rural land can be readily used for a residential purpose, as distinct from a rural purpose, appears to be assisted by the planning scheme. A review of the planning scheme reveals that up to two dwelling houses on a lot in the Rural zone is accepted development, subject to meeting specified requirements. The land east of Barrett Road is included in the Rural zone. The requirements specified in the Rural zone code for a dwelling house do not call for that use to be subordinate or ancillary to a rural use in order to be accepted development.

The proposed development

- [23] The development for which approval is sought is defined in the *Planning Act* as '*reconfiguring a lot*'. This definition is engaged here because the proposed development involves creating new lots by subdividing a single parcel of land.

- [24] A review of the proposed plans of subdivision reveal the following matters;
- (a) it is proposed to subdivide the land into four lots, identified as lots 1000, 2000, 3000 and 4000;
 - (b) lot 4000, which is the largest of the lots proposed at 25.543 ha, is a large rural lot located in the southern part of the land;
 - (c) three smaller lots are proposed in the northern part of the land, namely (from south to north);
 - (i) lot 3000, having an area of 2.077 ha;
 - (ii) lot 2000, having an area of 2.129 ha; and
 - (iii) lot 1000, having an area of 2.253 ha;
 - (d) building envelopes are proposed for lots 3000 and 1000, having areas of 1,986 m² and 2,201 m² respectively;
 - (e) access to three lots (1000 to 3000) requires construction of a new road within an unformed road reserve (Daly Road); and
 - (f) access to lot 4000 is to be obtained via an existing access from Barrett Road.
- [25] The existing improvements discussed in paragraph [8] will remain and are located on lot 2000.
- [26] Covenant areas A and C impact on the western edge of all of the proposed lots.
- [27] Covenant B is located in the south-eastern corner of lot 1000.
- [28] The existing covenant areas remain unaltered in the plan of subdivision.
- [29] As I have already observed, the development application was impact assessable. An application of this kind is subject to public notification. The public notification process did not provoke any submissions.

Statutory assessment regime

- [30] The statutory assessment regime for this appeal is prescribed by the *Planning Act 2016* (**the Act**). The Act requires, among other things, the development application be assessed in accordance with s 45, which applies to the Court's decision on appeal as if it were the assessment manager: s 46(1), *Planning & Environment Court Act 2016*.
- [31] Section 45(5)(a)(i) of the Act mandates the application be assessed against assessment benchmarks in a categorising instrument. Section 45(7) confirms the reference to an assessment benchmark is one in effect when the development application was properly made. Here, this is version 2019/02 of Council's Planning Scheme, Townsville City Plan (**the planning scheme**).
- [32] Section 45(8) of the Act permits weight to be given to a statutory instrument that has come into effect after a development application was treated as properly made. In this case, it was common ground the North Queensland Regional Plan (dated March 2020) took effect after the relevant date and may be given weight in the assessment. Council's case calls in aid particular parts of the plan to support a refusal. The

provisions relied upon are directed towards the protection of agricultural land from fragmentation.

- [33] The statutory assessment framework is to be approached consistently with the following Court of Appeal authorities, namely: *Brisbane City Council v YQ Property Pty Ltd* [2021] QPELR 987; *Abeleda v Brisbane City Council* (2020) 6 QR 441; *Wilhelm v Logan City Council & Ors* [2021] QPELR 1321; and *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors*; *Dexus Funds Management Ltd v Fabcot Pty Ltd & Ors* [2022] QPELR 309. Having regard to these authorities, it can be observed:
- (a) the ultimate decision called for when making an impact assessment is a ‘*broad, evaluative judgment*’;
 - (b) in contrast to its statutory predecessor, the discretion conferred by s 60(3) of the Act admits of more flexibility to approve an application in the face of non-compliance with a planning scheme;
 - (c) the exercise of the discretion under s 60(3) of the Act is subject to three requirements, including that it be based upon the assessment carried out under s 45; and
 - (d) the Act does not alter the characterisation of a planning scheme – the document remains a reflection of the public interest.

The adopted planning controls

- [34] The disputed issues in this appeal require two planning documents to be examined, namely the planning scheme and the North Queensland Regional Plan (NQRP).
- [35] For the purposes of the planning scheme, the land:
- (a) is included in the Rural zone;
 - (b) is included in the Horticulture precinct of the Rural zone; and
 - (c) is subject to a range of overlays, including the Natural assets overlay, which is supported by mapping that indicates the western and northern parts of the land are regarded as exhibiting environmental features of ‘*very high importance*’.
- [36] Turning to the contents of the planning scheme, it was adopted and took effect during the currency of the now repealed *Sustainable Planning Act 2009*. It was amended in June 2017 for alignment with the Act. The planning scheme has been prepared with a 25 year planning horizon in mind.
- [37] The planning scheme components are identified in s 1.2. The components include a Strategic framework and 22 zones, including the Rural zone and Rural residential zone.
- [38] The Strategic framework is contained in Part 3 of the planning scheme. It sets the policy direction and forms the basis for ensuring ‘*appropriate development occurs within the planning scheme area for the life of the planning scheme*’: s 3.1(1). To describe the intended policy direction, the Strategic framework has a number of

layers. The layers include themes that, collectively, represent the policy intent. The themes are supported by strategic outcomes and elements.

