# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Boral Resources (Qld) Pty Limited v Gold Coast City Council* [2018] QCA 75 |
| PARTIES: | **BORAL RESOURCES (QLD) PTY LIMITED**<br>ACN 009 671 809<br>(applicant)<br>**v**<br>**GOLD COAST CITY COUNCIL**<br>(respondent) |
| FILE NO/S: | Appeal No 5923 of 2017<br>P & E Appeal No 3084 of 2014 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave *Sustainable Planning Act*<br>Miscellaneous Application – Civil |
| ORIGINATING COURT: | Planning and Environment Court at Brisbane – [2017] QPEC 23 |
| DELIVERED ON: | 20 April 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 February 2018 |
| JUDGES: | Holmes CJ and Gotterson and Morrison JJA |
| ORDERS: | **1. Leave to appeal is granted in respect of Ground 1 in the draft notice of appeal, Exhibit "RKL-3" to the affidavit of Robyn Kaylene Lamb filed herein on 13 June 2017.**<br>**2. The appeal in respect of Ground 1 is dismissed.**<br>**3. The application for leave to appeal is otherwise refused.**<br>**4. The appellant/applicant is to pay the respondent's costs of the appeal and the application on the standard basis.** |
| CATCHWORDS: | ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the respondent refused to grant the applicant a permit for a material change of use of land – where the proposal was for the development of a large hard rock quarry in the Gold Coast Hinterland – where the applicant submitted that the primary judge did not give a practical, common-sense meaning to s 3.5.5.1(10) of CityPlan 2016 – where the applicant submitted the words "appropriately" or "to an acceptable level" ought to have been |

interpolated into s 3.5.5.1(10) – whether the primary judge erred in law in interpreting s 3.5.5.1(10)

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the respondent refused to grant the applicant a permit for a material change of use of land – where the proposal was for the development of a large hard rock quarry in the Gold Coast Hinterland – where the primary judge found that the proposal would conflict with s 3.5.5.1(10)(b) of CityPlan 2016 – where the applicant submitted the primary judge mischaracterised the koala habitat that exists on the land as a matter of environmental significance – where the applicant submitted it is the koala that is a matter of environmental significance, not its habitat – where there were 23,000 non-juvenile koala habitat trees on the subject land – whether the primary judge erred in characterising the whole of the quarry footprint as a matter of environmental significance for the purposes of s 3.5.5.1(10)(b)

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the respondent refused to grant the applicant a permit for a material change of use of land – where the proposal was for the development of a large hard rock quarry in the Gold Coast Hinterland – where the applicant conceded its proposal conflicted with the Gold Coast Planning Scheme 2003 – where the primary judge observed that if the applicant's proposal does not succeed under CityPlan 2016, its prospects of success under the Gold Coast Planning Scheme 2003 are even more unlikely – whether the primary judge failed to apply s 25 and s 36 of the *Sustainable Planning Act* 2009 (Qld) with respect to State Planning Policy 2013 and the South East Queensland Regional Plan respectively

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the respondent refused to grant the applicant a permit for a material change of use of land – where the proposal was for the development of a large hard rock quarry in the Gold Coast Hinterland – where CityPlan 2016 was a relevant instrument – where the applicant submitted that the primary judge failed to give adequate reasons for his decision – whether the primary judge erred by failing to give adequate reasons for his decision

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the respondent refused to grant the applicant a permit for a material change of use of land – where the proposal was for the development

of a large hard rock quarry – where the primary judge refused the application, but observed that the resource should be protected for future exploitation – where the applicant submitted this reasoning was irrational and illogical – where the applicant submitted unless the resource is exploited now, it will never be exploited – where the respondent submitted the primary judge's observation envisaged that the resource may become exploitable at some time in the future under a later planning scheme – whether there was irrationality in the primary judge's determination that there were not "sufficient grounds" to justify approval

*Planning and Environment Court Act* 2016 (Qld), s 63
*Sustainable Planning Act* 2009 (Qld), s 25, s 36, s 314, s 326, s 495

*Glasshouse Mountains Advancement Network Inc v Caloundra City Council* [1997] QPELR 438, considered
*Lockyer Valley Regional Council v Westlink Pty Ltd* (2011) 185 LGERA 63; [2011] QCA 358, applied
*Newing & Ors v Silcock & Ors* [2010] QPELR 692; [2010] QPEC 49, considered

COUNSEL: D R Gore QC, with J Lyons, for the applicant
R S Litster QC, with S Fynes-Clinton, for the respondent

SOLICITORS: Hopgood Ganim Lawyers for the applicant
McCullough Robertson for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Gotterson JA and with the orders he proposes.

[2] **GOTTERSON JA:** In May 2014, Boral Resources (Qld) Pty Limited ("Boral") applied to the Gold Coast City Council ("the Council") for a development permit for a material change of use with respect to Lot 105 on SP144215 ("the land"). The land has an area of 216.7 hectares and is located in the vicinity of Reedy Creek west of Palm Beach at the Gold Coast. The purpose of the application was to obtain permission to develop some 65 hectares of the land ("the quarry footprint") by quarrying and undertaking associated construction infrastructure activities.

[3] The quarry footprint contains a hard rock resource known as meta-greywacke. Boral wishes to exploit this resource over some 40 years at least as a replacement for an existing quarry it operates nearby at West Burleigh which has a remaining operational life of about six to ten years. The remainder of the land would be maintained as a vegetated buffer.

[4] In recognition of the hard rock resource, the land has been identified as Key Resource Area 96 ("KRA 96") in successive State Planning Policy instruments since January 2007.[1] This designation identifies it as a key resource area of State significance.

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1 State Planning Policy ("SPP") 2/07: AB303; SPP 2013: AB301–302.

[5] Boral sought relevant approvals for the proposed quarry. In January 2014, the Minister for the Environment (Cth) issued an approval for it under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("EPDCA") subject to conditions.[2] In December 2013, and after a comprehensive environmental assessment over more than three years, the Coordinator-General (Qld) recommended that the development proceed subject to conditions.[3] Then, in July 2014, the Department of Environment and Heritage Protection (Qld) issued an environmental authority for the development, also subject to conditions.[4]

[6] Boral's application to the Council was the final step in the approval process. Upon receipt of it, the Council engaged a number of independent experts to carry out a review and assessment. Matters addressed by them included visual amenity, development engineering, noise and air quality, traffic and transport, geological and quarry operations, ecological issues, economic need, community need, town planning and social planning. Town planners retained by the Council recommended approval of the quarry development subject to 100 conditions.[5] A Council officer, whose responsibility it was to prepare an internal report, recommended that the application be approved subject to the conditions proposed by the town planners.[6]

[7] On 8 July 2014, the Council's City Planning Committee met. It resolved to recommend to the Council that the officer's recommendation not be adopted and that Boral be advised that its application was refused.[7] At a meeting held on 11 July 2014, the Council resolved to refuse Boral's development application.[8] The Council's decision notice set out the 12 grounds for refusal nominated by the Council in its resolution.[9]

**The appeal to the Planning and Environment Court**

[8] Boral commenced an appeal in the Planning and Environment Court against the refusal decision. The appeal was heard over a little in excess of seven weeks in late 2016 and early 2017. Oral evidence was given by some 34 expert witnesses and by some lay witnesses. On 4 May 2017, an order was made dismissing the appeal[10] and reasons for that order were published.