- [39] Theme 3.3 is titled '*Shaping Townsville*'. One of the strategic outcomes for this theme provides that land has been allocated for housing, business and community uses sufficient to meet Townsville's needs for at least 25 years. With respect to rural residential land, s 3.3.1 goes further than simply identifying that provision has been made for this type of accommodation. The provision makes clear that areas of this kind will not expand. Section 3.3.1(4) relevantly states:

“(4) Limited areas for rural residential lifestyles provide residents with a semi-rural living option. These areas do not create conflicts with other rural uses, extractive industry operations or natural assets and environmental values, and do not expand further.” (emphasis added)

- [40] That rural residential areas are not intended to expand is a theme repeated in element 3.3.2, which is titled '*City Shape and housing*'. Specific outcome 3.3.2.1 is relevant to this element and provides, in part:

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

- [41] Sections 3.3.2.1(19) and (20) support the strategic outcome stated in s 3.3.1. They are directly relevant to rural residential areas and state:

“Rural residential areas

- (19) Rural residential areas provide for semi-rural lifestyles in which the primary use of properties is residential, but some, generally domestic scale, rural uses occur. Activities that would significantly disrupt the amenity of these areas are not intended to occur.
- (20) New rural residential development does not occur beyond those areas zoned for rural residential purposes.” (emphasis added)

- [42] Section 3.6 of the Strategic framework is a theme titled '*Sustainable economic growth*'. In the context of sustainable economic growth, strategic outcome 3.6.1(4) provides for the protection of rural land for a particular purpose. The provision states that '*...Farming activities and the productive capacity of all rural land is protected*'.

- [43] Element 3.6.4 of the planning scheme supports the above stated strategic outcome. Sections 3.6.4.1(1) to (4) provide:

“Protecting productivity

- (1) The productive capacity of all rural land is optimised within its environmental constraints.

- (2) Significant non-rural activities and intensive animal industries do not occur in Townsville's primary horticultural areas.

Avoiding fragmentation

- (3) Further fragmentation of rural land is avoided. A lack of viability for existing farms and small holdings does not justify their further subdivision or use for non-agricultural purposes.
- (4) Development complies with the nominated minimum lot size for each precinct which will generally range from 10ha for rural lifestyle precincts, to 40ha for horticultural-based precincts to 400ha for grazing-based precincts." (emphasis added)

- [44] The subdivision proposed will fragment the land by dividing it into parts. This will facilitate the land being held by multiple owners for different purposes, rather than one owner for a single purpose. An approval that facilitates this course is not, at face value, avoiding fragmentation of rural land and sits uncomfortably with s 3.6.4.1(3) of the planning scheme. This difficulty is, on one view, compounded because the subdivision, if approved, would yield three lots significantly less than 40 ha.
- [45] There is no dispute that the four lots proposed fall short of the nominated minimum lot size of 40 ha for the Horticulture precinct in the Rural zone: s 6.6(4)(e). Compliance cannot be achieved with the nominated minimum lot size given the land is smaller than 40 ha. The real point of controversy focuses on the extent to which the stated minimum is rigid or inflexible. In my view, the minimum does admit of flexibility. This is because: (1) it is prescribed in an acceptable outcome in two relevant codes: AO17 of the Rural zone code and A026 of the Reconfiguring a lot code; and (2) because s 6.6.1.2(4)(e) states that '*subdivision of lots below 40ha generally does not occur*'. These provisions, taken in combination, admit of there being an exception to the stated minimum of 40 ha. Useful touchstones as to when, and in what circumstances, the exception may be availed of include performance outcomes PO14 and PO17 of the Rural zone code and PO26 of the Reconfiguring a lot code. I will return to these provisions in the context of assessing non-compliance with the planning scheme.
- [46] The planning scheme area is divided into zones. Zones organise the planning scheme area in a way that facilitates the location of preferred or acceptable land uses. The zones are also divided into precincts.
- [47] Each zone has a zone code. The zone code contains a purpose; overall outcomes that achieve the purpose; performance outcomes that achieve the overall outcomes and purpose of the code; acceptable outcomes that achieve the performance and overall outcomes and purpose of the code; and performance and acceptable outcomes for specific precincts.
- [48] Section 6.6.1 of the planning scheme contains the Rural zone code (**the RZC**). The purpose of the RZC is to:
 - “(a) provide for a wide range of rural uses including cropping, intensive horticulture, intensive animal industries, animal

husbandry, animal keeping and other primary production activities;

- (b) provide opportunities for non-rural uses that are compatible with agriculture, the environment, and the landscape character of the rural area where they do not compromise the long-term use of the land for rural purposes; and
- (c) protect or manage significant natural features, resources and processes, including the capacity for primary production.”

[49] Section 6.6.1.2(2) of the RZC states a ‘*particular purpose*’ for the code. That purpose is to ensure:

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

[50] The purpose of the RZC will be achieved through a number of overall outcomes, including the following:

- “(a) the zone primarily accommodates cropping or animal husbandry and ancillary detached houses;
- (b) all rural land is protected from further fragmentation. A lack of viability for existing farm units and small holdings does not justify their further subdivision or use for non-rural purposes;
- (c) housing in the rural zone only occurs to the extent that it supports the productive use of the land...rural residential development is contained within designated growth areas and does not expand into the rural zone;
- (d) other new enterprises, including rural industries and tourism activities, are accommodated where:
...
(ii) the productive capacity of the land is not diminished and conflicts with existing and intended activities in the surrounding area are avoided; ...”