**The application to the Court of Appeal**

[9] On 14 June 2017, Boral filed an application pursuant to s 63 of the *Planning and Environment Court Act* 2016 (Qld) for leave to appeal to this Court against the order of the Planning and Environment Court.[11] That provision permits an appeal with leave of this Court only, and only on the ground of error or mistake in law or jurisdictional error.[12] A draft notice of appeal exhibited to an affidavit in support of the application lists some six grounds of appeal.[13]

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2 Exhibit 7: AB1348–1352. Approval was initially sought in December 2010.
3 Exhibit 5: AB712–881.
4 Exhibit 8: AB1353–1369.
5 Exhibit 6: AB886–1031. The conditions are at AB988–1031.
6 Exhibit 6: AB1284.
7 Exhibit 6: AB1338.
8 Exhibit 6: AB1338–1341.
9 Exhibit 6: AB1342–1347.
10 AB5193.
11 AB5058–5061.
12 *SPA* ss 63(1),(2).
13 AB5194–5198.

**Applicable legislative provisions and planning instruments**

[10] The planning scheme in force at the time of lodgement of the application with the Council was the Gold Coast Planning Scheme 2003 ("CP 2003"). After Boral commenced its appeal, that planning scheme was replaced by CityPlan 2016 ("CP 2016") which came into force on 2 February 2016.

[11] The appeal to the Planning and Environment Court was by way of hearing anew.[14] The judge of that court was required to assess the application pursuant to the provisions of s 314 and s 326 of the *Sustainable Planning Act* 2009 (Qld) ("*SPA*"). The former required the assessment to be made against specified relevant instruments. Section 326(1) required that the assessment decision not conflict with a relevant instrument. Section 326(1)(b) created an exception – unless there were sufficient grounds, in terms of matters of public interest,[15] to justify the decision, despite the conflict.

[12] It is common ground that for the assessment required by s 314, each of CP 2003, the South East Queensland Regional Plan 2009-2031 ("SEQRP"), and the prevailing State Planning Policy ("SPP"), was a relevant instrument, but CP 2016 was not. Pursuant to s 495(2)(a) of the *SPA*, weight could, however, be given to CP 2016 by the Planning and Environment Court, as it considered appropriate.

[13] The learned primary judge accorded significant weight to CP 2016. His Honour did so in the following circumstances. It was the most recent statement of planning intent not only for the Council but also for the State Government, and as such, it accorded recognition to KRA 96.[16] CP 2003, on the other hand, was inconsistent with SPP 2013, and its predecessor SPP 2/07, in that it not only failed to protect that Key Resource Area but effectively ignored its existence.[17] That could be seen, for example, in the Reedy Creek Structure Plan in CP 2003 in which the designated future uses of the land were partly urban residential, partly park living and partly proposed open space and nature conservation.[18] Nevertheless, s 314(2)(d) of the *SPA* required the assessment to have regard for KRA 96 given its recognition in the prevailing SPP.

[14] That the learned primary judge had regard for CP 2016 was uncontroversial in the proceeding before him. Significantly, counsel for both sides, and his Honour, were of the view that the proper construction of a provision in it, s 3.5.5.1(10), to which I shall return, was central to the outcome of the appeal before him.[19]

**Features of CP 2016**

[15] CP 2016 comprises a number of components, one of which is the strategic framework. In the event of inconsistency between provisions within CP 2016, the strategic framework prevails over all other components.[20] The strategic framework is in Part 3 of CP 2016. It sets the policy direction for the plan.[21] It is structured in a way

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14 *SPA* s 495(1).
15 Ibid sch 3.
16 Reasons at [236]. See Exhibit 1: AB312 and Exhibit 11B: AB2308.
17 Reasons at [234].
18 The quarry footprint itself was designated for low-density urban residential and park living development: Exhibit 10B: AB1909.
19 Reasons at [229].
20 CP 2016 s 1.5(1)(a).
21 Ibid s 3.1(1).

that states the strategic intent and then addresses six themes for shaping future growth and managing change across the city.[22]

[16] For each theme, strategic outcomes are listed.[23] The elements that refine and further describe the strategic outcomes are identified.[24] Specific outcomes for each of these elements are set.[25] I mention at this point that Part 3.5, a division of Part 3, deals with the theme of strengthening and diversifying the city's economy. The natural resources element of that theme is discussed in Part 3.5.5. In turn, the specific outcomes for that element are the subject of Part 3.5.5.1.

[17] Part 3.7, also within Part 3, concerns the theme of living with nature. It contains strategic outcomes in Part 3.7.1, and discusses the theme element of nature conservation in Part 3.7.4, for which specific outcomes are set out in Part 3.7.4.1.

[18] For convenience, I propose to refer to components of parts as sections, as the learned primary judge did. Thus, s 3.5.5.1(10) is to be found in Part 3.5.5.1 and s 3.7.1(4) to which I shall refer, is to be found in Part 3.7.1.

[19] Part 8 and Part 8.2 of CP 2016 concern Overlays and Overlay Codes respectively. Part 8.2.6 addresses the Environmental significance overlay code for which criteria for assessment are set out in Part 8.2.6.3. Within that latter part, there is a Part C which applies only to assessable developments. It itself contains Table 8.2.6-2, the Environmental significance overlay code for assessable developments.

[20] Part 9 of CP 2016 relates to Development codes. The Extractive industry code is in Part 9.3.7. Significantly, this code contains a note in bold type that "non committed" extractive resource areas are those within the resource area or processing area of a key resource area and not contained within the Extractive industry zone.[26]

[21] Schedule 1 to CP 2016 contains a number of tables of definitions. Schedules 2 and 3 contain maps including strategic framework maps.

**The reasons at first instance**

[22] The learned primary judge described the location and topography of the land noting that it is traversed by a prominent ridge line that extends from the Springbrook Range to Burleigh Heads, by three secondary ridge lines, and by several waterways and water courses. It had once been cleared but it is now extensively covered by regrowth.[27] Other land in the vicinity has a mosaic of uses including urban and rural residential development, educational facilities, small-scale industrial and retail activities, and vacant land.[28]

[23] Boral's proposal for the land was described as one that involves four distinct stages: Establishment, Construction, Development and Operation.[29] Over its likely life, the quarry would involve a number of benches excavated from at or about natural

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22 Ibid ss 3.1(3)(a)–(b).
23 Ibid s 3.1(3)(c).
24 Ibid s 3.1(3)(d).
25 Ibid s 3.1(3)(e).
26 AB2126.
27 Reasons at [4]–[8].
28 Ibid at [9]–[10].
29 AB318–321.

ground level to a depth of –RL 66 metres.[30] For the first 25 years, the quarry would be significantly screened from view by a series of ridge lines, but at the 25 to 30 year mark through to the end of its life, the quarry benches would become progressively exposed as ridge lines identified as J and J4 were quarried. Material parts of ridge lines J4 and K would be levelled much earlier in the Establishment and Construction stages.[31] Blasting would occur once a week at set times during quarrying.[32]

[24] From the estimated resource of 79 million tonnes in the quarry footprint, hard rock and overburden worth of the order of $1.4 billion to $1.5 billion in 2016 dollar terms could be produced. The quarry material would be used to manufacture concrete, asphalt, drainage, road base, bricks, pavers and other construction products.[33]

[25] His Honour referred to the approvals that had been given by other governmental authorities to which I have referred. He considered that they provided "meaningful support for the proposal".[34] However, they were in no way "determinative" of the application to the Council or to the appeal.[35]

[26] The learned primary judge examined the evidence given by the lay and expert witnesses. He expressed conclusions with respect to it. On the evidence of the former, he was satisfied that even if all relevant environmental guidelines and policies were met by Boral, the development would have adverse impacts on the residential amenity of at least some of the residents surrounding the proposed quarry and an access road to it, Old Coach Road.[36]

[27] With regard to areas of expertise, his Honour examined the evidence given by the experts called by each side. Where there was a conflict which he needed to resolve, he indicated which body of evidence he preferred and the reason or reasons for his preference. He expressed conclusions on an area-of-expertise basis.