[51] As I have already said, the land is included in the Horticulture precinct of the Rural zone. The RZC includes a number of overall outcomes particular to this precinct. The overall outcomes of interest to this appeal are as follows:

“Horticulture Precinct

- (a) this precinct contains the most productive areas in the Townsville region, in which cropping is the predominant land use. The productive capacity of this land is maximised;
- (b) rural industries which have a direct nexus with the rural production in the immediate locality and only small-scale farm stay or bed and breakfast accommodation are established in this precinct;
- ...
- (e) subdivision of lots below 40ha generally does not occur.”
(emphasis added)

- [52] Figure 6.155 sits directly below the overall outcomes for the Horticulture precinct. It can be seen from the figure that the precinct is found in two locations. The land is located in the northernmost part of the planning scheme area.
- [53] Table 6.6.1.3 contains performance outcomes and acceptable outcomes for the RZC. Performance outcomes PO14 to PO17 have direct application to the Horticulture precinct. The provisions (and any acceptable outcome where provided) are in the following terms:

Horticulture Precinct	
PO14 Productive Land within this precinct is maintained.	No acceptable outcome is nominated.
PO15 Rural industries are established only where associated with rural production in the immediate vicinity.	No acceptable outcome is nominated.
...	
PO17 Reconfiguration is limited to protect the ongoing viability of existing and potential horticulture.	AO17 The minimum lot size in the precinct is 40ha.

- [54] Council’s case is founded on a contention that the subdivision, if approved, would yield lots that are suitable, and attractive, for rural residential development. It is for this reason that particular parts of the Rural residential zone code (**the RRZC**) are in issue. The code is contained at s 6.2.4 of the planning scheme. This code is relied upon to reinforce the point that rural residential development is not contemplated outside of the Rural residential zone. That the planning scheme contains a forward statement of planning policy to this effect can be accepted. It is particularly clear from the following provisions of the RRZC.
- [55] The purpose of RRZC code is to, among other things:

- “(1) The purpose of the Rural residential zone code is to provide for residential development on large lots where the intensity of residential development is dispersed.”

[56] A particular purpose is identified for the RRZC. It includes the following:

- “(2) The particular purpose of the code is to:
- (a) provide for semi-rural lifestyles in which the primary use is dwelling houses on large lots which may have limited access to infrastructure and services;
 - (b) provide for some subordinate, and generally domestic scale, rural activities and home based business to occur; ...”

[57] The purpose of the RRZC is achieved through a number of stated overall outcomes. They include:

- “(3) The purpose of the zone will be achieved through the following overall outcomes:
- ...
 - (b) reconfiguration creates large lots which support a semi-rural lifestyle and avoid intensification of impacts on on-site and on nearby ecological values, natural resources or rural activities;
 - ...
 - (d) further expansion of existing rural residential areas does not occur beyond those areas zoned for this purpose;...”

[58] The planning scheme utilises overlays to identify areas of State or local level interest, or that have one or more of a number of characteristics. The relevant characteristics include sensitivity to the effects of development, constraints that impact on land use, and opportunities for development.

[59] The Natural assets overlay code applies to the land. The purpose of the code is to, among other things:

- (a) protect areas of environmental significance, and the ecological processes and biodiversity values of terrestrial and aquatic ecosystems;...”

[60] The purpose of the Natural assets overlay code will be achieved through a number of overall outcomes, including the following:

- “(a) development avoids or minimises direct and indirect impacts on areas of environmental significance and their associated ecological functions and biophysical processes;...”

[61] Part 9 of the planning scheme contains Development codes. One such code is the Reconfiguring a lot code. The purpose of the code includes a familiar theme, namely to:

“...protect the productive capacity, landscape character and ecological and physical functions of Townsville’s diverse natural resources.”

[62] The purpose of the Reconfiguring a lot code will be achieved through a number of overall outcomes. They include:

“(2) The purpose of the code will be achieved through the following overall outcomes:

...

(c) lot reconfiguration is responsive to the local environment, including topography, natural drainage systems, vegetation and habitat, cultural heritage features, streetscape character, landmarks, views and vistas;

...

(e) lot reconfiguration assists in protecting areas containing important ecological values or providing important environmental services;

(f) lot reconfiguration does not facilitate fragmentation or alienation of land that would prejudice the productive use of rural land resources;...”

[63] Table 9.3.4.3 contains performance outcomes and acceptable outcomes for the Reconfiguring a lot code. With respect to lot size and design, performance outcome PO26 (and the accompanying acceptable solution) states, in part:

PO26	AO26
<p>Reconfiguration creates lot sizes that:</p> <p>(a) are consistent with the intended character of the zone, precinct or sub-precinct in which the land is located;</p> <p>...</p> <p>(c) are sufficient to protect the productive capacity, environmental and landscape values of rural land resources</p> <p>...</p> <p>(e) are sufficient to protect areas with significant ecological values.</p>	<p>Minimum lot size is in accordance with Table 9.3.4.3(c).</p>

[64] Acceptable outcome AO26 calls up Table 9.3.4.3(c). Reference to this table reveals the minimum lot size for land in the Horticulture precinct of the Rural zone is 40 ha, with a minimum 300 m frontage. In the Rural residential zone, the minimum lot size is stated in the same table as 4,000 m² unless the land is located in a water resource catchment overlay, where the minimum lot size is 4 ha.

[65] The NQRP took effect after the development application was properly made.

- [66] The NQRP contains four regional goals that assist in achieving a stated vision. Each goal includes key themes, a regional outcome and supporting policies. The latter is intended to inform planning and decision making. A regional outcome sitting beneath ‘*Goal 1: A leading economy in regional Australia*’ deals with agriculture and value added industries. Regional outcome 1.3 states:

“Maintain and investigate opportunities to expand a prosperous and sustainable agricultural sector in the region.”

- [67] This regional outcome is supported by 7 regional policies, one of which is in the following terms:

“1.3.1 Non-agricultural development within PAAs is not supported, unless the proposed use demonstrates net benefits for regional agricultural production, without compromising the PALUs current or future ability to operate, or is for public infrastructure.”

- [68] A ‘*PAA*’ is a strategic cluster of regionally significant agricultural production areas. They contain various priority agricultural land uses, which are ‘*PALUs*’. The land is included in a PAA.

- [69] The NQRP identifies agricultural ‘*priority areas*’ and encourages their maintenance. This does not, in my view, introduce a forward planning policy not otherwise evident in the planning scheme. This has the consequence that the NQRP need not be dwelled upon in any particular detail in this appeal. It is the planning scheme, and the assessment against that document, that has a significant role to play in the exercise of the discretion to approve or refuse the development application before the Court.

The disputed issues

- [70] The parties prepared, and agreed upon, a list of disputed issues: Exhibit 1. Counsel are to be commended for the document. It helpfully identified the provisions of the planning scheme in issue and categorises the issues in a way that reveals the degree of importance to be attributed to each in isolation, or when taken in combination with other related issues. A close examination of the issues indicates that Council’s refusal case is founded on seven propositions, namely:

- (a) the subdivision will fragment the land;
- (b) the subdivision, if approved, will diminish the agricultural capacity of the land;
- (c) the development will yield 3 additional lots akin to rural residential lots outside of the area designated for such development in the planning scheme;
- (d) there is no need for the subdivision;
- (e) the development will lead to adverse ecological impacts (by reason of vegetation clearing for the proposed access road);
- (f) the subdivision proposes building envelopes outside an existing covenant area absent Council’s consent; and
- (g) the subdivision does not comply with the planning scheme.

- [71] The appellant joins issue with all but subparagraph (d). In relation to need, it was conceded there is no demonstrated need for the subdivision. This was said to be a neutral consideration in the exercise of the discretion. While I have difficulty with that proposition, as will be clear from the reasons that follow, the outcome of this appeal is not influenced by the absence of a demonstrated need. The issue of greatest import in this appeal is alleged non-compliance with the planning scheme. In particular, non-compliance with a forward planning policy articulated, and repeated, at various levels of the planning scheme.
- [72] I will deal with the six remaining propositions in turn.

Will subdivision lead to fragmentation of the land?

- [73] This question is answered in the affirmative.
- [74] As I have already observed in paragraph [44], the subdivision, if approved, will fragment the land. This is because, if approved and acted upon, the subdivision will enable the land to be controlled by multiple owners (up to four in number), who may pursue different uses on different parts of the land. Future uses may, or may not, include an agricultural or horticultural purpose. That future uses of lots 1000, 2000 and 3000 may be residential in nature is far from fanciful. As existing development to the north and north-east of the land demonstrates, land that is 1 to 5 ha in size is attractive for uses that are primarily residential in nature, rather than rural.
- [75] Fragmentation of the land by subdivision is not supported by a forward planning policy articulated in the planning scheme.
- [76] A planning policy adopted in relation to fragmentation of rural land is stated in s 3.6.4.1(3) of the Strategic framework: paragraph [43]. The provision makes clear that further fragmentation is '*avoided*'. This policy is implemented through, among other things, the RZC. An overall outcome of the RZC calls for '*all rural land...[to be]...protected from further fragmentation*'. It is also implemented through the identification of minimum lot sizes in particular zones and precincts: s 3.6.4.1(4), paragraph [43]. Development is expected to comply with nominated minimum lot sizes. Here, that is '*generally*' 40 ha: paragraph [51]. The subdivision cannot comply with the nominated minimum lot size. At 32 ha, it is already smaller than the nominated minimum. Lots 1000, 2000 and 3000 are well below the nominated minimum, ranging from 2.07 to 2.25 ha.
- [77] I am satisfied the proposed subdivision sits uncomfortably with the adopted forward planning policy in relation to the fragmentation of rural land.
- [78] It is well established that the exercise of the planning discretion requires the nature and extent of any inconsistency with adopted planning controls to be examined. Here, the nature and extent of any inconsistency with the planning scheme in relation to fragmentation is informed by three considerations.
- [79] First, the evidence comfortably establishes that, even allowing for the existence of internal navigable paths and tracks, the land is already fragmented in a way that impacts on its productive capacity. In this regard, I accept that the following (existing) features, taken in combination, fragment the land into a southern and

northern portion (i.e. cause it to be broken into parts) and impact on its productive capacity, namely:

- (a) the requirements attaching to those parts of the land affected by Covenant areas A, B and C;
- (b) the presence of vegetation, which is of environmental importance and has the effect of breaking the land into two distinct parts; and
- (c) the presence of changes in topography, which also break the land into two distinct parts.

[80] The appellant's case is that the plan of subdivision seeks to accommodate the above constraints in three ways. First, by proposing multiple lots in the northern part of the land, which is its narrowest part and most affected by environmental constraints. Second, by designing the subdivision such that the largest lot (lot 4000) begins at the interface with areas constrained by vegetation and topographical features. Third, by designing lot 4000 to be of sufficient size to capture that part of the land exhibiting productive soil characteristics. The design of the subdivision in this way finds some support in the planning scheme. For example, s 3.6.4.1(1) of the strategic framework provides that the productive capacity of all rural land is '*optimised within its environmental constraints*'. A similar theme is evident in overall outcome (2)(a) of the RZC. It too envisages that the productive capacity of all rural land is maximised, but within '*the ecological constraints of the land*'.