[28] I propose to set out the conclusions expressed by the learned primary judge on a number of topics related to these areas of expertise. I have omitted footnotes to these conclusions.

[29] Geology:

> "(i) The meta-greywacke underlying the proposed development is of a good quality, capable of being effectively and economically quarried and its extent is such that it has the potential to provide product for some 40 to 60+ years;
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> (ii) There are some overburden problems associated with quarrying some of the meta-greywacke within KRA 67 and the other relevant geographical surrounds, but those problems would not prevent the vast majority of identified material being quarried;

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30 Reasons at [18].
31 Ibid at [21].
32 Ibid at [23].
33 Ibid at [17]–[20].
34 Ibid at [28].
35 Ibid.
36 Ibid at [46].

(iii) Somewhere in the order of 5% - 10% of the known quarriable material in one of the quarries located in KRA 67 may be physically sterilised;

(iv) There are structural issues associated with KRA 62 that are likely to make future quarrying within it more difficult than those likely to be encountered in quarrying KRA 96;

(v) There are still enormous volumes of quarriable hard rock in KRA 67 and its geological surrounds, including KRA 62."[37]

[30] Blasting:

"1. Adverse impacts on amenity from fly rock are highly unlikely.

2. With appropriate conditions imposed and with appropriate quarry management practices in place, all relevant regulations, policies and guidelines will be met.

3. Notwithstanding that all relevant guidelines and policies would be met, the amenity of some residents living near the quarry would be negatively affected as a consequence of vibration and over pressure/noise caused by blasting."[38]

[31] Noise:

"In circumstances where there is no basis for concluding that the appellant will not comply with all regulatory requirements and adopt an appropriate noise management plan, there could be no basis for refusing the application on the basis of noise per se. That however, in my view, is not the end of the matter, because, notwithstanding that all appropriate regulatory requirements will be met, any adverse impacts associated with noise have to be considered in the light of all the negative impacts on amenity that might flow from the development and operation of the quarry. This is not a case that can be resolved by looking at each issue in isolation and where compliance on a "one-by-one" basis is met, concluding that there would be no reason to warrant refusal."[39]

[32] Air quality:

"…I accept the evidence of Mr Welchman to the effect that dust as any form of nuisance would be limited to those residents "very close to the quarry." From time to time though, dust from the quarry would be noticeable to a broader section of the close by residents: as Mr Litster put it, as a reminder that they lived near a quarry that was not there before."[40]

[33] Traffic:

"Again, while acceptable traffic engineering solutions exist and would be put into place by Boral, the introduction of up to 450

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37 Ibid at [60]. KRAs 62 and 67 are other key resource areas capable of servicing the Gold Coast market with comparable product.

38 Ibid at [65].

39 Ibid at [72].

40 Ibid at [79].

haulage truck movements per day into the local roadwork system will, as is the case concerning traffic noise, vibration and dust, adversely impact on the amenity of some residents. In this context though it will not be the same residents who experience the same impacts. Who suffers what will be dependent on location and, at the end of the day, in relative terms these adverse impacts will affect only a very small proportion of the residents of the Southern Gold Coast local government area. In this context I accept the submission made on behalf of the respondent that the introduction of so many haulage trucks into the road network will be a constant reminder of the quarry to a number of the local residents. Particularly at locations such as the Kingsmore Road roundabout and, to use Mr Beard's words, while traffic issues associated with Old Coach Road would not of themselves warrant refusing the application they nonetheless result in an "undesirable outcome"."[41]

[34] Koalas:

"(i) The proposed development will result in the eventual destruction of in excess of 23,000 NJKHT (non-juvenile koala habitat trees) and, as a direct consequence, will have a direct and adverse impact on the extant koala colony.

(ii) Notwithstanding the philosophical starting point that the best solution is maintaining existing habitat, appropriate offsetting can result in a net benefit to the wider koala population in South-East Queensland.

(iii) While mortality cannot be ruled out, given the relatively low koala population and the staging of the clearing of the site with proper onsite management (including koala spotting) that mortality rate, if not able to be eliminated, can be minimised.

(iv) In the event that the development were to be approved, that approval would be subject to a number of conditions of the type identified by both Dr Carrick and Dr Ellis and, in addition, conditional upon evidence of the securing of appropriate offset sites and a "head start" planting regime of the type identified by Dr Carrick. In this context it is also of significance that koala habitat would remain, by virtue of the intended buffer area and surrounding habitat areas."[42]

[35] Visual amenity:

"1. The visual consequences arising from the road works and haulage trucks are largely inconsequential in the greater scheme of things.

2. The visual impact on more distant receptors i.e. at or about 4 to 5km distance will be minor.

3. The visual impact of the noise amelioration fence will introduce a material visual impact to some of the residents in

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41 Ibid at [88].
42 Ibid at [125].

and users of Baden Ridge Road. However, over time with the maturity of screening, that impact will significantly reduce.

4. Even with the adoption of best practices, various physical elements of the quarry, in particular the processing plant and the quarry benches will be visible to a range of moderate to high receptors, albeit over different time frames. Some receptors will not see the quarry benches for in the order of 25 years.

5. Notwithstanding that the retention of Ridges R3 and I will largely retain the impression of the "green backdrop", particularly from more distant viewpoints, the removal of, in particular, Ridge J with its vegetated slopes, will result in a not insignificant alteration to the existing appearance of ridge lines west of the Pacific Highway. In this context I am unable to accept Mr Chenoweth's evidence which was to the effect that, taking all relevant matters into account, the loss of Ridge J was a minor consequence."[43]

[36] Waterways:

"1. A material number of waterways will be destroyed as a consequence of the proposal.

2. The loss of those waterways will have a significant detrimental impact to the hydrological regime of the catchments of Stony Creek and Oyster Creek.

3. It is more likely than not that the existing hydrological regime could be replicated.

4. The effect of the proposal on waterway flows is insignificant within 1 or 2km downstream of the site."[44]

[37] Terrestrial ecology:

"The impact on the environment within the development footprint could only be described as catastrophic. Not only would ridgelines and gullies disappear, but so would a number of waterways and in the order of 30,000 trees including 23,000 NJKHT and other vegetation."[45]

"…If developed the quarry will irreversibly alter the existing landscape."[46]

"…I am satisfied that threatened species (the Slender Milkvine) and all locally significant plant species that do or might exist are capable of being translocated and propagated within the balance buffer area and that the balance buffer area will be better managed under management plans that will address, among other things, landscape rehabilitation, bushfire risks and feral animals etc."[47]

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43 Ibid at [143].
44 Ibid at [155].
45 Ibid at [178].
46 Ibid at [181].
47 Ibid at [182].

[38] Aquatic ecology:

> "By reference to the matters dealt with above, the evidence makes it tolerably clear that the destruction of the waterways within the disturbed area will not have any meaningful effect on downstream aquatic flora and fauna and that the aquatic flora and fauna within those waterways are not of themselves so unique or exceptional to warrant a strong preference or desire for conservation. That said, the inescapable conclusion is that the loss of some 2.5km of waterways will remove habitat or otherwise destroy aquatic ecosystems within the disturbance footprint which could be described as falling within the range of moderate to excellent."[48]

[39] The learned primary judge then turned to the planning documents.[49] He observed that a planning scheme is a statutory instrument under the *Statutory Instruments Act* 1992 (Qld).[50] He noted that allegations of conflict, as that word is used in s 326(1) of the *SPA*, "loom particularly large" in this case.[51] They concerned alleged conflicts between the proposed use of the land as a quarry on the one hand, and the two plannings schemes, CP 2003 and CP 2016, on the other.[52]

[40] **CP 2003 and conflict:** His Honour also noted a concession by Boral that approval of its application would conflict with CP 2003. That, he said, was unsurprising given that CP 2003 and, in particular, the Reedy Creek Structure Plan, "essentially provided for residential development consistent with residential development of the type already existing, and otherwise focused on recognising and protecting the environmental qualities and features" of the land.[53] He went on to reject a submission for Boral that the relevance of CP 2003 in this context had been entirely displaced in light of its disconformity with SPP 2013, particularly with regard to KRA 96.

[41] **CP 2016 and conflict:** As I have noted, the learned primary judge did accord significant weight to CP 2016. He enquired into whether approval would conflict with it. First, he identified as relevant to the enquiry two components of CP 2016; namely, State planning provisions and the strategic framework.

[42] As to the strategic framework, his Honour made the following observations:

> "[243] …In the introduction to the strategic framework it is identified that it is intended to set policy direction that will help to "*protect and enhance the Gold Coast outstanding lifestyle by ensuring appropriate and sustainable development occurs within the City Plan area for the life of the City Plan.*" The introduction then goes on to identify six "*City shaping themes that play an important role in shaping the future growth and managing change across the city, and collectively represent the policy intent of the City Plan:*
>
> (i) *creating liveable places*;

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48 Ibid at [196].
49 Ibid at [197].
50 *SPA* s 80.
51 Reasons at [201].
52 Ibid.
53 Ibid at [212].

(ii) *making modern centres*;

(iii) *strengthening and diversifying the economy*;

(iv) *improving transport outcomes*;

(v) *living with nature*;

(vi) *a safe, well-designed city*."

[244] Strategic outcomes include that "*natural resources are sustainably managed for current and future generations and leveraged to support the growth of nature based tourism in a sustainable manner.*"

[245] Section 3.5.5 of the strategic framework is concerned with the element of natural resources. Pursuant to s 3.5.5.1, the relevant specific outcomes are:

"(l) The prudent use of renewable and non-renewable natural resources supports long-term community needs and only occurs where any immediate or long-term environmental and social impacts can be managed to an acceptable level.

(2) Natural resource areas of economic value and associated haulage routes are protected from encroachment by activity that would compromise the ability to utilise the resource effectively and sustainably. Natural resource areas of economic value include:

(a) rural production areas ...

(b) extractive resource areas **(committed and non-committed).**

…

(7) **Committed and non-committed extractive resource areas** and their associated haulage routes are protected from encroachment from incompatible development. Surrounding development minimises views into resource areas.

(8) **In committed areas**, the extraction and haulage of the resource protects environmental values on the land **as far as practicable prevent significant impacts** on nearby sensitive users including the use of appropriate separation areas/buffering; **and does not scar vegetated ridgelines and elevated land** when viewed from outside the resource area.

…

(10) **In the non-committed areas at Reedy Creek**... operations only extend into the non-committed areas if it can be demonstrated that:

(a) the amenity of nearby residential land is **maintained**;

(b) critical corridors are accommodated and matters of environmental significance **are conserved, protected, enhanced and managed; and**

(c) **the green backdrop provided by ridgelines is not reduced** when viewed from major roads and surrounding residential land ..." (Emphasis added)."

[43] The land is a non-committed area at Reedy Creek within the meaning of s 3.5.5.1(10). The construction issue, to which I have referred, related to Boral's contention that this section should be read as if each of the three limbs in it contained modifying words such as "appropriately" or "to an acceptable level".[54] His Honour rejected that contention although he did accept that each limb ought not be construed "too strictly".[55]

[44] The learned primary judge stated that he did not consider that the proposal ought be refused by reference to aquatic ecology, terrestrial ecology, noise (from whatever source), air quality or vibration, whether taken singly or in combination with each other.[56]

[45] As to s 3.5.5.1(10)(a), his Honour found that the planned quarrying operations would materially conflict with the amenity of the nearby residential land. He was satisfied that "there would be tangible, negative impacts on residential amenity arising from the visibility of the development, blasting, the introduction of heavy traffic and, to a lesser extent, periodic dust issues".[57] Likewise, the green backdrop provided by ridgelines would be negatively impacted in a material way giving rise to a material conflict with s 3.5.5.1(10)(c).[58]

[46] The learned primary judge concluded that conflict with s 3.5.5.1(10)(b) was "even more serious".[59] He considered that the clearing of 65 hectares of koala habitat "could not be sensibly reconciled with the object of conserving, protecting and enhancing matters of environmental significance".[60] His Honour referred to the opinion expressed in a Joint Expert Report[61] that an offset area and replanting could be achieved over multiple parcels of land.[62] The experts recommended that that be undertaken preferably within the City of Gold Coast region or an immediately adjoining region.[63]

[47] The fact that habitat offsets elsewhere might well lead to a better overall outcome for the koala population in the wider South East Queensland area was, in his Honour's view, not to point. Furthermore, he was of the view that notwithstanding offsets, such clearing would amount to a failure to have regard for Strategic Outcome 3.7.1(4)[64] in CP 2016 which requires that matters of environmental significance within biodiversity areas be protected *in situ*, and also for the related

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54 Ibid at [246].
55 Ibid at [250].
56 Ibid at [252].
57 Ibid at [253]–[256].
58 Ibid.
59 Ibid at [257].
60 Ibid at [263].
61 Exhibit 18: AB2517-2582.
62 Reasons at [107], [108].
63 AB2521.
64 AB1992.

Specific Outcome 3.7.4.1(4)[65] which envisages that in biodiversity areas, "matters of environmental significance including vegetation and habitat for native flora and fauna are protected in situ".

[48] **Sufficient grounds:** Having concluded that there was conflict with both CP 2003 and CP 2016, the learned primary judge then undertook an enquiry into whether there were sufficient grounds to justify approval of the application despite the conflict. In this context, he acknowledged that the hard rock in KRA 96 is a valuable state resource but cautioned that the benefit of exploiting it at this particular time had to be balanced against competing interests.[66]

[49] Within this context, his Honour proceeded to consider topics which he had not to that point addressed, namely, quarry management and economic evidence. From this evidence, he reached the following conclusions:

> "(i) there is a need for the quarry in the sense that it would ensure a continuation of supply of good quality hard rock material in the Southern Gold Coast area;
>
> (ii) in the event that the proposal did not proceed there is a realistic risk of competition reducing with consequential price increases, and there will be additional costs to the community of in the order of $240 million over the life of the quarry;
>
> (iii) notwithstanding the above, approved resources located within the respondent's local government area would be sufficient to meet demand within that area for decades and meet demand within the wider Southeast Queensland region and Northern New South Wales for at least another 15 years; and
>
> (iv) it is in the interest of the broader Southeast Queensland community that this key resource be protected to ensure its availability for exploitation when appropriate."[67]

[50] The learned primary judge then moved to state his conclusions as to whether there were sufficient grounds to justify approval despite the conflicts with CP 2016 and CP 2003 that he had identified. His Honour said:

> "[325] The evidence presented during the course of this proceeding establishes three fundamental things. First, the subject land contains a significant volume of a resource of State significance. Second, there is a level of current need for the proposal to the extent identified above. Third, the proposal is in material conflict with important objects and outcomes of the respondent's planning scheme, particularly in respect of the protection of the biodiversity value of the site and its surrounds, the green ridgeline backdrop and urban amenity.
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> [326] I found this case to be quite a difficult one to decide but, on balance, I have come to the conclusion that I am not satisfied that there are sufficient grounds to justify approval. In that context I agree with the submission made by Mr Litster to the

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65 AB1997; Reasons at [264]. The term "protected in situ" is defined in Table SC1.2.2.6 in Schedule 1 to CP 2016 to mean, for the purposes of the Environmental significance overlay code, that matters of environmental significance must not be damaged or removed, and the matter cannot be offset.