[81] Second, as I have already observed, the 40 ha minimum lot size, while contained in an overall outcome, is not absolute or inflexible. In the Horticulture precinct of the Rural zone, subdivision of rural land is anticipated. Overall outcome 4(e) of the RZC anticipates that land in the precinct may be subdivided to a minimum lot size, '*generally*', of 40ha. The use of the word '*generally*' introduces flexibility. It indicates that the facts and circumstances of any given case may allow for a lot smaller than 40 ha. This is reinforced by the RZC and Reconfiguring a lot code. Both codes implement the stated minimum lot size by way of an acceptable outcome: paragraphs [53] and [63].

[82] Third, the planning scheme reveals there is a planning purpose underpinning the avoidance of fragmentation of rural land. The purpose is, at least, two-fold, namely to: (1) protect the productive capacity of rural land; and (2) ensure rural residential development does not expand into the Rural zone. The nature and extent of any material inconsistency in this appeal is informed by an examination of the proposed subdivision against these planning purposes.

Will the subdivision reduce the productive capacity of the land?

[83] The planning scheme, as I have already observed, speaks of the productive capacity of rural land and the need to protect and maximise that capacity. To examine this issue, I had the assistance of two soil and agricultural experts, Dr Matthew and Mr Sutherland.

[84] The experts produced a joint report. The points of agreement and disagreement in the report are founded on an agricultural and land suitability assessment dated February 2021 (**the Soil Report**). The assessment, among other things, mapped the landform and soils. It also described the agricultural and land suitability characteristics of the

land. It was agreed the Soil Report adequately mapped each of the relevant features of the land.

- [85] A review of the mapping in the Soil Report reveals that all of the practicable good agricultural land sits within proposed lot 4000. The agricultural land is identified as being predominantly land class 'A/B' and 'A'. Class A is crop land. Class A/B is a mixture of crop land and limited crop land. The mapping also reveals that the balance of the land is considered to be land class 'D'. This is not agricultural land. This applies to the area of lots 1000, 2000 and 3000.
- [86] The Soil Report included land suitability mapping. This mapping indicates that a large part of the land is unsuited to agricultural pursuits. This is due to vegetation and covenant constraints. It is of note that the part of the land mapped as class 'A/B' and 'A' has a suitability class of 2 and 3 respectively. Class 2 is suitable land with minor limitations. Class 3 is suitable land with moderate limitations. The suitability mapping suggests the land is not without constraint. That part of the land designated as suitable for agricultural pursuits is subject to minor limitations.
- [87] It can also be observed from the land suitability mapping that there is a finger or strip of land in the north mapped as suitability Class 5. Land of this character is described as unsuitable land with extreme limitations. This finger or strip of land sits within lots 1000, 2000, and 3000.
- [88] The Soil Report comfortably establishes that the proposed subdivision will protect that part of the land having the highest agricultural quality. This sits within lot 4000. The remaining area, which comprises lots 1000, 2000 and 3000, is constrained. It has poor soil characteristics. It is also subject to vegetation mapping regulations and covenants. This is consistent with Mr Sutherland's evidence, which I accept.
- [89] Mr Sutherland was of the view that the productive capacity of the land for rural purposes was curtailed. This was, in his view, a consequence of vegetation and land use restrictions associated with the existing covenants. The area most affected by these issues, as I understood the evidence, is located in the northern portion of the land. It is north of a ridgeline and protected vegetation.
- [90] Dr Matthew, who was called by Council, was critical of the proposition that the northern part of the land could be treated as isolated, remote or impractical for use for agricultural purposes. As I understood the evidence, he regarded the subdivision as fragmenting the land and precluding it being farmed as one unit. In his supplementary statement of evidence, Dr Matthew said:

“...it is axiomatic that the larger unsubdivided Lot 1 will have a greater potential horticultural/agricultural productivity and a more environmentally sustainable production system than the subdivided lots and a final subdivided lot of 25ha in combination. This is purely a function of area available for use on the existing lot, is greater because of the consumption of land in the event of a subdivision by

- building envelopes
- non-rural buffers to these envelopes
- roads

- effluent disposal areas and
- in the event of the larger block being used for farming the additional infrastructure that consumes additional farming land.

The existing un-subdivided Lot 1 has none of these farming land “losses” because any additional infrastructure...may be placed within the existing residential envelope or immediately adjacent to it minimising farm land losses.”

- [91] To the above can be added one further point. Dr Matthew pointed out in his report that the land in its subdivided form will not be suitable for rotations that allow part of it to be rested from time to time. This, he said, is likely to lead to a reduction in productivity because of the need to rotate and leave land fallow from time to time.
- [92] I do not accept Dr Matthew’s evidence. This is because the extent to which the land is broken into parts was, in my view, understated by him. I prefer Mr Sutherland’s evidence. His evidence satisfies me that the proposed subdivision, if approved:
- (a) protects the productive capacity of the land by placing all good quality agricultural land in lot 4000;
 - (b) will not compromise the ability to work the good quality agricultural land in lot 4000;
 - (c) appropriately takes into account the practical isolation and remoteness of the northern portion from the southern portion;
 - (d) is designed to reflect existing constraints; and
 - (e) appropriately takes into account the constraints to agricultural production on that part of the land where proposed lots 1000, 2000 and 3000 are located.
- [93] I am satisfied the productive capacity of the land would be protected by the proposed subdivision, within its known environmental constraints. The subdivision would not, as a consequence, cut across item (1) in paragraph [82].

Will an approval lead to the creation of lots that are akin to a rural residential pattern of subdivision?

- [94] This question is resolved in the affirmative, but on the basis that fragmentation by subdivision may lead to lots 1000, 2000 and 3000 being used for rural residential purposes.
- [95] I have reached this conclusion having regard to four matters, taken in combination.
- [96] First, the subdivision has been designed to separate constrained and unproductive land from that which is suited to rural pursuits. The dividing line is the common boundary between lots 3000 and 4000. The number, size and shape of the lots north of this line are justified on the footing they are located on the constrained and unproductive part of the land. I accept this proposition is established by the evidence. The land north of the dividing line is, I accept, to be treated as being unsuited to horticulture. This does not, however, justify fragmenting the northern part of the land into three lots.

- [97] Second, given lots 1000, 2000 and 3000 are located on constrained and unproductive land, it is likely to be attractive to residents who seek a rural residential lifestyle. This finds support in the evidence of the need experts and real world experience in this very locality. The real world experience, discussed in paragraphs [19] to [22], confirms that lots of the size and shape proposed in the northern part of the land are attractive for rural uses. They are also attractive for residents seeking a rural residential lifestyle. The latter purpose is described in the RRZC as ‘...*semi-rural lifestyles in which the primary use is dwelling houses on large lots which may have limited access to infrastructure and services*’. The character of the area east of Barrett Road is semi-rural in nature: paragraph [20]. An approval here may extend that character to include lots 1000, 2000 and 3000, assuming they are put to a residential purpose as the primary use.
- [98] Third, the planning scheme conveys an expectation that the development of lots 1000, 2000 and 3000 may include up to two dwelling houses. Development of this kind is accepted development, subject to requirements specified in the planning scheme. A review of the RZC, which contains the specified requirements, does not suggest a dwelling house must be ancillary or subordinate to a rural use of the land, such as cropping or animal husbandry. These matters, taken in combination with the attractiveness of lots 1000, 2000 and 3000 for a residential use, is cause for concern. The concern being that subdivision of the land may facilitate future residential uses of a kind that sit uncomfortably with overall outcome 6.6.1.2(3)(c) of the RZC: paragraph [50].
- [99] Fourth, an approval to subdivide the land would not bind the appellant (or successor in title) to use lots 1000, 2000 and 3000 for any particular purpose let alone exclude a future use that is primarily residential in nature. This is the direct product of the development application before the Court. It seeks approval for reconfiguration of a lot. The application does not seek approval for a material change of use. In circumstances such as this, it is to be assumed the lots, once created, may be put to one of the purposes contemplated in the Rural zone. This includes a dwelling house/s, which may proceed as accepted development absent a requirement to demonstrate a connection with rural production or rural pursuits.
- [100] The appellant did not accept that lots 1000, 2000 and 3000 would be used for rural residential purposes. Reliance in this regard was placed upon Ms Rayment’s evidence, in particular, her oral evidence. A review of Ms Rayment’s evidence reveals that, on her assessment, lots 1000, 2000 and 3000 would not be used for rural residential purposes having regard to s 3.3.2.1(19) of the Strategic framework and: (1) the size of each lot, which is more akin to a rural lot; (2) the proportion of each lot that would be put to a residential use in contrast to a rural purpose; (3) the distance between the lots and the edge of the urban area, where a semi-rural lifestyle can be expected; and (4) that the subdivision, if approved, would create lots of an appropriate size, dimension and configuration to accommodate land uses that are consistent with the RZC.
- [101] A close examination of Ms Rayment’s evidence reveals two shortcomings.
- [102] Ms Rayment’s opinion did not, in my view, give sufficient weight to s 3.3.2.1(19) of the Strategic framework. The provision assists here in that it identifies a number of characteristics specific to rural residential development. One particular characteristic

of note that separates rural residential development from a rural use is that emphasised below:

“Rural residential areas provide for semi-rural lifestyles in which the primary use of properties is residential, but some, generally domestic scale, rural uses occur.

[103] In light of the matters set out in paragraphs [96] to [99], it can be said with confidence that lots 1000, 2000 and 3000 are likely to be attractive to residents who intend the primary use of that land to be residential. The planning scheme, in its present form, would facilitate this for lots 1000, 2000 and 3000. It appears to do so because it does not require a landowner to: (1) demonstrate a residential use is related to, or supports, a nearby rural use; or (2) demonstrate the use is ancillary to a rural use on the land. Real world experience in this locality, which is traversed in paragraphs [19] and [20], suggests that the use of lots 1000, 2000 and 3000 for a residential purpose is far from remote or fanciful.

[104] The second shortcoming arises out of item (4) in paragraph [100].

[105] In the town planning joint report, Ms Rayment expressed the following opinion:

“...The proposed subdivision creates lots of an appropriate size, dimension and configuration to accommodate land uses consistent with the purpose and overall outcomes of the zone, because:

- i. The separated parts of the lot are of a useable shape, dimensions and configuration;
- ii. The four separated parts of the lot already appear and function as separate areas;
- iii. The land will continue to provide for a range of rural uses, to the extent it already could; and
- iv. The proposed subdivision boundaries protect and manage significant natural features, resources and processes (with reference to the agricultural land JER).”

(emphasis added)

And:

“...The subdivision contributes to the opportunity for rural development and small-scale horticulture, and additional housing to support agricultural activities such as housing for rural workers, which is in the public interest.”

[106] Ms Rayment confirmed (indirectly) in cross-examination that references to rural development potential in her evidence should be read as including rural industries, rural workers’ accommodation, animal keeping and a plant nursery: T3-50 to 51.

[107] A review of the RZC reveals there is support in the planning scheme for uses of the kind to which Ms Rayment referred. The RZC provides that the zone primarily accommodates ‘*cropping or animal husbandry and ancillary detached houses*’: s 6.6.1.2(3)(a). Non-rural uses are anticipated where, among other things, they are

directly associated with rural production and not more appropriately located in another zone: s 6.6.1.2(3)(d). Rural industries are expressly anticipated in the Horticulture precinct of the zone where they have a direct nexus with rural production in the immediate locality: s 6.6.1.2(4)(b).