66 Reasons at [275].

67 Ibid at [324].

effect that, under the relevant planning regime, the balance currently favours refusal of the application. That said, there can be no doubt based on the evidence of all of the relevant experts that this significant resource should be protected for future exploitation when appropriate.

[327] For the reasons given the appeal must be dismissed."

**The grounds of appeal**

[51] Boral relies on the following six grounds of appeal:

"Ground 1 – "*the interpretation errors*":

1. The primary judge erred in law in interpreting the Respondent's planning scheme, *CityPlan 2016* (**CP2016),** particularly in relation to:
   (a) s.3.5.5.1(10) (**specific outcome 10**);
   (b) other provisions of CP2016 relevant to:
      (i) extractive industry uses;
      (ii) environmental matters;
      (iii) amenity impacts.

Ground 2 – "*the CP2003 error*":

2. The primary judge erred in law in deciding that the Appellant's prospects of approval under the Gold Coast Planning Scheme 2003 (**CP2003**) were more unlikely than under CP2016, in circumstances where he had decided that CP2003 was in direct conflict with State Planning Policy 2013 for the purposes of s.25 of the *Sustainable Planning Act 2009* (***SPA***).

Ground 3 – "*the relevant considerations errors*":

3. The primary judge erred in law when undertaking the "*sufficient grounds*" exercise contemplated by s.326(1)(b) of *SPA*:
   (a) by failing to take relevant considerations into account, in particular:
      (i) each of his findings as to matters of public interest;
      (ii) his suspicion that the drafting of specific outcome 10 was intended to make the development of the Appellant's proposal extremely difficult, if not impossible;
      (iii) the approval of the Appellant's project by the Coordinator-General in December 2013;
   (b) by taking irrelevant considerations into account, in particular:
      (i) the suggestion on behalf of the Respondent that, under CP2016, the balance currently favoured refusal of the Appellant's application;

(ii) his erroneous conclusion that conflict with CP2003 was even more serious than with CP2016.

Ground 4 – "*the inadequate reasons errors*":

4. The primary judge erred in law by failing to give adequate reasons for his decision, particularly in relation to:

   (a) specific outcome 10;

   (b) the nature and extent of the "*matters of environmental significance*" (as that expression is defined in CP2016) relevant to the present case;

   (c) his determination that there were not "*sufficient grounds*" to justify approval for the purposes of s.326(1)(b) of *SPA*, with respect to either CP2003 or CP2016;

Ground 5 – "*the irrationality error*":

5. The primary judge erred in law in that his determination that there were not "*sufficient grounds*" to justify approval was irrational and illogical.

Ground 6 – "*the consequential errors*":

6. In consequence of the errors identified above, the primary judge erred in law:

   (a) in deciding that the Appellant's proposal was in material conflict with CP2016;

   (b) in failing to decide that there were sufficient grounds to justify approval despite any conflict."[68]

[52] At the hearing of the application, counsel for Boral clarified that if leave to appeal were granted and the appeal were to succeed on any of these grounds, then it would be appropriate for this Court to order that the matter be remitted to the Planning and Environment Court for further consideration. The alternative relief stated in the draft notice of appeal that the appeal be allowed was not pursued.[69] I now turn to consider the grounds of appeal.

**Ground 1**

[53] **The alleged error in interpretation of s 3.5.5.1(10):** Boral submits that the learned primary judge did not give a practical, common sense meaning to this specific outcome. To do so requires, it is submitted, interpolating words such as "appropriately" or "to an acceptable level" into the provision, conformably with the decision of this Court in *Lockyer Valley Regional Council v Westlink Pty Ltd*.[70]

[54] In developing the submission, Boral contended that his Honour had allowed general provisions in CP 2016 which contemplate protection *in situ* to limit the meaning he gave to s 3.5.5.1(10). Also, he had failed to adhere to s 326(1)(c)(ii) or the *SPA* by adopting a meaning that deprives the provision of any practical operation notwithstanding

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68 AB5195–5196.
69 Appeal Transcript ("AT") 1-45 ll21-27.
70 [2011] QCA 358; (2011) 185 LGERA 63 at [20].

that it must have been within the scheme's contemplation that not insignificant quarrying take place in the Reedy Creek non-committed area, given the recognition of KRA 96 in CP 2016. Reliance was also placed on s 9.3.7.2(2)(a) in CP 2016.

[55] In evaluating this submission, I would first reject a suggestion made in oral argument that the words that Boral urges be interpolated were omitted by drafting inadvertence. In the first place, the inclusion of the words "as far as practicable" in s 3.5.5.1(8) might well have been seen as appropriate for extractive resource committed areas, but not for the non-committed areas at Reedy Creek.[71] Further the words "only … if" which preface the conditions in s 3.5.5.1(10) suggest that this specific outcome was drafted with deliberate care.

[56] Any consideration of the meaning of s 3.5.5.1(10) must begin with an acknowledgement that, in its own terms, it is not incoherent, self-contradictory or obscure in meaning. The words Boral seeks to have inserted are not necessary to overcome a deficiency of that kind.

[57] The learned primary judge regarded s 3.5.5.1(10) as a provision which is not to be construed or applied too strictly. To similar effect, in *Newing & Ors v Silcock & Ors*,[72] Rackemann DCJ had observed that it should not readily be inferred from the absence of an express qualification that a provision of a planning scheme relevant to a change of use application requires that the proposed use have no impact at all, no matter how insubstantial, trivial or insignificant. A like observation had earlier been made by Quirk DCJ in *Glasshouse Mountains Advancement Network Inc v Caloundra City Council*.[73] Consistently with those observations, his Honour rejected the Council's submission that this provision should be construed and applied strictly.[74]

[58] In *Lockyer Valley Regional Council*, decided in 2011, this Court noted that the primary judge, Rackemann DCJ, had referred to *Glasshouse Mountains Advancement Network Inc*. Fraser JA (with whom White JA and Douglas J agreed), implicitly endorsed his Honour's observation made, with reference to authority, that planning schemes should be construed broadly, rather than pedantically or narrowly, and with a sensible, practical approach.[75]

[59] Consistency with the decision in *Lockyer Valley Regional Council* does not require the interpolation of the words suggested by Boral in order for s 3.5.5.1(10) to operate sensibly and practically. In my view, that is sufficiently achieved by the not too strict manner in which the learned primary judge considered it should be construed and applied. Moreover, to interpolate those words would unjustifiably displace recognition of the different standards that the express language of s 3.5.5.1(8) and s 3.5.5.1(10) respectively indicate are to be applied to extractive resource committed areas on the one hand, and to the Reedy Creek extractive resource non-committed areas on the other.