- [108] While there is support in the planning scheme for a range of rural and non-rural opportunities on the land, the evidence fell well short of demonstrating (on the balance of probabilities) that lots 1000, 2000 and 3000 are of sufficient size, shape and configuration to accommodate uses of this kind. This was because Ms Rayment's evidence on this topic was an assertion. Her evidence did not permit an examination of how, and in what way, lots 1000, 2000 and 3000 could accommodate a range of uses anticipated in the zone. For example, the evidence did not disclose what, if anything, was assumed about: (1) the developable area available to accommodate rural or non-rural uses in the face of known constraints (building envelopes/covenant areas etc); (2) the provision of buffers, if any, (to manage reverse amenity impacts) and the impact of any buffer on the developable area of each lot; (3) the range and extent of rural uses that could be accommodated on the land prior to subdivision; and (4) the type of (and need for) accommodation that could be provided for local rural industry workers.
- [109] Ms Rayment's evidence, if accepted, establishes that the land, rather than lots 1000, 2000 and 3000 (individually or collectively) can accommodate the range and extent of rural uses that could have always been accommodated before subdivision. This evidence does little to resolve a key issue in this appeal. The issue is whether lots 1000, 2000 and 3000 will be attractive, and used, for rural residential purposes. Real world examples demonstrate the lots will be attractive for this purpose. Ms Rayment's evidence does not demonstrate otherwise.
- [110] That an approval may facilitate the use of part of the land (lots 1000, 2000 and 3000) for rural residential purposes is a by-product of fragmentation by subdivision. It is also the by-product of lots that are significantly less than 40 ha. Each by-product is contrary to the planning scheme.
- [111] The planning scheme, read as a whole, reveals there is a forward planning policy of direct relevance. It has, in essence, four parts. The planning scheme provides that: (1) sufficient land has been allocated for rural residential purposes for a planning horizon of 25 years; (2) new rural residential uses will not occur outside of the areas designated for rural residential purposes; (3) further expansion of existing rural residential areas does not occur beyond the area zoned for this purpose; and (4) rural residential uses do not expand into rural land. These elements are reflected in the following statements in the Strategic framework of the planning scheme (with emphasis added):

“...substantial lands have been allocated for rural residential development. Rural residential areas provide for semi-rural lifestyles, but no additional land for rural residential development beyond what is allocated in this planning scheme is intended.” (section 3.2.5).

And:

“(1) The growth of Townsville will occur within the city’s existing urban and rural residential areas, and in areas identified for urban expansion through the Emerging community zone. Urban and rural residential development does not occur outside land identified for these purposes.” (Section 3.3.2.1(1)).

And: “(20) New rural residential development does not occur beyond those areas zoned for rural residential purposes. (section 3.3.2.1(20))

- [112] The subdivision is inconsistent with the identified planning policy and cuts across item (2) in paragraph [82]. This is a matter that warrants refusal of the development application and is entitled to significant weight given: (1) the inconsistency identified relates to a matter of forward planning policy; (2) the proper approach for the Court to matters of planning policy is one of restraint: *Grosser v Council of the City of Gold Coast* (2001) 117 LGERA 153, [38]; and (3) the appellant does not suggest the identified policy is unsoundly based or overtaken by events. In my view, the forward planning policy is entitled to respect and should be given its full force and effect, absent sound town planning reasons to do otherwise.

Will the form of access proposed give rise to an adverse ecological impact?

- [113] The form of subdivision proposed requires vegetation to be cleared in a road reserve to provide lawful access to lots 1000, 2000 and 3000. The vegetation to be cleared is identified by the planning scheme, and relevant State mapping, as having ecological significance. Ecological evidence confirms the area to be cleared contains remnant vegetation of a high ecological function.
- [114] There is little doubt that the area to be cleared for access sits uncomfortably with parts of the Natural assets overlay code (set out in paragraphs [59] and [60]). The proposed clearing: (1) would not protect an area of environmental significance; and (2) would not avoid or minimise direct or indirect impact on an area of environmental significance. This, however, needs to be tempered by the evidence given by Mr Budd. He is an ecologist. It was his view that the clearing works would not have an unacceptable adverse impact on ecological values of the locality. After examining his evidence, for which there was no counterpart, I was persuaded it should be accepted.
- [115] With the evidence of Mr Budd in mind, I readily accept a submission made by Mr Wylie that the clearing work (to provide access) does not, in and of itself, warrant refusal of the development application. This submission is consistent with the evidence of Mr Budd. It is also consistent with the evidence of Mr Perkins, who did not regard this matter as one weighing heavily in the balance. It was a point Mr Perkins said was ‘*in the mix*’. I agree with the approach taken by Council and Mr Perkins in this regard.
- [116] While the point is ‘in the mix’, I am satisfied it does not call for refusal of the development application. This is because it is high in technicality but low in substance. The technical nature of the point is clear once it is appreciated that non-compliance with the planning scheme that founds the issue is not accompanied by any unacceptable ecological impacts on Mr Budd’s evidence, which I accept.

- [117] Further, I would add that the issue, on closer inspection, in fact reveals a potential public benefit. At present, access is obtained to the northern part of the land via a track traversing a public park. The park is a reserve, for which Council is the trustee. The presence of the access track through the park is contrary to the purpose for which that land has been reserved. The proposed development presents an opportunity to remedy this defect in the road network and enables the park to be returned to its intended purpose. I accept Mr Skoien's submission that these factors represent a '*positive consideration*' militating in favour of approval.

Development outside of Covenant areas

- [118] Council took issue with the building envelopes proposed in lots 1000 and 3000. It did so on the footing that the development application does not engage with the point that these lots are encumbered by the terms of Covenant B. The terms of the covenant preclude the establishment of dwellings or secondary dwellings outside of an identified area absent the consent of Council. At the time of the hearing, the appellant had not obtained Council's consent.
- [119] Like the vegetation clearing issue, this point was not relied on by Council as a matter that warrants refusal of the development application in and of itself. It is relied upon as a further matter that tells against refusal of the development application.
- [120] I am satisfied this issue is a distraction.
- [121] The issue does not sound in non-compliance with an adopted planning control. Further, while it is true that consent has not been obtained, there is no evidence to suggest Council's consent will not be given. Nor is there evidence to demonstrate that an application to extinguish or modify the covenant would be a futility: *cf Altitude Corporation Pty Ltd v Isaac Regional Council* [2010] QPEC 127, [94] to [96]. In the absence of such evidence, to exercise the discretion in the manner contended for by Council would involve impermissible speculation or pre-judgment by this Court about a matter of consent under an existing covenant.
- [122] I am satisfied the consent issue raised by Council should not stand in the way of an approval.

Non-compliance with the planning scheme

- [123] Having regard to the matters discussed above, the exercise of the discretion will proceed on the footing that the subdivision, if approved: (1) complies with provisions of the planning scheme calling for the protection and maintenance of the productive capacity of the land, within the limits of its environmental constraints (including PO14 and PO17 of the RZC); and (2) does not comply with the provisions of the planning scheme traversed in paragraphs [44] and [111]. The nature of the non-compliance is material: paragraph [112].
- [124] As a means of possibly reducing the nature and extent of non-compliance with the planning scheme, I had particular regard to PO14 & PO17 of the RZC and PO26 of the Reconfiguring a lot code. I observed in paragraph [45] that they provide useful touchstones as to the circumstances that may facilitate a departure from the prescribed minimum lot size of 40 ha in the Horticulture precinct. The touchstones provide partial assistance to the appellant's case. Compliance has been demonstrated with the

RZC provisions but not PO26(a) of the Reconfiguring a lot code. PO26 requires lot sizes to be consistent with, among other things, the intended character of the zone or precinct in which the land is located. The evidence comfortably establishes that the size of lots 1000, 2000 and 3000 is inconsistent with the intended character of the Rural zone and Horticulture precinct. The proposed lots fragment the land and facilitate its use, in part, for a use that is primarily residential in nature, contrary to overall outcomes 6.6.1.2(3)(b) and (c) of the RZC. Overall, these matters do not appreciably reduce the serious nature of non-compliance established with the planning scheme in this case.

- [125] Given the nature of the identified non-compliance with the planning scheme, it is unnecessary, in my view, to traverse each and every provision put in issue by Council in this appeal. The remaining planning scheme provisions are to be found in codes that implement the planning policy to which I have referred. Once this is appreciated, it is sufficient to say that an assessment against the code provisions does not affect the weight to be attributed to non-compliance with the planning scheme discussed above. The force of the refusal case is, in my view, found in the inconsistency with an identifiable forward planning policy.

Exercise of the discretion

- [126] The non-compliance identified with the planning scheme is material. It involves non-compliance with a forward planning policy that the appellant does not suggest is unsoundly based or overtaken by events. Circumstances such as this compel refusal of the development application absent a sound town planning reason to do otherwise.
- [127] As to the reasons '*to do otherwise*', it was submitted on behalf of the appellant that there were a number of relevant matters pointing in favour of approval. They can be identified as follows:
- (a) while there is no economic need for the additional lots, this is a neutral consideration;
 - (b) there will be no adverse impact on land supply as a consequence of the creation of three additional allotments;
 - (c) the creation of three additional allotments leads to a potential benefit in that additional lots would be provided for rural uses or to accommodate the rural workforce;
 - (d) the removal of vegetation to facilitate access does not give rise to any unacceptable ecological impacts;
 - (e) the removal of vegetation to facilitate access leads to the benefit identified in paragraph [117];
 - (f) the proposed subdivision, if approved, would protect the productive capacity of the land in a manner that is consistent with known constraints and protects environmental values; and
 - (g) the proposed subdivision is consistent with the existing settlement pattern and character of the locality.
- [128] While I have some misgivings as to whether subparagraph (c) has been established by the evidence, I am satisfied the planning discretion should be exercised on the

footing that each of the above matters are relevant and are entitled to weight. Each of the matters favour approval, in particular, subparagraph (f), which is consistent with a number of planning scheme provisions calling for the productive capacity of land to be protected, within its environmental limits. This is deserving of considerable weight. It favours approval.

[129] On balance, however, I am not satisfied the grounds said to favour approval, taken individually or in combination, provide a sound town planning basis to approve the development application in the face of non-compliance with a forward planning policy. That policy is entitled to respect and ought be given its full force and effect. This is particularly so once it is appreciated that a refusal of the development application permits three planning aims to be achieved concurrently, namely, a refusal will:

- (a) protect and maintain the productive capacity of the land;
- (b) protect the land from further fragmentation; and
- (c) ensure rural residential development does not expand into rural zoned land.

Disposition of the appeal

[130] The appellant has not discharged the onus.

[131] The appeal will be dismissed.

[132] The respondent's decision, made on 23 April 2020, to refuse the appellant's development application (RAL 19/0061) is confirmed.