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71 As was noted by the learned primary judge at [250].

72 [2010] QPEC 49; [2010] QPELR 692 at [63].

73 [1997] QPELR 438 at 440-441.

74 Such a construction and application would, his Honour said, "result in an effective ban or prohibition on any meaningful quarrying on the land": Reasons at [250].

75 Ibid at [20].

[60] The contention that the learned primary judge allowed general provisions relating to protection *in situ* to limit the meaning of s 3.5.5.1(10) does not withstand scrutiny. For that to have occurred, his Honour would have had to have construed and applied this specific outcome with inflexible stricture. He did not. Nor is s 326(1)(c)(ii) of the *SPA* brought into play. The definition of the term "protect in situ" applies for the purposes of the Environmental significance overlay code. It is not expressed to apply to Part 3 specific outcomes. Hence, no conflict arises between the definition of that term and s 3.5.5.1(10).

[61] Nor does s 9.3.7.2(2)(a) assist Boral's submission. The role of Part 9.3.7.2 is to state the purpose of the Extractive industry code (in s (1)) and how that will be achieved through a number of overall outcomes (in s (2)). The first outcome in s 9.3.7.2(2)(a) is that extractive industry is separated from sensitive land uses and residential zones to ensure amenity impacts including visual, light, noise, dust, odour and vibration are "at an acceptable level".

[62] This overall outcome has no influence upon the construction and application of s 3.5.5.1(10) in my view. It is not a springboard from which to reason that the same qualification is to be read into s 3.5.5.1(10). The note in bold type to Part 9.3.7.2 is apt to put in question the application of this Code to "non committed" extractive resource areas. However, for present purposes, I shall assume that it does apply to them. Significantly, primacy is given by CP 2016 to the strategic framework, of which s 3.5.5.1(10) forms part, over codes, and, in any event, s 9.3.7.2(1) acknowledges that development under that code is to occur "in a manner consistent with the **Strategic Framework**".

[63] For these reasons, I would reject Boral's submission that his Honour erred in law in interpreting s 3.5.5.1(10). I mention also that I would reject a submission by Boral that his Honour erred in applying the provision by having regard to environmental impacts that would occur notwithstanding compliance with other regulatory regimes. His Honour did have regard to such impacts.[76] It was, in my view, correct for him to have done so. On the plain words of s 3.5.5.1(10), matters relevant to the assessment of impact upon the amenity of nearby residential land are not excluded from the assessment on account of their inevitability notwithstanding compliance with other applicable regulatory regimes. To have excluded such matters from an assessment on that account would have been without legal justification.

[64] **The alleged MES error:** This alleged error is related to the finding by the learned primary judge that there would be conflict with s 3.5.5.1(10)(b). It will be recalled that that provision requires that critical corridors are accommodated and matters of environmental significance ("MES") are conserved, protected, enhanced and managed. Boral submits that his Honour erred in characterising the whole of the quarry footprint as a matter of environmental significance for the purposes of this provision.

[65] The term "matter of environmental significance" is defined in "Table SC1.2.2: Administrative definitions" in Schedule 1 to CP 2016 to be a collective term referring to any environmental matter that is either a matter of national environmental significance, a matter of state environmental significance or a matter of local environmental significance. Each of these matters is defined to have the meaning given to it by the corresponding definition for the purposes of SPP 2014.[77]

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76 Ibid at [46], [255].

77 Table SC1.2.2.

It is uncontroversial that the koala, as a listed threatened species under the EPDCA, is a matter of national environmental significance, and, as threatened wildlife under the *Nature Conservation Act* 1992 (Qld), is a matter of state environmental significance. Hence, the koala is a matter of environmental significance for the purposes of s 3.5.5.1(10).

[66] Boral contends that learned primary judge misapplied s 3.5.5.1(10)(b) by characterising as a matter of environmental significance the koala habitat that exists over the 65 hectares occupied by the quarry footprint.[78] The mischaracterisation arises because it is the koala, and not its habitat, that is a matter of environmental significance. The true position is, it is submitted, that koalas are to be looked at individually for conservation management. Their presence within a particular habitat does not characterise the habitat, itself, as a matter environmental significance. That is so, it is argued, even where, as here, there is expert evidence to the effect that the 23,000 NJKHT on the quarry footprint are a koala habitat.

[67] The learned primary judge did describe koala habitat as a matter of environmental significance.[79] For that, he cited the description in Part 8.2.6.1 of CP 2016 of "koala habitat areas" as a matter of state environmental significance. It is arguable that, given the definition of matters of state environmental significance, that particular description is referable only to areas marked as essential habitat for endangered or vulnerable wildlife on a map prepared under the *Vegetation Management Act* 1999 (Qld).[80] The whole of the quarry footprint is not marked as essential habitat for koalas.

[68] I accept that it is therefore questionable whether the description in Part 8.2.6.1 to which I have referred, would, of itself, justify the characterisation of any koala habitat as a matter of state environmental significance. His Honour may have erred in doing so.[81] However, if an error was made, it was not one that impaired his finding that the clearing of the 65 hectares of koala habitat could not sensibly be reconciled with the object of conserving, protecting and enhancing matters of environmental significance. That holds true even if the koala is taken to be the relevant matter of environmental significance. It cannot seriously be disputed that to destroy its habitat is to fail to conserve and protect it as a listed threatened species.

[69] **The alleged errors in interpretation of Part 3.7 provisions:** Boral submits that the learned primary judge erred by rejecting its submission that the specific outcome in s 3.5.5.1(10) dominates the strategic outcome in s 3.7.1(4) and the specific outcome in s 3.7.1.4(4), with the consequence that the latter are effectively of no consequence for the Reedy Creek non-committed areas.[82] Another dimension to the alleged error is that the learned primary judge, in effect, allowed s 3.7.1(4) and s 3.7.4.1(4) to override s 3.5.5.1(10).

[70] I do not accept that his Honour erred in this way. It is true, of course, that s 3.5.5.1(10) is specific to those non-committed areas; but that does not displace the application of the other two to those areas. Nor is there inconsistency or conflict

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78 Reasons at [263], [264].

79 Ibid at [264].

80 Exhibit 6: AB885.

81 I hesitate to conclude that his Honour erred in characterising koala habitat as a matter of environmental significance. The description of native fauna habitat as a matter of environmental significance in s 3.7.4.1(4) supports such a characterisation.

82 Reasons at [267].

between them and s 3.5.5.1(10) that can be resolved only by ignoring the former. The *in situ* protection for koala habitat envisaged by s 3.7.1.4(4) can co-exist with s 3.5.5.1(10). Clearly, it is not at odds with it.

[71] I mention also that it is not clear whether CP 2016 intends that the expression "protected in situ" when used in strategic outcomes 3.7.1(4) and specific outcome 3.7.4.1(4) is to have the same meaning given to it for the purposes of the Environmental significance overlay code. While the definitional provisions in CP 2016 may not resolve that issue, the *situs*-specific protection signalled by the expression does, however, strongly imply that neither the strategic outcome nor the specific outcome countenances compensating for impairment within the *situs* of a given biodiversity area by means of offsetting outside that area. In my view, his Honour adopted a correct construction of both provisions which gives effect to that implication. I note that this point has significance only for the additional finding of a conflict with strategic outcome s 3.7.1(4) and specific outcome s 3.7.4.1(4). It has no significance for the finding of a conflict with s 3.5.5.1(10).

[72] **Summary:** I have in this discussion of Ground 1 sought to address the interpretative errors of law which, in its written outline of argument and oral submissions, Boral argues were made by the learned primary judge. For the reasons given, I am unpersuaded that any error of law as would vitiate his Honours ultimate finding of conflict with CP 2016 was made. This ground of appeal has not been established.

**Ground 2**

[73] Boral submits that the learned primary judge erred in law when he observed, in paragraph 270 of the Reasons, that if the proposal does not succeed under CP 2016, its prospects of success under CP 2003 are even more unlikely. In written submissions, Boral contends that the observation arose from a failure on his Honour's part to apply s 25 of the *SPA* with respect to SPP 2013 and s 36 of the *SPA* with respect the SEQRP.[83] It was made notwithstanding the deficiency in CP 2003 in failing to protect KRA 96 and in ignoring it in the Reedy Creek Structure Plan. Although not stated in Boral's written outline of argument, the submission implies that had his Honour applied s 25 and s 36, then he would have found that there was no conflict with CP 2003 or that any such conflict was of no greater order than that which he found with CP 2016.

[74] I preface my discussion of this ground by noting that the learned primary judge began paragraph 270 with the following:

> "As I have already indicated, insofar as CP 2003 concerned the proposal, as the appellant itself concedes, is in even more serious conflict albeit for different reasons."

As I have mentioned, his Honour had earlier noted that Boral conceded conflict with CP 2003[84] and said that, in view of the concession, he did "not consider it necessary to detail each and every conflict".[85] Boral does not suggest that his Honour was wrong in attributing the concession to it.

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83 Applicant's Outline of Submissions ("AOS") at [46].
84 Reasons at [212].
85 Ibid at [213].

[75] A perusal of the Reasons under the heading "CP 2003" reveals that the learned primary judge was conscious of s 25 and s 36, as well as s 314(1)(d) of the *SPA*.[86] His Honour referred to statements in SPP 2/07 relevant to how it was to be implemented in respect of extractive industry development applications.[87] He also referred to SPP 2013 which, he noted, deals with 16 State interests arranged under five broad themes. He observed that no one State interest was given priority over others.[88] The learned primary judge also referred to a principle in the SEQRP that a region's natural economic resources be managed so as to sustainably and efficiently meet the needs of existing and future communities and a statement in it that planning schemes must define use zones in a way that permits resource development where appropriate.[89]

[76] His Honour recorded that it was uncontroversial that CP 2003 did not reflect SPP 2013 and that, as required by s 314(2)(d) of the *SPA*, the development application ought be properly be assessed under that policy to the extent that it was relevant.[90] A significant and relevant aspect of it, and of its predecessor SPP 2/07, is its express provision for the need to identify and protect key resource areas.[91]

[77] I understand the learned primary judge to have reasoned that even if CP 2003 is read subject to SPP 2013 and the SEQRP, then this development application remains in significant conflict with it. Neither of the later documents prioritises any particular State interest over the others. They both recognise that the advancement of some interests very likely will cause tension with other interests.[92] Certainly, neither guarantees that a development application for an extractive industry in any particular key resource area will be approved.

[78] In my view, his Honour's reasons illustrate that he did have regard for the application of s 25 and s 36 of the *SPA*. He could not justifiably have reasoned that once those provisions were applied, CP 2003 was consigned to irrelevancy or that there was no, or minimal, conflict with it.

[79] For these reasons, I am unpersuaded that the learned primary judge erred in law in failing to apply s 25 and s 36 of the *SPA* as Boral contends he did. This ground of appeal is not made out.

**Ground 3**

[80] Under this ground of appeal, Boral contends that the learned primary judge both failed to take into account relevant considerations and took into account irrelevant considerations in undertaking the "sufficient grounds" exercise contemplated by s 326(1)(b) of the *SPA*. It is convenient to deal first with the relevant considerations which his Honour is alleged to have failed to take in account. According to the draft notice of appeal, the relevant considerations in question include each of his Honour's findings as to matters of public interest. However, in Boral's written outline of argument, particular findings as to such matters are specified. I propose to address them only.

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86 Ibid at [230]–[231].
87 Ibid at [217]–[218].
88 Ibid at [219]–[221].
89 Ibid at [222].
90 Ibid at [232].
91 Ibid.
92 Ibid at [234].

[81] **Koala habitat offsets:** It is submitted for Boral that if the availability of offsets for the adverse environmental impact for koalas did not avoid conflict with CP 2016, they were important for the sufficient grounds exercise. The learned primary judge should have taken that into account.

[82] His Honour was evidently conscious of the evidence that had been led concerning koala habitat offsets. He referred to it specifically, including in his discussion of sufficient grounds.[93] He explained why, on his construction of the relevant provisions in CP 2016, the availability of offsets did not avoid conflict with it. Having regard to the *in situ* protection of koala habitats contemplated by s 3.7.4.1(4), his Honour considered that offsets had little role to play in assessing whether there were sufficient grounds to justify approval. That approach had support in the express words of the provision. In these circumstances, it cannot be said that the learned primary judge failed to have regard to habitat offsets or for that matter, erred in the way he did have regard to them.

[83] **Matters of public interest:** The contention here is that the learned primary judge failed to take into account his positive findings in relation to amenity impacts, that a meaningful and effective corridor could be maintained, and that the loss of waterways would not put the proposal in serious conflict with CP 2016. Also, Boral submits that it is not clear that his Honour took into account a list of positive community outcomes summarised by an economist expert, Mr Norling, whose evidence was accepted by his Honour.

[84] Each of these matters of public interest was referred to by the learned primary judge in his reasons. In his discussion of sufficient grounds, he referred to factors relied on by Boral.[94] They include that the proposed development will provide benefits to the community and that it maintains and secures the connectivity of environmental corridors. There is no reason, then, to infer that his Honour ignored these particular matters of public interest in undertaking the sufficient grounds exercise.

[85] **Suspicion concerning drafting of s 3.5.5.1(10):** At a point in the Reasons where he rejected the Council's submission that s 3.5.5.1(10) ought to be construed strictly, the learned primary judge observed:

> "Before proceeding further, having regard to the way the respondent dealt with, or perhaps more accurately failed to deal with, KRA 96 in the 2003 Planning Scheme and the wording of s 3.5.5.1(10), one could not be blamed for being somewhat suspicious that the current drafting was intended to make any development of a quarry near the size of that proposed extremely difficult, if not impossible, within KRA 96".[95]

[86] In context, this observation related to a statutory construction issue and not to the sufficiency of grounds issue. Moreover, it was an observation as to what a third party observer might suspect. It was neither a finding of fact nor a finding as to a factor relevant to any determination his Honour had to make. It was therefore not a matter he was bound to take into account in undertaking the sufficient grounds exercise.

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93 Ibid at [264]; see also [263], [276], [278].
94 Ibid at [276].
95 Ibid at [251].

[87] **Coordinator-General's report:** Section 314(3)(c) of the *SPA* expressly required the learned primary judge to have regard to the Coordinator-General's report issued in December 2013. As noted, his Honour did refer to it, observing that it was in no way determinative of the appeal he had to decide. Boral's complaint is that he did not take account of it again in his reasons.

[88] That his Honour did not again refer to the Coordinator-General's report does not mean that he failed to have regard to it. His Honour was not required to accord precedence to it or to check to ensure that findings he was minded to make were in accordance with it. I am unpersuaded that his Honour failed to give the report the regard he was obliged to have for it.

[89] I now turn to the factors which Boral submits the learned primary judge took into account but were irrelevant to the sufficient grounds exercise.

[90] **Balance currently favours refusal:** The submission here is that his Honour took into account, as a relevant factor, a suggestion made on behalf of the Council that under CP 2016 "the balance currently favours refusal of the development application". In its written outline of argument, Boral implies that that was the only factor on which the learned primary judge relied in undertaking the sufficient grounds exercise.[96] It also implicitly disparages the exercise that was undertaken as one in which his Honour, in effect, reasoned that because there was conflict with CP 2016, then it followed that there were insufficient grounds to justify approval of the development application.

[91] It was in paragraph 236, the penultimate paragraph of the Reasons, that the learned primary judge noted his agreement with the suggestion made on behalf of the Council. Understood in context, his Honour's statement was an affirmation that the exercise he had independently undertaken in arriving at a conclusion, which accorded with the suggestion. His Honour neither stated, nor implied, that the suggestion was one that he took into account in undertaking the exercise. Indeed, the extensive reasoning given by him in undertaking that task robs this submission of any substance. So also, for the submission that he allowed the findings of conflict with CP 2016 to dictate a conclusion that sufficient grounds did not exist to justify approval.

[92] **Conclusion as to degree of conflict with CP 2003:** Boral submits that the learned primary judge took into account his conclusion that conflict with CP 2003 was even more serious than that with CP 2016 in carrying out the sufficient reasons exercise. That, it is submitted, is irrelevant to the exercise. It was an error for his Honour to have taken it into account.

[93] At paragraph 272 of the Reasons, the learned primary judge stated that, given the weight placed on CP 2016 in the proceeding, and consistently with the approach taken by the parties, the issue of conflict should be addressed by reference to CP 2016, rather than CP 2003. The words that follow clearly indicate that he proposed to undertake the sufficient grounds exercise by reference to the conflicts with CP 2016 as he found them to be.

[94] His Honour did venture the view that had the exercise been undertaken by reference to conflicts with CP 2013, it would have been even more difficult for Boral to

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96 AOS at [55].

establish sufficient grounds to justify approval.[97] But whatever view he may have expressed as to that, it was clearly not a matter he took into account in the assessment he did undertake of the sufficiency of grounds for approval of the development application referenced as it was to conflicts with CP 2016.

[95] For these reasons, this ground of appeal cannot succeed, in my view.

**Ground 4**

[96] The next ground of appeal contends that the learned primary judge failed to give adequate reasons for his decision, particularly in regard to s 3.5.5.1(10), the nature and extent of matters of environmental significance as defined in CP 2016 relevant to the case, and his conclusion that sufficient grounds did not exist for approval of the development application. In its written outline of argument on this ground, Boral relies on submissions made by it in respect of the preceding three grounds.[98] In doing so, it repeats the contention that no reason was articulated for the conclusion with respect to sufficient grounds other than the reference to the suggestion that the balance currently favours refusal.

[97] This ground, too, cannot succeed, in my view. His Honour explained how he construed s 3.5.5.1(10) and gave reasons for rejecting the opposed constructions of it proposed by Boral and by the Council. He also explained how he proposed to apply the provision. The learned primary judge did identify the matters of environmental significance that he considered relevant to the case. They included waterways, vegetation, habitat for native flora and habitat for native fauna, including the koala. As well, he stated his findings with respect to them and the reasons for the findings.[99]

[98] As to the conclusion with respect to sufficient grounds, I refer to my observation in the discussion of Ground 3, with respect to his Honour's reference to the suggestion made for the Council concerning balance. It was not a factor on which his Honour based his conclusion.

**Ground 5**

[99] In its written outline of argument, Boral submits that irrationality is revealed in a comparison of two aspects to paragraph 326 of the Reasons. The first aspect is the learned primary judge's agreement with the suggestion that the balance currently favours refusal of the development application. The second is his immediately following observation that "there can be no doubt based on the evidence of all the relevant experts that this significant resource should be protected for future exploitation when appropriate".[100]

[100] The irrationality, it is submitted, lies in thinking that it will be easier to obtain an approval to exploit this resource in the future.[101] The only rational view, it is further submitted, is that unless the resource is exploited now, it will never be exploited.[102]

[101] In support of the submission, Boral argues that the amenity issues relied on by his Honour (including visual amenity) would be present with any future proposal. So,

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97 Reasons at [273].
98 AOS at [59]. Separate oral submissions were not made in respect of this ground of appeal.
99 These also correlate with the examples of matters of environmental significance mentioned in s 3.7.4.1(4).
100 AOS at [63].
101 Ibid at [65].
102 Ibid.

too, would be the removal of koala habitat. Hence, it is illogical to think that there is any realistic prospect of an improvement in circumstances in the future.[103]

[102] In response, the Council submits that his Honour's observation about future exploitation was not made with reference to a restricted framework limited to a future application akin to Boral's present application and currently prevailing regulatory planning regimes, specifically CP 2016. It is an observation of broader scope. It was made with conscious recognition that whether the resource will, or will not, continue to be protected and will, or will not, be permitted to be exploited, remains a planning strategy to be determined by elected representatives at both State and local levels when CP 2016 and State planning instruments are reviewed in the manner prescribed by applicable legislation.[104]

[103] I accept the Council's submission. The observation on which this ground of appeal is based addresses protection of the significant resource. It envisages that, in a general sense, the resource may become exploitable at some time in the future under the planning strategy that then prevails, and that it should be protected pending that eventuality. So understood, the observation is an uncontroversial one. Clearly, the observation was not intended to be a prediction that the resource will become exploitable under the presently prevailing planning strategy, including CP 2016.

[104] To my mind, there is no irrationality in what the learned primary judge said at paragraph 326 of the Reasons. Accordingly, I consider that this ground of appeal is not made out.

**Ground 6**

[105] The final ground of appeal is predicated upon success of one or more of the grounds which precede it. It is not the subject of separate substantial submissions in Boral's outline of argument and was not separately addressed in oral submissions. It can be disposed of shortly. Since none of the other grounds of appeal on which it is predicated can succeed, it follows that this ground, too, cannot succeed.

**Disposition**

[106] Given the significance of the issue of interpretation of s 3.5.5.1(10) to this matter as raised by Ground 1, I am inclined to grant leave to appeal in respect of that ground. However, for the reasons given, I would dismiss the appeal in respect of it. I would refuse leave to appeal in respect of the other grounds of appeal. It is not disputed that costs should follow the event.[105]

**Orders**

[107] I would propose the following orders:

1. Leave to appeal is granted in respect of Ground 1 in the draft notice of appeal, Exhibit "RKL-3" to the affidavit of Robyn Kaylene Lamb filed herein on 13 June 2017.

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103 Ibid at [66]. Reference is also made to an observation made by the learned primary judge during the hearing before him that "it's never going to get any easier, with the passage of time, for Boral to quarry the site": AB97: Tr33-15 ll4-5.

104 Respondent's Outline of Submissions (ROS) at [26].

105 AT1-45 ll29-32.

2. The appeal in respect of Ground 1 is dismissed.

3. The application for leave to appeal is otherwise refused.

4. The appellant/applicant is to pay the respondent's costs of the appeal and the application on the standard basis.

[108] **MORRISON JA:** I agree with the reasons of Gotterson JA and the orders his Honour proposes.